R. v. Kazman

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: November 25, December 18, 2017;

January 3, 5, 23, March 9 and April

12, 2018.

Judgment: April 12, 2018.

Court File No.: CR-15-4269

[2018] O.J. No. 2143 | 2018 ONSC 2332

Between Her Majesty the Queen, and Marshall Kazman, Gad Levy, Armand Levy, Ali Vaez Tehrani, Madjid Vaez Tehrani, Alireza Salehi, Ekaterina Chapkina and Kamyar Ghatan, Defendants

(569 paras.)

Case Summary

Criminal law — Sentencing — Criminal Code offences — Fraudulent transactions relating to contracts and trade — Fraud over $5,000 — Other Criminal Code offences — Participation in criminal organization — Particular sanctions — Imprisonment — Restitution and compensation orders — Sentencing considerations — Deterrence — Denunciation — Risk or re-offending — Four accused sentenced to imprisonment, fines in lieu of forfeiture and restitution for participation in fraudulent scheme involving obtaining small business loans from five major banks — Accused Kazman and Levy were also members of a criminal organization — Organization's primary goal was to obtain capital through fraudulently obtained small business loans — A number of primary companies and dozens of secondary companies owned by C, Kazman and Levy were used to funnel proceeds from fraud in various directions — Court considered lack of remorse, sophistication of scheme and amounts involved — Main sentencing goals were denunciation and deterrence.

Sentencing of four accused for fraud convictions. Kazamn and Levy were convicted of five counts of fraud over $5,000, money laundering and participating in a criminal organization. Ali was convicted of one count of fraud over $5,000. His brother Madjid was convicted two counts of fraud over $5,000. The accused were involved in a sophisticated scheme to defraud Industry Canada which administered the Small Business Financing Program and five major banks. The accused obtained 16 small business loans. These loans went into default within 12 to 18 months of the start of the loan term. A number of primary companies and dozens of secondary companies owned by C, Kazman and Levy were used to funnel proceeds from the fraud in

various directions. Fraudulent invoices from the sham construction companies were submitted to the banks for leaseholds and fixtures, furniture and equipment. Kazman and Levy were members of a criminal organization with C. The organization's primary goal was to obtain capital through fraudulently obtained small business loans. Kazman and Levy laundered the proceeds of the fraudulently obtained Small business loans. The value of the loans for which Kazman was found guilty of was about $1.5 million. Levy brought Ali and Madjid into this fraudulent scheme. Kazman, 62, was a disbarred lawyer. Kazman, however, had a key role to play in the criminal organization. All accused now had very limited incomes. They had no prior records. They did not plead guilty and were not remorseful. Only Kazman and Madjid had made any restitution to the banks involved in their fraudulent loans.
HELD: Madjid was sentenced to two years' imprisonment and three years' probation.

The court accepted the joint sentence submission. The court accepted that he no longer had any assets and that his current income was very low. He as ordered to make restitution of $70,000. A total fine of $42,138 in lieu of forfeiture was imposed. Ali was sentenced to 14 months' imprisonment and three years' probation. Unlike the other accused, there was no positive evidence of a financial benefit of any significance to him. There was no insight into the fact that he committed a serious fraud. The court was not satisfied that he would not likely re-offend. He had not expressed any remorse or made any restitution. He was ordered to make restitution of $30,000. The total fine in lieu of forfeiture was $34,054. Kazman was sentenced to seven years' imprisonment. There was a significant risk that Kazman would reoffend. He was ordered to make restitution in the amount of $300,000 and pay a fine of$483,334 in lieu of forfeiture. Levy was sentenced to eight years' imprisonment. He received the largest share of the fraud proceeds and participated in additional frauds in the amount of $2.3 million. He was to make restitution of $725,000. The total fine in lieu of forfeiture was $1,152,825. An aggravating factor for both Kazman and Levy was the fact that they had also been convicted of money laundering and that they were part of a criminal organization. Deterrence and denunciation were the principal sentencing goals. There were elements of breach of trust in that the accused were dealing with banks and with a government loan program set up for a specific purpose, which they took advantage of. Sentence: For Madjid, two years' imprisonment; three years' probation; $70,000 restitution; $42,138 fine in lieu of forfeiture; for Ali, 14 months' imprisonment; three years' probation; $30,000 restitution; $34,054 fine in lieu of forfeiture; for Kazman, seven years' imprisonment; $300,000 restitution order; $483,334 fine in lieu of forfeiture; for Levy, eight years' imprisonment; $725,000 restitution order; $1,152,825 fine in lieu of forfeiture.

Statutes, Regulations and Rules Cited:

Criminal Code, *R.S.C. 1985, c. C-46, s. 2*(b), s. 380(1)(a), s. 462.3(1), s. 462.31(1), s. 462.37(1), s. 467.12, s. 718.2(b), s. 718.2(c), s. 718.2(e), s. 738(1)(a)

Counsel

Tara Brun, John Rinaldi and *Michael Coristine* for the Crown.

Marshall Kazman, Self-Represented and also represented by *Richard Litkowski*.

Gad Levy, Self-Represented and also represented by *Mitchell Worsoff*.

Armand Levy, Self-Represented.

Taro Inoue, for Ali Vaez Tehrani.

Alice Barton, for Madjid Vaez Tehrani.

Aaron Harnett and *Christine Cole*, for Alireza Salehi.

Jeff Chapnick, for Ekaterina Chapkina.

Walter Fox, *Sayeh Hassan*, and *Nicholas Pham*, for Kamyar Ghatan.

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REASONS FOR SENTENCING OF M. KAZMAN, G. LEVY, A. TEHRANI AND M. TEHRANI

N.J. SPIES J.

Introduction

1 On September 8, 2017, following a long trial before me, I released written reasons; *R. v. Kazman, 2017 ONSC 5300* (Judgment) and convicted Marshall Kazman and Gad Levy of five counts (Counts 1 - 4) of fraud over $5,000 of the banks; Bank of Nova Scotia (BNS), Toronto Dominion Bank (TD), Bank of Montreal (BOM), Royal Bank of Canada (RBC), and Canadian Imperial Bank of Commerce (CIBC), and Industry Canada, contrary to s. 380(1)(a) of the *Criminal Code*; one count (Count 6) of laundering the proceeds of the frauds contrary to s. 462.31(1) of the *Criminal Code* (money laundering), and one count (Count 7) of committing the offence of fraud over $5,000 for the benefit of, or at the direction of, or in association with a criminal organization contrary to s. 467.12 of the *Criminal Code*.

2 I convicted Ali Vaez Tehrani (A. Tehrani) of Count 5; fraud over $5,000 of the CIBC and Industry Canada in connection with his company called Alta Design Corp. (Alta) and acquitted him of two counts of fraud over (Counts 1 and 4) and Count 7. I also convicted his brother, Madjid Vaez Tehrani (M. Tehrani), of two counts of fraud over $5,000; Count 1 of BNS and Industry Canada in connection with his company Uzeem Corp. (Uzeem) and Count 5 of CIBC and Industry Canada in connection with Kube Home Décor Inc. (Kube). I acquitted him of Count 5 in connection with Roxy Design Inc., a company owned by Alireza Salehi, and Count 7.

3 I found Armand Levy[1], Ekaterina Chapkina and Kamyar Ghatan not guilty of all charges. Mr. Salehi pleaded guilty early on in the trial before Justice John McMahon and I learned of the facts he admitted and the sentence he was given during this sentencing hearing. It has some relevance to my determination of sentence, as I will come to.

4 Although Messrs. Kazman and Levy were self-represented during the trial, save for their attempts to bring s. 11(b) *Charter* applications, they each retained counsel for the sentencing hearing. Although the sentencing submissions took a period of several months to complete for all defendants, all counsel took the position that I should render my sentencing decisions for each defendant at the same time, given the importance of my considering the principle of parity. Most of the delay in completing this sentencing was as a result of my agreeing to allow Mr. Levy until March 9, 2018 to make his submissions.

The Facts

Circumstances of the Fraud Offences

5 It is not easy to summarize the circumstances of the offences as the evidence at trial took over five months and my written reasons are very lengthy.

6 The primary victim of these frauds was Industry Canada; now Innovation, Science and Economic Development Canada (ISEDC),[2] which administered the Government of Canada's Canada Small Business Financing Program ("CSBFP"). The main objective of this program is to encourage lenders; the five major banks in this case, to make loans to small businesses that they might not otherwise make, due to the borrower's lack of experience, insufficient security

and/or the fact that the business is just starting up. The goal is to promote the expansion, modernization and improvement of small businesses throughout the country and thus spur on the economy and increase jobs. Applicants apply for a small business loan ("SBL") directly with participating banks, which can finance, among other things, up to 90% of the costs of purchasing leasehold improvements and fixtures and purchasing new equipment and furniture for the business. SBL proceeds cannot be used to finance inventory.

7 The focus of this trial was on 16 SBLs that were obtained by the defendants (save for Messrs. Kazman and Armand Levy) during the period of June 2007 to March 2010 from the five major banks. With the exception of one SBL obtained by Mr. Levy, all of these SBLs went into default within 12 to 18 months of the start of the loan term. Mr. Levy's SBL was the last SBL granted to these defendants before they were charged with fraud.

Count 7 - Members of a Criminal Organization

8 In convicting Mr. Kazman and Mr. Levy of Count 7, I found that they and Miriam Cohen were members of a criminal organization. Ms. Cohen pleaded guilty to certain offences before the preliminary inquiry and I set out below the facts that she admitted and the sentence she received, as this too is relevant to the determination I must now make. I found the primary goal of this criminal organization was to obtain capital through fraudulently obtained SBLs by Ms. Cohen and later some of the other defendants and finally by Mr. Levy on behalf of a company he owned.

9 I found that Mr. Levy and Mr. Kazman conspired with Ms. Cohen, who was the initial borrower, in obtaining four fraudulent SBLs (the Cohen SBLs). After their success with the Cohen SBLs, Messrs. Kazman and Levy and Ms. Cohen began to look for other opportunities and the frauds continued. Both Mr. Kazman and Mr. Levy in particular, began to recruit borrowers. As the organization grew, Ms. Cohen began to provide loans to persons the group recruited for the purpose of showing the banks that the borrower had access to capital when applying for the SBL.

10 Each member had a role to play in the criminal organization. Mr. Kazman incorporated Ms. Cohen's borrowing companies and in some cases prepared the fraudulent leases provided to the banks. Mr. Levy prepared Business Plans which were provided to the banks explaining in more detail the owner of the company, his or her skills in operating the type of business the loan was to be for as well as projected income and expenses. The Crown did not assert that any of these Business Plans contained misrepresentations but the fact I found that Mr. Levy prepared all of them was one of the many reasons why I connected him to the frauds. Mr. Levy also produced forged documents including fraudulent Notices of Assessment (NOAs) and T1 Generals that inflated actual earnings, fraudulent investment statements; typically guaranteed investment certificates misrepresenting their term length, and fraudulent invoices from various construction companies provided to the borrowers for leasehold improvements and furniture, fixtures and equipment for work that was not done and equipment that was not supplied, that caused the banks to release the SBL proceeds to the borrowers who in turn paid these invoices. I concluded that it was Mr. Levy who did all of the alterations in question in the case of each

fraudulent GIC, NOA and T1 General provided to the banks. In many cases there was also proof that it was Mr. Levy or someone on his behalf that faxed the fraudulent documents to the bank.

11 I also found that Ms. Cohen and in some cases, the other borrowers as well, deceived the appraisers who came to assess the value of the assets so that the banks did not become aware of the frauds.

12 Messrs. Kazman, Levy and Ms. Cohen laundered the proceeds of the fraudulently obtained SBLs. This was primarily done by Mr. Kazman who was the signing officer of the various construction companies that had provided fraudulent invoices to the borrowers that the borrowers then provided to the bank for payment from the SBL proceeds. I found that Messrs. Kazman and Levy and Ms. Cohen were all in control of six purported construction companies; Northwood, Eastern, Oakwood, Icon, Whitehorse and A&P that I found were shams.

13 These sham construction companies received the fraudulently obtained SBL proceeds when the borrowers paid the fraudulent invoices. The funds then flowed back and forth between various other companies owned by Ms. Cohen and Messrs. Kazman and Levy who benefited in varying degrees from payments made to various companies that they owned and to them personally. These corporations received the fraudulent SBL proceeds as part of the laundering of those funds. I found that Mr. Levy or one of his companies received the most money from the fraudulent SBLs. Mr. Kazman received the second largest amount.

14 Mr. Kazman avoided any contact with the borrowers, save for Ms. Cohen and his assistant Ms. Chapkina, the SBL application process and the invoicing and any work that was actually done to the premises leased by the borrowers, but as the legally skilled member of the group he drafted promissory notes, leases and other documents when needed. Also, with the exception of Whitehorse Contracting Inc., he made the bank deposits and signed most of the cheques in order to distribute the fraudulent SBL proceeds received to various sham construction companies and then to Ms. Cohen and Mr. Levy and himself through payments he made to them personally and to their various companies. As part of the money laundering, Mr. Kazman, Ms. Cohen and Mr. Levy arranged to have cheques going back and forth between them and their companies. Some of those cheques purported to be in payment of invoices and others were simply noted to be "on account". I did not accept the evidence from Messrs. Kazman and Levy that these were legitimate payments.

15 Mr. Levy was the man out front who dealt with the borrowers and when necessary the bank during the application process. I found that with the exception of the Cohen SBLs, where absolutely no work was done or equipment and furniture supplied, Mr. Levy was the one the borrowers dealt with. He was also the one who prepared and provided the inflated invoices from the sham construction companies to the borrowers and in some cases directly to the banks. I accepted the evidence of the other defendants that they had no dealings with Mr. Kazman but I found that Mr. Kazman was in control of the fraudulently obtained SBL funds received by the sham construction companies from the borrowing companies and the one who was primarily responsible for the money laundering.

16 This organization had a sophisticated plan. In many cases they were able to use their own

properties that they would lease to the borrower. In some cases it was a recently purchased property, sometimes using the proceeds of a fraudulently obtained SBL towards the purchase of the property. This permitted the organization to have a borrower use their SBL proceeds to improve the value of the property owned by members of the criminal organization (although typically not to the extent represented in the invoices provided to the banks) and this allowed the organization to prosper when these properties were then sold for a large profit.

17 In other cases, however, the plan was to renovate a property including what I characterized in my Judgment as a "total gut job"; where the premises were purportedly gutted to the exterior walls, including removal of all wiring, plumbing, HVAC and sometimes even store fronts and "total rebuild"; purportedly installing everything back again new, and since the leases were often short lived which permitted re-leasing to a new borrower, that new borrower would then be charged for the same work a second time. This was done preying upon borrowers like Kamyar Ghatan, who lacked the skill and time to appreciate he was being charged for leaseholds that had already been done. Those inflated invoices would typically not raise an issue with the bank and the full SBL would be advanced to the borrower and then the fraudulent inflated invoices were paid to the sham construction company, benefiting the criminal organization.

18 I did not accept the Crown's argument that every person who became a borrower automatically became a member of the organization and I acquitted Messrs. Salehi, A. Tehrani and M. Tehrani of Count 7.

19 Of the 16 SBLs the Crown relied upon, I found fraud in the case of 12 of them. I will review some of the details of my findings with respect to those frauds that are relevant to my sentencing decisions.

The Cohen SBLs

20 The frauds I found to have been committed in this case commenced in June 2007, when Ms. Cohen, Mr. Kazman and Mr. Levy began to work together, as part of a criminal organization, to fraudulently obtain SBLs for four companies owned by Ms. Cohen over a very short period of time; Energy Lighting and Furnishings Inc. (ELFI), Count 1, Energy Lighting Inc. (ELI), Count 2, Light House Contracting Inc. (LHC), Count 3 and Light Source Contracting Inc. (LSC), Count 4; (collectively referred to as "the Cohen SBLs").

21 Using the first in time fraud; ELFI as the example, Mr. Kazman, who was then a practicing lawyer, incorporated ELFI for Ms. Cohen in June 2007. ELFI was approved for a $169,830 SBL from the BNS in July 2007. The BNS was provided with a fraudulent Agreement to Lease dated July 3, 2007 between ELFI as the tenant and TCM Property Management Inc. ("TCM Property") as the landlord, for a lighting and furnishings store of 2,500 square feet (SF) on the main floor of 489 Champagne Drive, Toronto, signed by Ms. Cohen and a Mark Vandross, as landlord. The real landlord of the premises at the time was Pianosi Bros. Construction Limited (Pianosi Bros.).

22 The BNS was also provided with a fraudulent NOA, which I found Mr. Levy prepared, which grossly inflated Ms. Cohen's actual income. In addition, the BNS loan file contained a fraudulent term deposit statement which included alteration of the maturity date as well as the maturity

value which I also found was prepared by Mr. Levy. This suggested Ms. Cohen had a one year investment with a starting principal of $129,750, when in fact it was for 30 days and set to expire before approval by the BNS of the SBL. Ms. Cohen also signed various documents for the bank certifying the information she provided was true and accurate, which was not the case. I also found that once the SBL was in default, Ms. Cohen misled the bank's appraiser by showing him unrelated assets so the bank would not discover the fraud.

23 Apart from the fraud in obtaining the SBL, the BNS was provided with two invoices totaling $204,607[3] from Northwood Contracting (Northwood); a company I found was controlled by Messrs. Kazman and Levy and Ms. Cohen. I found that the invoices were prepared by Mr. Levy and that he faxed them to the BNS for ELFI, and that they purported to be for leasehold improvements for total gutting and rebuilding the leased premises and for fixtures, furniture and equipment. These invoices were completely fraudulent in that none of this work was done, nor were any of these products supplied. The BNS was unaware of the fraud and these invoices induced the BNS to advance the SBL funds to ELFI's business account and ELFI paid Northwood the invoiced amounts, exhausting the entire SBL. I found that ELFI never existed as a business except on paper.

24 I also found that Northwood, like several other construction companies owned and controlled by Mr. Kazman and Mr. Levy, and to some extent by Ms. Cohen, were created only for the purpose of receiving and diverting the fraudulently obtained SBL proceeds to Messrs. Kazman and Levy, Ms. Cohen and their various companies and later to some of the other defendants. I found these construction companies to be shams, created only for this fraudulent purpose. Mr. Kazman's role in the fraud was to control the money received by these corporations from the borrower, typically as the sole banking officer. He wrote the cheques and deposited the funds.

25 Mr. Coort, a Forensic Accountant retained by the RCMP to assist with the investigation, analyzed the ELFI account from when it opened to when it closed. Monies deposited into the account, apart from the SBL proceeds, which were paid out to Northwood, came from companies I found to be controlled by Ms. Cohen and Messrs. Kazman and Levy. I found that the money Northwood received from ELFI, which I found Northwood was not entitled to, was paid out from Northwood through a very circuitous route primarily to Mr. Levy but also to Mr. Kazman and Ms. Cohen. It was this analysis done by Mr. Coort for each of the 16 SBLs that formed the basis of my finding Mr. Kazman and Mr. Levy guilty of laundering the proceeds of crime.

26 Although I found that based on the evidence with respect to ELFI alone that Mr. Kazman was not guilty of Count 1, once I found that he was in control of Northwood with Mr. Levy and Ms. Cohen, I reconsidered the evidence with respect to ELFI and found that Mr. Kazman was involved in this fraud. In particular he used an incorrect name of a company he owned in preparing the lease to distance himself from the fraudulent lease. I also found that given his participation in Northwood, particularly as the signing officer and in the circulation of the SBL funds paid by the BNS to ELFI, that he was aware of the fraudulent Northwood invoices provided to the bank and that they were being presented to the BNS as part of a fraudulent SBL in order to induce the bank to advance the SBL proceeds.

27 On the basis of these findings I found Mr. Kazman and Mr. Levy guilty of Count 1 in that they, along with Ms. Cohen, committed a fraud of over $5,000 on the BNS and Industry Canada, with respect to ELFI.

28 The second Cohen SBL for her company Energy Lighting Inc. (ELI), Count 2, followed a strikingly similar pattern. Mr. Kazman incorporated ELI for Ms. Cohen in July 2007, not even a month after ELFI, with an office address stated to be 559 Eglinton Avenue West, Toronto (559 Eglinton), a property that he had purchased a couple of months earlier through his company 6747841 Canada Inc. with another partner.

29 ELI was approved for a SBL from the TD in early September 2007 in the amount of $153,000. I found that the TD was provided with a fraudulent Agreement to Lease and a fraudulent commercial lease between Ms. Cohen in trust for a company to be incorporated and 6747841 Property Management for 559 Eglinton. Ms. Cohen signed these documents and although I could not make out the signature of the landlord, I found that Mr. Kazman prepared this fraudulent Agreement to Lease, which incorrectly named the landlord company as an incorrect version of his company 6747841 Canada Inc., again to try to distance himself from this fraud. I found this to be a fraudulent lease as ELI had no interest as a tenant in 559 Eglinton, which was being renovated by Mr. Kazman and his partner as two residential apartments.

30 I found that the Business Plan provided to the TD, which was virtually identical to the one prepared for ELFI, was prepared by Mr. Levy. I also found that the ELI loan file contained an altered NOA for Ms. Cohen for 2005, grossly inflating her income, and the same altered NOA for 2006 as found in the ELFI loan file, and that Mr. Levy or someone on his behalf faxed these fraudulent NOAs to the bank. I also found that Ms. Cohen made various misrepresentations to the TD and that she misled the bank's appraiser after the loan was in default.

31 This time Messrs. Kazman and Levy used a different sham construction company; Eastern Contracting Inc. (Eastern), which I found they both owned and controlled with Ms. Cohen. In this case Mr. Kazman asked his assistant to open the bank account and act as the signing officer initially although he also became a signing officer and signed all but one of the cheques. I also found that the two invoices to ELI from Eastern, purportedly for leasehold improvements and equipment, furniture and fixtures, for a total of $185,000 plus applicable taxes, provided to the TD, were prepared by Mr. Levy and that they were fraudulent in that none of the work was done and none of the products were supplied and that this deceived the bank into releasing the SBL proceeds to ELI. I found that ELI never existed as a business except on paper.

32 Based on the Coort Analysis, I found that ELI then paid the SBL proceeds and other monies to Eastern, in payment of the two fraudulent invoices. ELI also received funds from companies owned by Messrs. Levy and Kazman and Eastern. Payments out from Eastern were made by Mr. Kazman and I found that he was aware of the fraudulent Eastern invoices and that they were being presented to the TD as part of a fraudulent SBL in order to induce the bank to advance the SBL. The SBL proceeds went to Eastern and then other companies owned by Mr. Levy and one of Mr. Kazman's companies. In the same timeframe monies were paid by Mosaic Contracting & Tiles Sales Inc. (Mosaic), a company owned by Mr. Levy to ELFI, ELI and

Oakwood Renovations and Construction Ltd. (Oakwood), another sham construction company that I found was owned and controlled by Messrs. Kazman and Levy and Ms. Cohen. The funds received by Oakwood from Mosaic were then virtually all paid to Mr. Kazman and Ms. Cohen.

33 I found the same pattern of fraud involving Ms. Cohen and Messrs. Kazman and Levy with the other two SBLs obtained by Ms. Cohen for her sham companies; Light House Contracting Inc. (LHC), Count 3; a $179,010 fraud on the BOM through fraudulent invoices from Northwood and Light Source Contracting Inc. (LSC), Count 4; a $175,000 fraud on the RBC through fraudulent invoices from Northwood. I found that in fact no leasehold improvements were done by any company nor were any products supplied for any of the Cohen SBLs. It is not necessary to summarize the other two Cohen SBLs for the purposes of sentencing.

34 After the four Cohen SBLs, Mr. Levy brought Mr. Salehi, Mr. A. Tehrani and Mr. M. Tehrani into this fraudulent scheme. Ms. Cohen's role was to provide loans for the capital for some of their SBLs and invoices purporting to be for lighting. Mr. Kazman and Mr. Levy continued in the roles I have already described.

Qua Design Inc. (Qua)

35 The Qua SBL in the amount of $155,906 obtained from the BNS (Count 1) was Mr. A. Tehrani's first SBL. The premises leased were 677 Queen Street West, Toronto (677 Queen), a property purchased just a few months before by 677 Holdings Inc., owned by Mr. Kazman and two other partners. Although I found a great deal of Mr. A. Tehrani's evidence in connection with Qua to be incredible and I had doubts about whether or not the invoices for leaseholds and fixtures, furniture and equipment invoiced to Qua were legitimate, I concluded that the Crown had not proven the allegation of fraud against Mr. A. Tehrani, Mr. Kazman or Mr. Levy and found them not guilty of Count 1 as it related to Qua.

Roxy Design Inc. (Roxy)

36 The SBL that came next in the chronology was for a company owned by Mr. Salehi; Roxy, in the amount of $166,500 and obtained from the CIBC; Count 5. Mr. Salehi was not called as a witness. Although I found that Mr. Levy prepared the fraudulent GIC found in the CIBC loan file and I found a problem with the equipment purportedly supplied to Roxy pursuant to an Oakwood invoice, I was not able to tell which invoice was improperly inflated; the invoice for Qua or for Roxy. Accordingly, I found that the Crown had not proven these allegations of fraud and acquitted Mr. Kazman and Mr. Levy of Count 5 as it related to Roxy.

37 My biggest concern with respect to this SBL were payments made by one of Mr. Levy's companies that received part of the SBL proceeds to companies owned by Mr. M. Tehrani purportedly for furniture that I found was not the case. This was one of the reasons that I found that Mr. M. Tehrani was involved in money laundering for Mr. Levy. However, since I found that the Crown had not proven beyond a reasonable doubt that Oakwood inflated its invoices to Roxy (as opposed to Qua), I found Mr. M. Tehrani not guilty of Count 5 as it related to Roxy.

Contempo Design Inc. (Contempo)

38 Mr. A. Tehrani obtained the next SBL in the chronology from the RBC for his company Contempo in the amount of $175,000 but later limited to $85,185; Count 4. This was a second furniture store that Mr. A. Tehrani decided to start even before he opened Qua in early June 2008. He entered into a lease with Mr. Levy's company Trust Inc. Realty Corp. for 1048 Eglinton Avenue West (1048 Eglinton).

39 I made a number of findings with respect to 1048 Eglinton and in particular that significant work was done to the premises by Northwood for a SBL Mosaic obtained from the BOM in October 2006 for $225,000 for this location.

40 Although again I had serious concerns with Mr. A. Tehrani's evidence, I was not persuaded that the Crown had proven beyond a reasonable doubt that he had committed a fraud with respect to Contempo. However, I did find that all of the leasehold improvements Northwood billed for were not done and that the Northwood invoice prepared by Mr. Levy and provided to the RBC was fraudulently inflated and that Mr. Kazman as the signing officer of Northwood and responsible for circulating the SBL funds paid by the RBC to Contempo, was aware of the fraudulent Northwood invoice and that it was being presented to the RBC as part of a fraudulent SBL in order to induce the bank to advance on the approved SBL proceeds. On that basis I found Mr. Kazman and Mr. Levy guilty of Count 5 as it related to Contempo. The bank ultimately withheld paying out all of the SBL and litigation ensued, which Messrs. Kazman and Levy became involved in.

41 It is significant to the Crown's sentencing submissions that Mr. Levy's company Trust Inc. Realty Corp. owned 1048 Eglinton at the time of this SBL. Mr. Kazman testified that he was a silent 50% shareholder in the company although he admitted that he was not a signing officer. Mr. Levy disputed this evidence. I did not have to resolve this issue for the purpose of deciding the charges, but to the extent proceeds of crime were used to improve the value of 1048 Eglinton, that fact is relevant to the Crown's claim for a fine in lieu of forfeiture against both Mr. Levy and Mr. Kazman. I will come back to this.

Contemporary Design Inc. (CDI)

42 The next SBL in the chronology was one that Mr. Salehi obtained for his company CDI from the BNS in July 2008 in the amount of $153,000; Count 1. I found that the lease provided to the BNS was fraudulent and not a copy of the actual lease Mr. Salehi entered into with the third party landlord Anticoni Sakellariou for 2906 Dundas St. West (2906 Dundas), for the full main floor at street level and the basement. What was also significant about this property is that the next SBL in the chronology was for Alta, obtained by Mr. A. Tehrani, and he purported to sublease 2906A Dundas Street West (2906A Dundas) from CDI. I found that Mr. Salehi and Mr. A. Tehrani came up with a plan to notionally split 2906 Dundas and that together they committed a fraud on two different banks.

43 I found that Mr. Levy was the person who prepared the fraudulent GIC for presentation to the BNS that was found in the BNS's file. The purported leasehold improvements for CDI were done by Mosaic; Mr. Levy's company and LHC; a company I found never existed that obtained a

fraudulent Cohen SBL and Icon Contracting Inc.; a sham construction company I found was controlled by Messrs. Kazman and Levy and to some extent Ms. Cohen. I found that the Mosaic invoices were inflated and misrepresented the work done by Mosaic and that Mosaic charged CDI for leasehold improvements including a new HVAC that in fact had been installed and paid for by the landlord, and for other work that was not done. This caused the BNS to advance SBL funds for work that had not been done. This was one of the reasons I found Mr. Levy, who admitted that Mosaic was his company and that he prepared the invoices, to be guilty of fraud; Count 1.

44 Having already found that LHC, one of the Cohen companies, was a company in name only and that it could not have supplied the furniture and fixtures listed in its invoice to CDI; having found that this LHC invoice included work already invoiced by Mosaic; that this invoice was either prepared by Mr. Levy or Mr. Kazman; that Mr. Kazman was aware of the invoice and that he was making a payment to LHC, a company that he knew only existed on paper which had created an invoice so that the bank would advance the SBL proceeds, and other findings, I found Mr. Kazman guilty in relation to CDI.

45 I concluded that Messrs. Kazman and Levy and Ms. Cohen controlled Icon. I also found that the Icon invoice for equipment and fixtures had equipment that was identical to Oakwood's invoices to Qua and Roxy, and that some equipment on the Icon invoice to CDI was identical to the Northwood invoice to Contempo. This equipment could not have been sold twice and I found that this meant that Messrs. Kazman and Levy and Ms. Cohen, who were in control of Icon and Oakwood, were involved in the preparation of this Icon invoice and that they knew this invoice was a fraud and would be relied upon by the bank for payment of the SBL proceeds.

46 For these reasons I found Mr. Kazman and Mr. Levy guilty of fraud; Count 1 in connection with CDI.

Alta

47 The next SBL in the chronology was Mr. A. Tehrani's SBL in the amount of $188,190 obtained for his company Alta, from the CIBC; Count 5, in September 2008. I found that clearly by August 29, 2008, Mr. Salehi and Mr. A. Tehrani had reached their agreement that they "share" 2906 Dundas and that they had agreed to defraud two banks, the BNS by Mr. Salehi and the CIBC by Mr. A. Tehrani. In the case of Alta, the CIBC was provided with a lease even before CDI had any rights to the premises for 2906A Dundas, an address that did not exist, and with a fraudulent TD GIC that I found was forged by Mr. Levy and that Mr. A. Tehrani made a misrepresentation to the bank in the Loan Registration Form when he signed it with the Loan Limit Clause checked off since the three SBLs that he now had totaled well over $400,000.

48 I was also satisfied that Mr. A. Tehrani had to have known that Alta and CDI were obtaining SBLs to renovate the very same premises and that he knew about whatever renovations Mr. Salehi was doing to the premises, including the new front doors, the opening of the staircase and building the open partition. I found that given the dates of the Mosaic invoices to CDI and to Alta, that Mr. A. Tehrani would have known that he was being presented with invoices for work that had already been done for CDI. I found that Mr. A. Tehrani had to have known that he and

Mr. Salehi were presenting invoices to the BNS and CIBC suggesting work had been done for two different stores when that was not the case. I found that no leasehold improvements were done for Alta or at the very least, if the cost for the improvements that were done were shared between CDI and Alta, that the Mosaic invoices were inflated. I also found that the exterior photo over the store front of 2906 Dundas, which had no store name, was part of the conspiracy to confuse the banks and conceal the existence of two separate SBLs at the same location.

49 I also found that the Mosaic invoices were improperly inflated because they charged for work that I found was not done based on the evidence of Mr. Sakellariou, the son of the landlord. This meant that Mr. Levy defrauded the bank when he prepared these invoices for presentation to the bank and that Mr. A. Tehrani must have known this.

50 I also found that the two invoices from Icon for furniture and fixtures and more equipment, computers and tools, were exaggerated and that all of the equipment on the Icon invoice was not supplied to Alta. As Icon was controlled by Messrs. Kazman and Levy and Ms. Cohen, this was one of the reasons that I found Mr. Kazman and Mr. Levy guilty of Count 5 as well.

51 I also found that after the SBL went into default that Mr. A. Tehrani had to have known that he was not showing assets that belonged to Alta to the bank's appraiser, because they had already been represented as CDI's assets and that clearly some of these assets were too old to be any of the items on the Icon invoices. I found that this was an attempt by at least Mr. A. Tehrani to try to fool the bank's appraiser and the bank into abandoning the assets and hopefully not pursue what happened to the assets financed by the bank and learn of the fraud.

52 I found that the Alta SBL was a sham and obtained by Mr. A. Tehrani based on very significant misrepresentations he made to the CIBC in order to obtain a SBL and use the funds received of $188,190 for purposes other than those represented to the bank.

53 For these reasons I found that the Crown had proven beyond a reasonable doubt that Mr. A. Tehrani, Mr. Kazman and Mr. Levy committed fraud over $5,000 of the CIBC and Industry Canada with respect to Alta and that they were guilty of Count 5. The fact there was no evidence that Mr. A. Tehrani profited from this fraud did not undermine my conclusion.

54 Ms. Brun submitted that because the Alta fraud was connected to the CDI fraud that Mr. Salehi pled guilty to, I could consider the facts that Mr. Salehi admitted as facts for the purpose of this sentencing hearing. I do not believe I have authority to do so although I do accept that in considering the level of planning in the Alta fraud, the fact that Mr. A. Tehrani and Mr. Salehi cooperated together on this fraud of two banks through their respective corporations is significant.

55 I found in my Judgment that Mr. A. Tehrani was using his medication and alleged memory issues as an excuse not to answer many questions. I accepted that there would be things he would not be sure of but the extent of his alleged memory loss was extreme and very selective. I found that the few things that he seemed certain of and said he did remember was surprising and self-serving; the most obvious example being the yellow sealed envelope that I found was really a case of him adopting what he knew his brother was going to say about this same topic.

There were also many times that I found Mr. A. Tehrani's evidence to be incredible. Furthermore, in certain respects I was able to make a positive finding that Mr. A. Tehrani was not being truthful.

Modernito Design Inc. (Modernito)

56 A SBL in the amount of $150,000 obtained by Mr. Salehi in January 2009 from the BOM for his company Modernito was the next SBL in the chronology; Count 3. Mr. Salehi entered into a lease with Mr. Levy's company, Trust Inc. Realty Corp., for the main floor of 1048 Eglinton for approximately 1,400 SF.

57 I found that what happened in this case was what happened in the case of Contempo. Although I accepted that some limited work was done for Modernito, I found that it would have been minimal given that Modernito was also a furniture store; and the premises had already been purportedly totally renovated for Mosaic and then to a limited extent for Contempo, also a furniture store. I found that the Icon invoices presented to the BOM that represented that there was another complete total gut job and total rebuild were false - that work was not done. All of the work that was purportedly done by Icon for Modernito had purportedly already been done at 1048 Eglinton by Northwood for Mosaic, as set out in the first Northwood invoice to Mosaic, save there was no reference to the rear entrance. As a result of these fraudulent invoices, the BOM advanced the SBL proceeds in the amount of $150,000 to Modernito.

58 Given Messrs. Kazman and Levy and Ms. Cohen were in control of Icon, I found Mr. Kazman and Mr. Levy guilty of Count 3 with respect to the Modernito SBL.

Kube Home Décor Corp. (Kube)

59 Turning to the SBLs obtained by Mr. M. Tehrani, I reviewed some that were not covered by the Indictment because both the Crown and Mr. M. Tehrani clearly thought they were relevant as background information. In particular, Mr. M. Tehrani obtained a SBL for his company Meez Corp. for $165,240 from the BNS in November 2006. This SBL was paid back in full as of December 21, 2009. Mr. M. Tehrani also obtained a SBL from the BOM for his company Comod Corp. (Comod) but there was very little evidence about this. The Crown did not suggest that this SBL was fraudulent.

60 Mr. M. Tehrani's company Kube was approved for a SBL from the CIBC in February 2009 in the amount of $166,500. Mr. M. Tehrani admitted that he went to a different bank; the CIBC, because he knew that given he had outstanding SBLs, he would not get another loan. This is why he did not disclose his outstanding SBLs for Meez Corp. and Comod to the CIBC.

61 I did not accept Mr. M. Tehrani's evidence in several respects. First, I did not accept his evidence on why he decided to lease 677 Queen. I also did not accept his evidence that the yellow envelope he introduced into evidence was the sealed envelope that Mr. Levy gave him to take to the bank. I found that this false evidence was given to support his evidence that he was given a sealed envelope to take to the bank and that he did not open it and so did not know about the fraudulent documents inside.

62 I found that the 2006 and 2007 NOAs for Mr. M. Tehrani found in the loan file were fabricated or altered by Mr. Levy to increase Mr. M. Tehrani's stated income to the bank by about five times. I found that Mr. Levy did the same with respect to Mr. M. Tehrani's T1 General 2006 and T1 General 2007 where the total income numbers were altered to match the altered NOAs. The CIBC loan file also contained two fraudulent GIC statements that I found were forged by Mr. Levy.

63 Although I did not accept Mr. M. Tehrani's evidence about the yellow envelope, I was not satisfied beyond a reasonable doubt that he knew Mr. Levy had included fraudulent tax documents and fraudulent GICs in his package for the bank. I did find, however, that he deliberately misrepresented his income when he was filling out the application form with the assistance of the banker. On this point the Crown did not establish that the CIBC relied upon his reported income in deciding to send his loan application to the underwriters but this finding is relevant to his sentence.

64 Although I found that some renovations were done to 677 Queen for Kube, I found that the unit was not totally gutted again. In particular I found that Mr. Levy was able to maximize his profits by simply making cosmetic changes from the drywall out and for the most part leaving what was already behind the walls in terms of electrical and plumbing and that the Mosaic invoices, prepared by Mr. Levy, that were presented to the bank were fraudulent in that they included a significant amount work that Mr. Levy knew was not done for Kube and that he knew would be submitted to the CIBC in order to obtain the release of SBL funds and ensure that his company received full payment of these invoices. I also found that Mr. Kazman and Mr. M. Tehrani were aware of this.

65 I also found that not all of the furniture listed on the third Mosaic invoice for furniture, fixtures, equipment and tools was actually delivered to Kube and that Mr. M. Tehrani knew this and tried to avoid the bank learning this by showing dated assets to the bank's appraiser that were clearly not provided by Mosaic, according to the invoices.

66 Finally, I found that certain payments made by Mr. Levy to Mr. M. Tehrani's companies purportedly for furniture, were not in fact for furniture. Given there was no suggestion that these payments were loans, the only inference to be drawn was that Mr. M. Tehrani was involved in money laundering as submitted by the Crown.

Homelife Forest Hill Realty Inc. (Homelife)

67 The next SBL in the chronology was obtained by Kamyar Ghatan from the BNS in the amount of $204,000 for his company Homelife; Count 1. I found Mr. Ghatan not guilty of fraud and necessarily not guilty of Count 7, but I did find Mr. Levy guilty of Count 1 in connection with this SBL. In particular I found that Mr. Levy altered the GIC that he gave to Mr. Ghatan to give to the bank and that he altered the tax documents found in the BNS loan file although I did not find any reliance by the bank to its detriment on these altered documents. I also accepted that Mr. Ghatan might not have noticed these alterations.

68 I found that Mr. Ghatan did not know the property history of 1040 Eglinton Avenue West (1040 Eglinton), a building owned by Mr. Levy through his company MGM Inc., and that Mr. Levy took advantage of that and charged Mr. Ghatan for renovations that had already been purportedly done to this property for other companies that obtained SBLs before Homelife including Accessories & More Ltd. in the fall of 2007 for the main floor, Dufferin Paralegal Ltd., a company owned by Mr. Kazman, in the spring of 2008 for the second floor, and Western Leather, in the fall of 2008 for the main floor. I concluded that the building had purportedly been subject to a total gut job and total rebuild twice and that it was obvious that there would be no need to gut the property yet again about one and one half years later to replace the electrical panel, the wiring, the plumbing, and the HVAC or replace the store front since that was purportedly done for Western Leather. As Mr. Levy admitted that his company Castlerock Design Corp. (Castlerock), which he owned with his wife, was the contractor for this job and given my finding that Castlerock invoiced Homelife for work not done, I was satisfied that Mr. Levy provided Homelife with an inflated invoice from Castlerock that he knew included leasehold improvements that he had not in fact done and that he knew that the BNS would rely on this invoice in advancing the $204,000 SBL to Homelife. On this basis I found Mr. Levy guilty of Count 1.

69 I accepted that Mr. Ghatan would not necessarily have been aware that what was on the first Castlerock invoice had not in fact been done. He wanted a turnkey operation and he was busy getting ready to open a brokerage. I therefore found that Mr. Ghatan was not aware of the fact that the first Castlerock invoice was inflated.

70 Although this is another property that Mr. Kazman testified he had a 50% interest in, which was denied by Mr. Levy, Mr. Levy also admitted that Mr. Kazman was not involved in these invoices and so I found that the Crown had not proven its case against Mr. Kazman as it related to Homelife. Mr. Kazman's admission, however, becomes relevant to the Crown's sentencing submissions.

World and Exclusive

71 Ms. Chapkina obtained two SBLs with the assistance of Mr. Kazman and Mr. Levy. The first was a SBL from the BNS in April 2009 in the amount of $137,700; although only $86,679.50 was advanced, for her company called World of Accessories Ltd. (World). The second SBL in the amount of $138,720 was obtained in July 2009 from the RBC for her company Exclusive Accessories Inc. (Exclusive). I found that the Crown had not proven beyond a reasonable doubt that Ms. Chapkina or Mr. Kazman was guilty of either Count 1 as it related to World or Count 4 as it related to Exclusive.

72 I did find that Mr. Levy counselled Ms. Chapkina as to how to fill in the application for both banks knowing that what he was telling her amounted to misrepresentations to the banks. I also found that Mr. Levy prepared a fraudulent CIBC GIC statement and that he put it in the package for Ms. Chapkina to take to the banks. However, I was not satisfied beyond a reasonable doubt that the Crown had proven that these items were relied upon by the banks and found Mr. Levy not guilty of this conduct in relation to either SBL.

Uzeem Corp. (Uzeem)

73 Mr. M. Tehrani's company Uzeem was approved for a SBL from the BNS in January 2010 in the amount of $229,500, which was subsequently reduced to $217,591. I found Mr. M. Tehrani and Mr. Levy guilty of Count 1, in connection with this SBL. In particular I found that the package Mr. M. Tehrani gave the BNS included fraudulent NOAs for the 2007 and 2008 tax years, inflating his income, and a forged TD GIC, that Mr. Levy prepared; that Mr. M. Tehrani did not disclose his SBLs for Kube or Comod or the guarantee he signed for those SBLs, and that Mr. M. Tehrani admitted that he realized if he told the bank about the outstanding Kube loan that he would not get the loan for Uzeem. As for his annual personal income, I found that Mr. M. Tehrani must have known that his actual income was a fraction of what he was writing down on the Summary form for the bank and finally that by confirming compliance with the Loan Limit Clause, I found that Mr. M. Tehrani made a false representation to the bank as the outstanding SBLs for Kube and Comod exceeded $300,000.

74 Mr. Levy's company Mosaic was the contractor/supplier for Uzeem. Much more significant than the misrepresentation of income and these other matters that Mr. M. Tehrani failed to disclose to the bank, I found that Mr. Levy and Mr. M. Tehrani presented a grossly inflated Mosaic invoice to the BNS that represented that a new store entrance and a new HVAC system had been installed when in fact that work had been done by the landlord; Mr. Wong, at his expense, before Mr. M. Tehrani took possession of the premises. I did not accept Mr. M. Tehrani's assertion that Mr. Wong was lying and that he was a "crook" and selling drugs upstairs. The fraudulent invoice resulted in the BNS advancing the Uzeem SBL in the amount of $217,591.

75 I found Mr. Kazman not guilty of fraud in connection with Uzeem, which the Crown conceded. I found that this was likely because Mr. Kazman's and Mr. Levy's relationship had broken down by this time.

Bluerock Construction Inc. (Bluerock)

76 Mr. Levy obtained two SBLs for his company Bluerock from the CIBC on March 15, 2010 in the total amount of $349,999.95; five cents below the allowable maximum at the time. One SBL was for $195,000 for leasehold improvements and the other for $155,000 for equipment.

77 I found these two SBLs to be a complete fraud, and found Mr. Levy guilty of Count 5 with respect to Bluerock. I accepted Mr. Kazman's evidence that Mr. Levy obtained these SBLs without his knowledge and found him not guilty of fraud in connection with these SBLs in that no funds from the Bluerock SBLs were traced to him or any of his companies.

78 Mr. Levy testified that he negotiated two leases with Mr. Kazman; one for 3042 Keele Street West (3042 Keele) and the other for 846 Sheppard Avenue West (846 Sheppard). 3042 Keele was purchased by 3042 Realty Corp., a company controlled by Mr. Kazman, on October 22, 2009, and it owned this property at all material times. 846 Sheppard was owned by 846 Realty Corp., a company that Mr. Kazman was a part owner of, from May 4, 2009 until the property was

transferred to Mr. Levy's company, GMS Realty Inc., on March 9, 2010, just a few days before the Bluerock SBL was approved. I found that the leases Mr. Levy presented to the CIBC were frauds and that these leases were prepared by Mr. Levy for the CIBC to justify the SBL. As I set out in my Judgment, I found that this was an elaborate fraud perpetrated on the CIBC by Mr. Levy with the assistance of Mr. Benlezrah, the principal of the purported contractor, Bonded Contracting & Design Inc. (Bonded).

79 Four invoices from Bonded to Bluerock were found in the CIBC loan file that totaled $417,045. These invoices were paid in full by Bluerock. I found that Mr. Benlezrah was not an honest witness and that he was like other people that Mr. Levy and Mr. Kazman arranged to incorporate construction companies that they could manipulate, although in this case I did not find that Mr. Kazman was involved. I found that Mr. Benlezrah and Mr. Levy did not do any leasehold improvements in either location and that Bluerock was a company on paper only and never did any business.

80 Bluerock received the SBL proceeds from the CIBC in addition to two payments from Mosaic of $100,000. Bluerock used the money it received from the CIBC and Mosaic to pay Bonded the full amount of its invoices of $417,045. In the same period $115,350 was paid out by Bonded to companies owned by Mr. Levy. I also found that Mr. Levy used some of the funds from the Bluerock SBL to pay the SBL he had for MDC Contracting.

81 In this period Bonded also made significant payments to Mr. M. Tehrani's companies As Is and Uzeem. According to Mr. Levy, some of these payments were for furniture. I found these payments very significant in terms of the Crown's allegations against Mr. M. Tehrani since I found that Bluerock only existed on paper and there would be no reason for Bonded to actually buy furniture for a sham corporation that did not exist. I concluded that Bonded was making these payments at the direction of Mr. Levy either to provide monies owed to Mr. M. Tehrani for his role in the fraudulent scheme or as part of the money laundering. Mr. M. Tehrani was not charged with money laundering but the Crown asserts that these findings can be relied upon as an aggravating factor in the sentencing of Mr. Tehrani.

Count 6 - Laundering Proceeds of Crime

82 I found Messrs. Kazman and Levy guilty of Count 6. Where I found fraud, I found that Mr. Levy was the one who prepared the fraudulent invoices for leaseholds, furniture, fixtures and equipment. However, I found that he did so, in most cases, with the knowledge of Mr. Kazman who then, for most of the companies, was also tasked with actually making the bank deposits and writing the cheques. Based on the Coort Analysis, I found the evidence overwhelming that the distribution of the SBL proceeds and the circulation of those funds back and forth between companies owned by Messrs. Kazman and Levy and by Ms. Cohen was with the knowledge and intent of all three of them to conceal the fact that those monies were obtained from the banks and then the borrowers by fraud.

83 Although in some cases where I found fraud, I accepted that some of the payments made using funds traced back to the SBL proceeds were made to pay legitimate debts between the parties, I rejected the evidence of Messrs. Kazman and Levy that they were all legitimate

payments for advancing or repaying loans or other legitimate debts. In any event, the source of the funds was as a result of frauds perpetrated on the various banks.

84 Mr. Coort traced some of the payments towards the purchase of properties. Others went toward mortgages held on property owned by Mr. Kazman or Mr. Levy and other payments were for personal expenses but again these payments were made in the fashion that they were to conceal their source. This becomes relevant to the Crown's sentencing submissions.

Impact on Canadian Government, the Banks and Citizens

85 In dollar terms the government of Canada is the primary victim of these frauds and Canadian taxpayers suffered the loss. Although not involved in the application process or in a bank's decision of whether to grant a SBL, Industry Canada acts, in effect, as an insurer for the SBL if a lender complies with all of the requirements of the CSBFP. In that event, if a SBL goes into default, Industry Canada will reimburse the lender up to 85% of the monies advanced. That happened in this case with respect to most of the fraudulent SBLs.

86 Andre LeClair, who testified at trial, and is responsible for the CSBFP, prepared a victim impact statement (VIS) on behalf of Industry Canada. He set out in great detail the purpose of the program, including the fact that SBLs deliver major economic benefits such as job creation and higher sales growth and income than compared to other businesses.

87 Mr. LeClair states at para. 9 of his VIS that the use of the CSBFP for fraudulent purposes "undermines the basis of the program and undermines the benefits derived from the granting of the SBLs" by the banks. "The proceeds of the loans do not result in growth in any business and there are no economic benefits flowing from these loans. The benefits flow directly to the individuals who perpetrate the fraud by lining their pockets with funds fraudulently obtained" from the banks. Since the Canadian Government may be obligated to reimburse the banks for these fraudulent loans, the Canadian taxpayers suffer the losses.

88 Security has increased in the administration of the CSBFP to improve early detection of fraud but these changes have made the program less attractive to legitimate borrowers.

89 In terms of the monetary losses resulting from fraud at large (not limited to the case at bar) Industry Canada has paid out $4.8 million in claims in the period from April 2012 to March 2017 and has submitted 21 requests for investigation where fraud is alleged to the RCMP. Industry Canada has been granted restitution orders resulting from charges laid totaling approximately $2.5 million of which about $145,000 has been collected. Industry Canada requests that I make a restitution order against Mr. Kazman and Mr. Levy to cover Industry Canada's monetary losses in this case of $1,100,148.

90 The RBC and TD banks also prepared VISs. In the case of RBC, Mr. McCarthy on behalf of the bank states that the RBC has an outstanding loss with respect to the LSC SBL in the amount of $44,583 and that it incurred legal fees of over $64,000. With respect to the Contempo SBL, $18,101 is outstanding and the bank incurred legal costs of just under $100,000 because the RBC sued some of the defendants and Mr. Kazman sued the RBC for suing him and RBC's

lawyers for acting for the RBC. There is also the cost of time of the employees to investigate the frauds.

91 Mr. McCarthy also described how the LSC fraud impacted on Tony Ruvio, who was a witness at trial. The LSC was his very first SBL and according to Mr. McCarthy, Mr. Ruvio gave evidence in the civil proceedings about how he was duped as an individual and began to suffer depression and anxiety as a result and that this fraud made him give up his career.

92 Ms. Gallienne on behalf of the TD also provided a VIS. With respect to ELI the bank's loss is $11,628 and it incurred legal costs of almost $8,500. Ms. Gallienne asks that I not consider the fraud committed by Messrs. Kazman and Levy and Ms. Cohen as a "victimless" crime in that this type of activity costs the TD, its clients and its shareholders millions of dollars annually.

93 No VISs were filed by the BNS, CIBC or the BMO but Mr. Rinaldi submitted that it stands to reason that they would have had similar concerns. I agree.

94 In addition to the losses of the banks, and the resulting impact on their employees and shareholders, the Crown argued that a number of people were used by Messrs. Kazman and Levy as "straw men" and that they were victims of their fraud. That is true, for example, with respect to Mr. Ghatan who was overbilled by Mr. Levy for leasehold improvements that were not done. There were also people like Ms. Chapkina who was the person Mr. Kazman instructed to incorporate Eastern and open a bank account in the name of Eastern; one of the sham construction companies. Other individuals were paid to do the same for other sham construction companies at the request of Mr. Kazman.

95 The Crown also argued that the landlords like the Pianosis, Mrs. Sakellariou and the Wongs were victims. These people did not suffer financial losses that were quantified but the defaults of the SBLs meant that the borrowing companies ended the leases within months of commencement. Furthermore, these landlords were compelled to come to court to testify and be subjected to accusations they were lying when they were cross-examined and the defendants and in particular Mr. Kazman, Mr. Levy and Mr. M. Tehrani testified that they were lying to the court. I accepted the evidence of the landlords and they certainly did not deserve these accusations.

96 The Crown's position is that Industry Canada is the true victim in this case and if I feel the need to prioritize restitution, Industry Canada should come first over the banks.

Sentences Given to Other Defendants

97 Because of the principle of parity, the sentences received by Ms. Cohen and Mr. Salehi are relevant to my sentencing decision.

98 The fact both pled guilty is a very strong mitigating factor. Mr. Rinaldi argued that this is even more so in a fraud case that was expensive and took a very long time to try. The timing of the guilty pleas is also important. I will come to the cases that support this position.

Miriam Cohen

99 I found Ms. Cohen to be the third person in the criminal organization so obviously she had a very significant role in the frauds. Mr. Rinaldi, who has been with this file from its outset, explained the history of the Crown's dealings with Ms. Cohen, which resulted in her pleading guilty on February 13, 2014 before Justice Pringle in the Ontario Court of Justice (OCJ) to four counts of fraud over $5,000 (the four Cohen SBLs). The 42-page agreed statement of facts (ASF) that was put before Pringle J. was arrived at after many drafts going back and forth. Justice Pringle sentenced Ms. Cohen to a conditional sentence of two years less a day and three years' probation with a number of conditions. The sentence proposed was a joint submission in terms of the fact that it was conditional and its length but the terms were argued before the court.

100 I do not have a copy of any reasons given by Justice Pringle but Mr. Rinaldi advised that with respect to the joint submission, Pringle J. said it was close to the line but she would accept it. She used some very strong language similar to that of McMahon J., which I will come to, when he accepted a joint submission with respect to Mr. Salehi. In terms of Ms. Cohen's personal circumstances, she has a child with learning disabilities and special needs and that was relied on to justify an exception to house arrest. Mr. Rinaldi advised that Justice Pringle stated that but for the guilty plea, the personal circumstances of Ms. Cohen and the fact that she had paid back $270,250 to the banks, that she would not have accepted the joint submission.

101 According to Mr. Rinaldi there was never any suggestion that Ms. Cohen was not going to plead guilty and resolve her matter. She always wanted to do so but wanted a lawyer to assist her. Mr. Rinaldi stated that Ms. Cohen was the first one who wanted to resolve the first indictment but didn't want to resolve it without the second indictment also being part of the resolution.

102 Mr. Rinaldi submitted that Ms. Cohen's desire to resolve the charges and her genuine remorse right from the very beginning justified the sentence she received and that the delay in her pleading guilty was that she didn't have counsel. The position of the Crown is that Ms. Cohen pleaded guilty as early as was feasible. To explain the delay in Ms. Cohen pleading guilty, Mr. Rinaldi provided a detailed chronology which I have set out in Appendix "A" to this decision. I accept that Ms. Cohen's intention was to plead guilty from the outset.

103 It is also significant that Ms. Cohen began her restitution to the banks in June 2009, before she was charged, and that her restitution to the banks totaled $270,250. I understand this was in response to some civil lawsuits but, as Mr. Rinaldi points out, she was not the only one sued and Ms. Cohen did resolve matters very quickly with the banks. An additional $120,000 payment was made in August 2011, after Ms. Cohen was charged, which according to Mr. Rinaldi was attributed equally to both her and Mr. Kazman, bringing her total up to $330,250. This was her last payment.

Alireza Salehi

104 On November 3, 3016, Mr. Salehi pleaded guilty to three counts of fraud over $5,000 on a new Indictment. Counsel filed a 25-page ASF with respect to Roxy, CDI and Modernito. The admitted fraud included an altered GIC, providing invoices from Oakwood that were false to the banks and the total loss was admitted to be approximately $466,000. Ms. Brun advised Justice McMahon that the reason the Crown was proceeding with a joint submission was that Mr. Salehi attempted to resolve the matter about a year prior, and that in arriving at the joint submission Mr. Salehi's personal circumstances and the fact that he did not receive much of the fraudulent proceeds in that most of the money flowed to Messrs. Kazman and Levy, had been considered.

105 The joint submission as to penalty was for a conditional sentence of two years less one day and three years' probation. Ms. Brun advised McMahon J. that Mr. Salehi had already made a $5,000 payment towards restitution and that he would pay an additional $45,000 during the term of his sentence pursuant to a free-standing restitution order.

106 In providing his reasons for accepting the joint submission, Justice McMahon commented at pp. 28-29, on the fact that Mr. Salehi had "readily acknowledged his involvement" in the fraud, that Mr. Salehi's role in the fraud was limited and that he had "significant challenges to his life with a very handicapped child" who was then three years of age. In terms of other mitigating factors McMahon J. relied on the fact that this was a joint submission, Mr. Salehi was not the operating mind of the group but rather the "front man", most of the money went to Mr. Kazman and Mr. Levy, who in some ways exploited him, that Mr. Salehi was 49 years old with no criminal record, the fact he was trying to support two young children, one who has significant physical disabilities which was a very difficult and challenging factor, and what McMahon J. characterized as the most important mitigating factor, the fact that Mr. Salehi had exhibited remorse for his actions and pleaded guilty avoiding the necessity of a trial and providing certainty of result to both the Crown and to the court. As aggravating factors McMahon J. relied on the fact that Mr. Salehi was involved in three separate fraudulent transactions with three separate companies and the total fraud was $466,000.

107 Justice McMahon concluded at p. 30:

> As such, he is entitled to a <u>significant reduction in what otherwise would have been a fair and fit sentence</u>. The joint submission, generally, would be below the range appropriate for such sentences, but because of the unique personal circumstances of the accused, his limited role, the remorse exhibited by the plea of guilty, I am satisfied that the joint submission proposed is fair and just. [Emphasis added]

108 With respect to Mr. Salehi, the chronology leading up to his guilty plea provided by Mr. Rinaldi and Ms. Brun is set out in Appendix "B". I find that although it was not as early as Ms. Cohen, Mr. Salehi wanted to resolve his matter very early on after the trial commenced.

Circumstances of the Defendants

109 Some background information with respect to each of the defendants is contained in my Judgment and I will not repeat all of that here. None of the defendants have a criminal record.

Marshall Kazman

110 Mr. Kazman is 62 years old. He has three children from his first wife, whom he has been separated from for a number of years. He has a fourth child, a son, with another woman who is presently 12 years old. Mr. Litkowski, counsel for Mr. Kazman, submits that this son faces certain challenges that Mr. Kazman has been instrumental in assisting with. I will come back to this.

111 Mr. Kazman has a Bachelor of Science degree from the University of Toronto and a law degree from the University of Windsor Law School, graduating in 1982. He was called to the bar in the early 1980's and practiced law for 22 years, working first with his father and then as a sole practitioner.

112 For reasons dated December 2, 2005, Mr. Kazman was found guilty of professional misconduct by a Hearing Panel of the Law Society of Upper Canada ("LSUC"); *LSUC v. Kazman*, *2005 ONLSHP 32*. The main allegation against Mr. Kazman was that he had participated in a dishonest scheme to obtain mortgage financing concerning five properties. His client was found to be the mastermind behind the scheme. In September 2006, the LSUC revoked Mr. Kazman's licence to practice law. The Appeal Panel of the LSUC and the Divisional Court upheld this decision. Mr. Kazman was able to continue practicing while the case was under appeal but he could not issue cheques without permission from the LSUC.

113 For the purpose of the trial, I ruled that I would not consider the findings of the Hearing Panel when considering the Crown's case and in particular Mr. Kazman's credibility. I did conclude that in considering the defences raised by the defendants and in particular Mr. Levy, that I could consider the findings of the Hearing Panel of the LSUC. Clearly the findings of the Hearing Panel are also relevant to sentencing Mr. Kazman and in particular his prospects for rehabilitation although I must bear in mind that the Hearing Panel did not make their findings on the criminal standard of proof. Mr. Litkowski did not challenge the Crown's position that the findings of the Hearing Panel, as upheld on Appeal, are relevant when considering Mr. Kazman's prospects for rehabilitation. As I will come to, the timing of Mr. Kazman's conduct during the LSUC proceedings is also relevant to that issue.

114 Although the Hearing Panel found that Mr. Kazman did not know that the transactions were fraudulent, the majority of the Hearing Panel concluded that the mental element required for a finding of professional misconduct was satisfied because he was nevertheless reckless and wilfully blind as to whether the transactions were fraudulent. They found that certain red flags should have alerted Mr. Kazman to the need to ask probing questions, but he failed to do so to avoid actual knowledge. Accordingly, the majority of the Hearing Panel concluded that Mr. Kazman engaged in professional misconduct.

115 The Hearing Panel concluded on September 13, 2006 that disbarment was an appropriate penalty for Mr. Kazman, keeping in mind that "maintaining the integrity of the lawyer in the mortgage and real estate system is a matter of considerable importance to the public;" *LSUC v. Kazman*, *2006 ONLSHP 57*. In arriving at this conclusion, the Panel stated the need to balance

its obligation to protect the public against its obligation to treat Mr. Kazman fairly. The Panel also considered a number of factors including the fact that willful blindness or reckless involvement in a dishonest scheme to obtain mortgage financing is extremely serious because the risk of loss is significant; Mr. Kazman's culpability related to multiple transactions with similar features; it was not a momentary lapse of judgment; Mr. Kazman's office prepared false and misleading affidavits; Mr. Kazman did not profit from the transactions, other than the legal fees that he collected; it was clear that Mr. Kazman wanted to make "real change" and that he had taken steps to create a busy and normal law practice; and witnesses spoke highly of Mr. Kazman in their professional and personal dealings with him. The Panel concluded that Mr. Kazman was not a "dupe"; rather, he had "adverted to the probability that these transactions were fraudulent" and had "refrained from making further inquiries because he did not want to be fixed with actual knowledge."

116 As Mr. Litkowski submitted, the majority of the Hearing Panel decided that although disbarment was the appropriate penalty, they noted Mr. Kazman's "difficult life" and his struggle with addictions, his diagnosis of attention deficit disorder and his character witnesses. There was also a dissent which held that a suspension rather than disbarment was the appropriate penalty. As Mr. Rinaldi pointed out however, at para. 8 of the penalty decision, the Hearing Panel stated that Mr. Kazman's addictions were not a factor although they did take into account that he had by "force of character remained free from these addictions for the past 8 1/2 years". Mr. Rinaldi also pointed out that Mr. Kazman had a dated discipline history that the Panel took into consideration. In June 1995 Mr. Kazman was suspended for three months for practicing law while under suspension.

117 Mr. Kazman appealed the decision of the Hearing Panel and the appeal decision was released on May 7, 2008; *LSUC v. Kazman*, *2008 ONLSAP 7*. The Appeal Panel concluded that the majority of the Hearing Panel did not act unreasonably in making its findings of fact or in choosing a penalty, and that the Panel did not err in determining questions of law. Mr. Kazman appealed to the Divisional Court and his appeal was dismissed; *LSUC v. Kazman, 2011 ONSC 3008*.

118 After Mr. Kazman lost his licence he continued as a paralegal under the business name Dufferin Paralegal Ltd. Paralegals were not licenced at the time by the LSUC.

119 A letter from Mr. Kazman's cardiologist dated December 12, 2017 was filed. Mr. Kazman had a heart attack in September 2013. A stent was put into his right coronary artery. It would seem that any cardiac issues are now stable.

120 Mr. Litkowski filed a developmental assessment report dated June 2012 with respect to Mr. Kazman's son, SD. At that time SD was almost seven years old. The report states that SD had a previous diagnosis of ADHD. The results of the assessment revealed average cognitive abilities. Academically, SD was at grade level save for reading where it was identified that SD had a learning disability contributing to his reading and writing difficulties. A number of recommendations were made with respect to attention and learning included additional support in various areas including reading and language skills to be encouraged at home and school.

121 Mr. Litkowski also filed a letter dated December 12, 2017 from Ari Blatt, a registered social worker with the Toronto District School Board. In that letter Mr. Blatt states that he has been involved in supporting Mr. Kazman's son from 2012 through the spring of 2017. He states that SD is assessed with a learning disability and ADHD and requires additional support with respect to issues of anxiety, academic achievement, social skills and regular school attendance. Mr. Blatt states that throughout this time Mr. Kazman has played "a significant role in supporting ... [SD] as well with many of these issues. He has been an important presence in ...[SD]'s life and has maintained regular daily contact with ...[SD]." He goes on to mention specifically Mr. Kazman's role in ensuring that his son attends school. He concluded his letter by stating: "Given ... [SD]'s social-emotional and academic needs, I believe that Mr. Kazman's regular presence plays an important role and any prolonged absence may have a detrimental impact on ... [SD]."

122 Mr. Rinaldi had a conversation with Mr. Blatt as Corporal Thompson was not available. Mr. Blatt's answers to the questions asked were filed as an exhibit on consent. Mr. Blatt stated that he saw SD roughly once every 7-10 days. He said that SD's lack of attendance ebbed and flowed and the worst of it was when he was younger. He could not say at what points Mr. Kazman was there to assist, only that there were occasions over the five-year period where he did assist and help in getting SD to come to school. This information came however, from SD's mother and at times SD, as Mr. Blatt had never witnessed Mr. Kazman helping his son. He told Mr. Rinaldi that in the five-year period, Mr. Kazman's involvement to help SD come to school did not happen as many as 50 times, that most of the assistance from Mr. Kazman occurred when SD was younger and that his improvement could also be as a result of his getting older and maturing. Mr. Blatt has had no further contact with SD since he left the Toronto District School Board when his family moved out of the city after the 2016-2017 school year. By my calculation SD is about 13 now.

123 Mr. Kazman has filed letters of support from his two sisters, his other children and other family members. His children describe him as an incredible loving father with whom they have a close relationship. His family speaks of a devoted and supportive father, brother, uncle and mentor figure who is extremely active in the life of his extended family. Some refer to his generosity, his spirituality, and his caring and compassionate nature. A number of Mr. Kazman's friends and business associates have also filed letters of support. They too describe Mr. Kazman as a kind and loving person and speak of his tendency to help others in need. Some of the letters also speak to the relationship Mr. Kazman has with his son, SD. They typically state that they were shocked when they learned of his convictions given what they believed about Mr. Kazman's character and they all suggest that his convictions are out of character. None of these friends appear to have been aware of the fact that Mr. Kazman was disbarred.

124 I have ignored any comments in these letters as to what an appropriate sentence would be and the pleas for leniency. As well, some of the character references believe that Mr. Levy is to blame for what has happened to Mr. Kazman but that is contrary to the evidence in this case. Furthermore, as the Crown points out, Mr. Kazman was disbarred for similar activities at a time when he did not know Mr. Levy.

125 Mr. Litkowski submits that Mr. Kazman is receiving social assistance in the amount of $817

a month and that he does chores at the property where he resides in Caledon to supplement the rent that he pays. It is alleged Mr. Kazman has no assets save for one bank account with a balance of about $150. Mr. Kazman filed a T5007 setting out his social assistance payments from 2016 totaling just under $10,000.

126 The Crown does not dispute that Mr. Kazman is on social assistance but does not accept the suggestion that Mr. Kazman has no assets. Ms. Brun filed the decision of Justice Clark of this court; *R. v. Kazman*, *2016 ONSC 4320*, dismissing Mr. Kazman's *Rowbotham* application. The relevant findings are as follows:

a) Mr. Kazman gives no indication that he has made any effort on his own behalf to earn a living, much less to save any money. Instead, he indicates that he lives on an Ontario Works stipend and has not filed income tax returns for approximately five years. Yet he gives no specific indication in either his affidavit or his *viva voce* evidence, as to why he cannot work. Instead, he relied, in his *viva voce* evidence, on the proposition that he must be impecunious, because, were that not so, the government would not give him the disability payments it does. That answer is not sufficient. Even assuming he is impecunious, that simply begs the question of how he comes to be so and whether he has made any reasonable efforts to reverse the situation. (at para.23)

b) Justice Clark noted throughout his decision that Mr. Kazman relied on letters rather than affidavits which, "as a former lawyer, surely Mr. Kazman must understand, in a matter of this nature, the important difference in suasive value between a letter and an affidavit." (at para. 26)

c) Mr. Kazman did not dispute that a corporation of which he was a director and part owner owned a piece of commercial real estate (3042 Keele Street) that was purchased for somewhere in the neighbourhood of $500,000 and sold some years later for $1,110,000. Justice Clark found Mr. Kazman's claim that once certain indebtedness was paid off that he realized virtually no money from the sale was only a "bald assertion, however, there is no evidence of any substance backing up his contention." (at para. 28)

d) Mr. Kazman sold a piece of real estate to Ms. Cohen for $575,000 on January 31, 2012. Mr. Kazman acknowledged that this was the house which was his primary residence but said it was sold under power of sale. Mr. Kazman said that he paid the lion's share of the money from the sale to Ms. Cohen because he was indebted to her as a result of certain earlier business dealings and so that she would rent him a room in the same house. Mr. Kazman said that had she not done so he would have had nowhere to live. He provided a trust letter to Legal Aid Ontario purporting to show that he paid $130,000 to Ms. Cohen. According to Mr. Kazman, he was left with only $1,700 from the sale. (at para. 29) Clark J. found at para. 31 that Mr. Kazman's claim as to the disposition of his residence was "dubious".

e) At para. 33 Justice Clark found that "Mr. Kazman's account of his finances is cursory at best" and at para. 35 he concluded "to say that Mr. Kazman's financial situation is murky is to indulge in understatement. On the basis of what has been

> put before me, I am not satisfied that Mr. Kazman is, in fact, impecunious. It being his onus of proof, he has failed to satisfy this arm of the test."

127 I found in my Judgment that Mr. Kazman purchased, renovated and sold properties with various partners including Ms. Cohen and Mr. Levy and that Mr. Kazman and Mr. Levy had a falling out sometime in 2010, likely around the time of the Uzeem SBL in early 2010. The Crown relies upon this in support of her request for a fine in lieu of forfeiture. I will deal with the evidence when I consider this submission.

128 Mr. Kazman's sentencing materials include a letter from Ms. Coutts from RBC confirming that both Mr. Kazman and Ms. Cohen paid $120,000 to the RBC in August 2011 which was accepted as settlement of the bank's action against them. This payment was after Mr. Kazman was charged. This is the $120,000 payment Mr. Rinaldi mentioned as part of the restitution made by Ms. Cohen. I accept, therefore, that Mr. Kazman has made $60,000 in restitution towards the Cohen SBLs.

129 Mr. Kazman addressed me at the conclusion of the sentencing submissions with respect to him. His statement was very short. He apologized to the court and advised that he was sorry for his part in the transactions and that he got involved. Although Mr. Kazman's statement was some expression of remorse it struck me as primarily relating to the fact that he has been convicted of these serious offences and is facing a significant sentence.

Gad Levy

130 Mr. Worsoff did not tell me much about Mr. Levy's background although, as I will come to, he called his wife as a witness. I know from the trial that Mr. Levy was born in Morocco and came to Canada around 1982 and finished high school here. He then started working for a cousin in a clothing business and then for his brother-in-law in a furniture business. Mr. Levy quickly became successful with his own clothing store, Jigolos, and he bought his first property; 617 College Street in Toronto, where he continued to operate Jigolos. Mr. Levy incorporated a number of other companies and had two clothing stores on Bloor Street in rented premises.

131 Mr. Levy advertised as a specialist for obtaining SBLs through his company Fairbank Financial & Accounting Ltd., which purportedly also gave advice for investments and mortgages. Mr. Levy had a number of construction companies. His first company was MDC Modern Design Concept Inc. (MDC Modern), which was incorporated in April 2001. He incorporated a number of different construction companies after this as well as other types of corporations. I heard no evidence about these companies doing any actual construction work save for what was purportedly done in connection with the 16 SBLs before me.

132 Mr. Worsoff did not file any character letters on behalf of Mr. Levy but Karen Levy, Mr. Levy's wife, gave evidence in support of her husband. Mrs. Levy testified about how she has felt over the past eight years since her husband was first charged with these offences. She quickly resorted to what could only be described as a rant however, directed primarily at Mr. Kazman who was in the court, stating that this case was full of fabrications and inaccuracies and that Mr.

Kazman, the one person who her husband trusted, deceived him and was a liar and a thief. She insisted that her husband was not a mastermind, king or emperor.

133 Once Mr. Worsoff got Mrs. Levy back on track she testified that they have three children aged 3, 5 and 9. She and Mr. Levy have been married for 13 years and she has stood by him and said that she always will. She described their current living circumstances as grim as they have lost everything. She testified that Mr. Levy hasn't been able to work and she blames the stillborn death of a son in 2010 and two miscarriages in 2011 and 2012 on this "garbage case".

134 Mrs. Levy testified that over the past six and a half years they have lived in several places, being evicted over and over again because of her husband's name on the internet and the fact they cannot get a bank account. She produced what she alleged were a number of eviction notices but they were in fact notices of hearing served on behalf of a landlord to evict the Levys. If I understand her evidence, as they could not pay the rent they would simply move and they would not fight these eviction notices.

135 Mrs. Levy testified Mr. Levy has no income and she has no assets either. It is her position that since 2010/2011 Mr. Levy has not worked anywhere and in the period between 2012 and 2016 they had no bank account. She then said that Mr. Levy did open one account but then was told by the bank that they did not want him as a customer. She admitted that she has a banking account. They started to receive child benefit cheques in 2013 and when she was asked how she cashed those she said that she still had an account with the National Bank. Her evidence in this area was very confusing and inconsistent. She finally agreed that she did have bank accounts continuously through this period but that she didn't bring any banking records with her. She also admitted that a year ago Mr. Levy opened a Tangerine account. The records for that account were also not brought to court.

136 According to Mrs. Levy, neither of them has earned a penny since these charges. She also testified that Mr. Levy never sold any property since he was charged. They have been living on the generosity of family and friends. She estimated that they owe maybe $300,000. Ms. Levy testified that they qualified for social assistance but were told that they would only receive $1,000, which "wouldn't have helped us". She said they didn't take the support as it was not enough to provide what they needed. She denied it would be better than nothing to get $1,000.

137 I did not receive an affidavit from Mr. Levy as to his financial circumstances during the course of his sentencing submissions. Mr. Rinaldi advised Mr. Worsoff of the list of information required by the Crown by email on March 13, 2018 and when Mr. Levy was in court to receive my decision on his second s. 11(b) *Charter* application on April 4, 2018, I made it clear to him that if he wanted me to consider an affidavit he had to get it to the Crown well in advance of April 12, 2018 as the Crown would have the right to cross-examine him if his affidavit was not acceptable to the Crown.

138 On April 9th Mr. Worsoff served an application to adjourn Mr. Levy's sentencing hearing to dates as early as April 19th on the basis that Mr. Levy needed "further time to obtain government documents depicting his income and assets over the past six years". No supporting affidavit was included and so no explanation was provided for why those documents could not

have been available much earlier given it has now been seven months since Mr. Levy was convicted. Furthermore, no explanation was provided as to why a matter of one week would make a difference. At the time of finishing these reasons I obviously have not heard the adjournment application but if I am reading this decision to the defendants on April 12th as scheduled, I will have dismissed the application for an adjournment for reasons given orally.

139 Mr. Levy addressed me at the conclusion of the sentencing submissions with respect to him. He expressed absolutely no remorse for anything he had done. All of his comments were consistent with the position he took during the trial that he is the victim; alleging that this case has caused the loss of three children, and injured his wife, and that he has lost everything and that it has not been easy for him to survive all of these years since he was charged.

Ali Vaez Tehrani

140 I learned information about Mr. A. Tehrani from his evidence at trial and an affidavit sworn for the purpose of the sentencing by his brother Mr. M. Tehrani.

141 Mr. A. Tehrani and his brother Mr. M. Tehrani were born in Iran. Mr. A. Tehrani is the older of the two and they have four brothers. While in their teens, they were both sent by their parents to Italy to study. Mr. A. Tehrani testified that he studied jewellery; which was the family business. Mr. A. Tehrani did not explain the reason but according to the affidavit of Mr. M. Tehrani, after they graduated they planned to return to Iran to work in the family jewellery business but the political upheaval in Iran prevented this. They stayed in Italy until 1984 when they immigrated to Toronto as Immigrant Investors. As required, they opened a jewellery manufacturing facility immediately upon arrival. Both Mr. A. Tehrani and Mr. M. Tehrani worked in this business for five to six years.

142 After leaving the family business, Mr. A. Tehrani opened a jewellery design office for himself. He and his brother, Mr. M. Tehrani, then operated a fine food business together for about four years until the business was sold. After Mr. A. Tehrani got married and had children, he decided to spend more time with his family and so he started working for The Brick and then for Leon's, where he worked for almost ten years while he learned the furniture business. Mr. A. Tehrani quit working at Leon's at some point after he opened Qua. Mr. A. Tehrani filed one short character reference letter from someone who appears to be a long-time friend who has known him for many years and says he works hard and loves his family.

143 Mr. Inoue, Mr. A. Tehrani's counsel, submitted that any restitution order should be limited to $1,900 as Mr. A. Tehrani is on Ontario Disability (ODSP) and has no means to pay. The Crown pointed out that no evidence had been filed to support Mr. A. Tehrani's alleged impecuniosity. With the cooperation of the Crown it was agreed that Mr. Inoue would have Mr. Tehrani swear an affidavit with documents in support to provide the necessary evidence to the Crown to support this position.

144 Mr. A. Tehrani then swore an affidavit on March 9, 2018 in support of his position with respect to his financial status. In that affidavit he included his NOAs for the tax years 2012 to 2016. They reflect a total income for 2016 of $2,679; for 2015, $6,080, for 2014, $5,782, for

2013, $4,734 and for 2012, $29,946. It appears that Mr. A. Tehrani is living in a non-profit home in Richmond Hill where rent is geared to income. Mr. A. Tehrani was on Ontario Works and when he went onto ODSP his income increased to $907 per month. Mr. A. Tehrani has a car that he paid $600 for and it costs him insurance in the amount of $167.46 monthly. He also included his personal bank account statements for the last six months and deposed that he does not have any business accounts. This account shows his only source of income being ODSP and prior to that Ontario Works.

145 During the trial I received information from Mr. A. Tehrani about his health and in particular medication he was taking for pain and depression which he said had affected his memory. Mr. Inoue made no reference to this evidence in his submissions in support of his position on sentencing. However, Mr. A. Tehrani's affidavit also includes what he describes as "medical letters outlining the medical issues that resulted in me going on ODSP". In a letter dated September 12, 2016, signed by a chiropractor, reference is made to an injury on May 15, 2015 and that since then Mr. A. Tehrani has been receiving therapy for injuries related to his motor vehicle accident. His symptoms include muscle strain, low back pain, tension headaches, depression and sleep disorder. Additionally, Mr. A. Tehrani had a previous reported history of low back pain. His limitations are set out and the chiropractor opined that Mr. A. Tehrani was not capable of any gainful employment at that time. In addition, a note from the Toronto Poly Clinic states that Mr. A. Tehrani is under the care of a physician there and that because of lumbar pain and depression he is totally and permanently disabled. Presumably this is the evidence that resulted in Mr. A. Tehrani being put on ODSP.

146 Mr. A. Tehrani addressed me at the conclusion of the sentencing submissions with respect to him. He said that he had suffered a lot over the last ten years and that his son found out about these allegations and that he wanted to start a normal life. My clear impression was that Mr. A. Tehrani is sorry that he was caught and convicted. He seemed to have no insight into the fact that he was found guilty of fraud and in that regard he expressed no remorse.

Madjid Vaez Tehrani

147 I learned information about Mr. M. Tehrani from his evidence at trial and Ms. Barton filed an affidavit that he swore in support of his s. 11(b) *Charter* application on December 13, 2016 and another affidavit sworn on March 7, 2018 to address his financial situation.

148 Mr. M. Tehrani is currently 55 years old. He is a Canadian citizen. He is divorced with two daughters attending college. He is very devoted to his daughters and this was reflected in the character letters they each wrote in support. He also has the support of his former wife, Ms. Parise.

149 As already stated, Mr. M. Tehrani was born in Iran and at the age of 13 he was sent to Italy to study with his brother Mr. A. Tehrani. He has a Bachelor of Arts degree. They stayed in Italy until 1984 when Mr. M. Tehrani, at the age of 21, along with his brother Ali and an older brother immigrated to Toronto with his family as Immigrant Investors.

150 After coming to Canada, Mr. M. Tehrani also worked in the family jewellery manufacturing

business for a few years and, after he got married, he began to work as an employee for a jewellery store. After operating a fine food business with Mr. A. Tehrani, he and his wife and her sister opened a home décor, furniture and accessories store called Bizarre Shoppe Ltd. in 1989. Around 2002 Mr. M. Tehrani started importing vintage Vespa scooters and that is how he met Mr. Levy as Mr. Levy's store Jigolos was operating nearby.

151 Mr. M. Tehrani and a partner incorporated Meez Ltd. and eventually he and Mr. Salehi became partners in that business. Mr. M. Tehrani also opened other businesses thereafter including Meez Corp. and Comod and the businesses that formed the basis of the charges against him. He repaid, in full, the first SBL that he obtained for Meez Corp. and there was no allegation that Meez Corp. or Comod was involved in fraud.

152 In his affidavit in support of his 11(b) *Charter* application Mr. M. Tehrani deposed that he was well liked and respected in his community among his peers and place of worship and had a large circle of friends who he interacted with all the time before he was charged in the fall of 2012. He worked hard, 12 hours a day and on weekends, in building and maintaining a successful business and keeping up with his financial responsibilities to ensure that he could provide for his family and he employed staff as well. Mr. M. Tehrani deposed that having the charges hanging over his head has been incredibly stressful and that he has been depressed ever since the charges were laid. Initially he tried to hide the charges from his family but today is more open about this. This however, has not alleviated the stress and despair he feels every day. He deposed that he felt imprisoned by the accusations and limitations they had on his life and could no longer sleep peacefully or even enjoy a meal as he used to.

153 Mr. M. Tehrani deposed that his marriage dissolved and he lost his business in August 2010 when the bank closed his account and announced they would not work with him any longer. He declared bankruptcy on December 2, 2011 and was discharged on September 2, 2012. Since declaring bankruptcy Mr. M. Tehrani deposed that he can no longer support his children and can barely support himself. He must now rely on the charity of others. After 32 years in Canada working in the family business and other businesses that he has owned and operated, he has gone from being a successful and respected businessman to working as a delivery driver through Uber Eats for Swiss Chalet. He has no social interactions with his work colleagues and the notoriety of the charges has damaged both his personal and business relationships. He deposed that he is no longer the same person to many of those people who once liked and respected him in his community and in his church.

154 Reference letters were filed on behalf of Mr. M. Tehrani. His ex-wife describes him as a hard-working and caring person and as a loving father who is in regular contact with his two daughters. That is confirmed by letters from his two daughters. His older daughter believes her father has learned a lot from the wrong choices he has made and that he will never repeat these illegal acts again. The younger daughter is shocked that her father was accused of something like this. She describes her father as loyal, respectful, truthful, a hard worker and someone who she believes could never ever have the intention of stealing money from anyone. A nephew also wrote a letter in support of Mr. M. Tehrani. He has allowed his uncle to come and live with him and they have been roommates since 2013. He sees his uncle as his mentor. Mr. M. Tehrani

now has a new partner who has two sons. She wrote a letter of support. They are planning to live together.

155 With respect to Mr. M. Tehrani's financial circumstances, he filed an affidavit after the sentencing submissions with the consent of the Crown setting out his current financial situation and the Crown did not seek to cross-examine him on this affidavit. In this affidavit he deposed that he pays for his ex-wife's and his daughter's cell phone plans along with his own on a Rogers family plan. He also pays his daughters cash monthly for their TTC Metro passes in the amount of about $117 each. He currently pays no other regular child support. Mr. M. Tehrani attached his NOAs from 2012-2016 to his affidavit. He had not yet filed his taxes for 2017. They reflect a total income for 2012 of $12,477 plus $1,650 (post-bankruptcy), for 2013, $5,120, for 2014, $7,302, for 2015, $7,458, and for 2016, $6,499. Mr. M. Tehrani deposed that he does not have any undeclared income and that these NOAs accurately reflect his income for those years.

156 A letter from Sprinters Courier Ltd. dated October 20, 2017 confirms that Mr. Tehrani was a very dedicated employee from April 2013 to September 2016. Mr. Tehrani has also worked since 2013 for Cara/Swiss Chalet.

157 Mr. M. Tehrani currently lives with a nephew in Toronto Community Housing. Once the trial started in September 2016 his income consisted of Ontario Works benefits supplemented with some employment income by delivering for Swiss Chalet. By August 2017 he was no longer eligible for Ontario Works. He attached his bank account statements for the period January 2017 to January 2018 where his payments from Uber Eats for whom he delivers are deposited and from which account he pays his expenses. He uses a 2005 Toyota Matrix with almost 300,000 km on it to earn his income. He deposed that he has no other assets of any significance.

158 Mr. M. Tehrani chose not to address me at the conclusion of the sentencing submissions with respect to him, which of course is his right.

Legal Parameters

159 The maximum sentence for the frauds over $5,000, contrary to s. 380(1)(a) of the *Criminal Code,* is 14 years. Section 380(1), which imposes a minimum sentence of two years if the total value of the subject matter of the fraud exceeds one million dollars, was not in force at the time of these frauds; it was added in 2011.

160 The maximum sentence for the convictions of laundering the proceeds of the fraud, contrary to s. 462.31(1) of the *Criminal Code*, is imprisonment for a term not exceeding 10 years. There is no minimum.

161 Pursuant to s. 467.12 of the *Criminal Code,* a person who is found guilty of the commission of the offence of fraud exceeding $5,000 for the benefit of, or at the direction of, or in association with a criminal organization is liable to imprisonment for a term not exceeding 14 years. There is no minimum. Pursuant to s. 467.14 of the *Code,* any sentence imposed pursuant to s. 467.12 arising out of the same event or series of events shall be imposed consecutively.

Principles of Sentencing

162 The fundamental purpose of sentencing, as set out in s. 718 of the *Criminal Code*, is to ensure respect for the law and the maintenance of a just, peaceful and safe society. The imposition of just sanctions requires me to consider the sentencing objectives referred to in that section, which the sentence I impose should attempt to achieve. These are denunciation, deterrence; both specific and general, separation of offenders from society when necessary, rehabilitation, reparation for harm done and the promotion of a sense of responsibility in offenders and acknowledgment of the harm which criminal activity brings to our community.

163 Mr. Litkowski relies on *R. v. Edwards* (1996), 105 C.C.C. (3d) 21 (Ont. C.A.) at para. 34, where Justice Finlayson cited an expert opinion on the limits of general deterrence but that was in the context of offences of domestic violence and so I did not find that decision of any assistance. Mr. Litkowski also referred to the decision of the late Justice Rosenberg of the Court of Appeal in *R. v. W.J.* (1997), 115 C.C.C. (3d) 18 at para. 48, where he recommended caution and restraint in relying on lengthy sentences as general and specific deterrents. As I will come to, that opinion is at odds with the views of the Court of Appeal in the case of sentencing offenders convicted of large scale frauds.

164 In addition, in imposing sentence, I must take into account the principle of proportionality as codified in s. 718.1. The degree of punishment must reflect the gravity of the offence and the moral blameworthiness of the offender.

165 Mr. Litkowski relies on the principle of restraint codified in s. 718.2(e) of the *Criminal Code* and submitted that as Mr. Kazman is a first offender, where imprisonment is necessary the term should be as short as possible and tailored to the individual circumstances of the offender; see *R. v. Batisse* (2009), 241 C.C.C. (3d) 491 (Ont. C.A.) at paras. 32-34. This applies to all of the defendants although I note that in virtually all of the sentencing decisions counsel relied on the offender had no criminal record.

166 In this case the principle of parity as codified in s. 718.2(b) of the *Criminal Code* is important. That provision directs that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." The principle of parity of sentences is intended "to preserve fairness by avoiding disparate sentences where similar facts relating to the offence and offender would suggest like sentences": *R. v. Rawn,* 2012 ONCA 487 at para. 18. In *R. v. Beauchamp*, 2015 ONCA 260, the Court of Appeal considered the parity principle and stated at para. 278 that "disparate sentences for different offenders for the same offence do not violate [that] principle" as long as "the sentences are warranted by all the circumstances".

167 Mr. Litkowski also referred to s. 718.2(c) of the *Criminal Code* which sets out the totality principle and provides that where consecutive sentences are imposed the combined sentence should not be unduly long or harsh. In that regard he referred to *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 42. He submitted that "in short, a combined sentence must not be unduly long or harsh in the sense that its impact simply exceeds the gravity of the offences in question or the

overall culpability of the offender." He also referred to *R. v. Johnson*, *2012 ONCA 339* which recognizes that where the ultimate effect of the combined sentence is to deprive the offender of any hope of release or rehabilitation, the functional value of the sentencing principles of denunciation and deterrence reach the point of diminishing returns. I will consider this principle in determining the total period of incarceration and any restitution ordered for each defendant. As I will come to, however, the law is clear that the totality principle does not apply to any fine in lieu of forfeiture that I might impose.

168 Finally I must also have regard to the applicable aggravating and mitigating circumstances relating to the offences as set out in s. 718.2. A specific aggravating factor in this case, applicable to Messrs. Kazman and Levy, is s. 718.2(a)(iv) of the *Criminal Code*, which provides that evidence that an offence was committed for "the benefit of, at the direction of, or in association with, a criminal organization" is a statutory aggravating factor on sentencing.

169 I was also referred to *R. v. Shah*, *2017 ONCA 872*, which I found to be helpful. Although it was not a fraud case it is of interest because it considers how a sentencing judge can take into account lack of remorse. Although the Court of Appeal confirmed that lack of remorse is not ordinarily a relevant aggravating factor on sentencing, in that it cannot be used to punish the offender for failing to plead guilty (at para. 8), the Court did find that the absence of remorse is a relevant factor in sentencing with respect to the issues of rehabilitation and specific deterrence, "in that an accused's absence of remorse may indicate a lack of insight into and a failure to accept responsibility for the crimes committed, and demonstrate a substantial likelihood of future dangerousness"; at para. 8.

170 Finally, Mr. Inoue referred to *R. v. Schertzer*, *2013 ONSC 22* where Justice Pardu, as she then was, observed at para. 28 that all of the parties agreed that delay, which does not amount to a deprivation of the right to trial within a reasonable time, can be a mitigating factor as it causes prolonged uncertainty and in that case it was accompanied by "ruin and humiliation"; at para. 29. In that case, however, the defendants were acquitted on all counts save for those related to one investigation. The Court, however, went on to note at paras. 30 and 31, relying on *R. v. Bunn*, *2000 SCC 9* at para. 23, that the ruin and humiliation that a defendant "brings down upon himself and his family, together with the loss of his professional status could provide sufficient deterrence and denunciation when coupled with a conditional sentence...".

Case Law

Sentences for Fraud - Pre-2011 Amendment

171 Many cases were referred to me by the parties on the issue of what sentence should be imposed for the convictions of fraud over $5,000. I have referred to most of those cases in chronological order as follows.

R. v. Sahaidak, *[1990] O.J. No. 2792* (SCJ)

172 This decision was referred to me by Mr. Litkowski, which he submitted is relevant "despite its vintage". Sahaidak, a member of the LSUC, was convicted of four counts of fraud of various

trust companies while performing his duties as a lawyer. The decision does not set out the amount of the fraud but does state that Sahaidak gained in the order of $100,000, which is far less than what Mr. Kazman gained from his frauds. Given its date I did not find this decision that relevant in terms of the length of sentence imposed although I note the offender was sentenced to three years in the penitentiary.

173 What Doherty J., as he then was, stated with respect to the character letters filed is still relevant. He noted that he read 63 character letters and concluded at para. 8 that Sahaidak was "in most respects an honourable man, a generous man and a devout family man." He also stated at para. 10, that Sahaidak "contributed to his community and to his church ... [and] has served many clients long and well." However, Doherty J. went on to state the following at para. 11, which suggests that Sahaidak's good character was of limited relevance:

> If my job was to sentence Mr. Sahaidak, the man, and if my sentence did not have to concern itself with the details of the crimes, and if I didn't have to be concerned for the effect of my sentence on others and the effect of my sentence on the public perception of justice, I would impose a most lenient sentence in recognition of Mr. Sahaidak's positive antecedents, his contribution to the community, and perhaps most importantly to save his family from further pain. My concerns and responsibilities on sentencing, however, go beyond the antecedents of Mr. Sahaidak ... [Emphasis added]

174 Doherty J. concluded by stating at para. 33, that his decision was made "bearing in mind ... the character letters", which suggests that good character has some relevance as a mitigating factor on sentence.

175 As already stated, I have a considerable number of character reference letters provided by Mr. Kazman and Mr. M. Tehrani in particular. I will comment further on those in my determination of a fit sentence.

176 The other assistance I found from this decision is the factors that Doherty J. considered were relevant in determining the length of sentence, including the number of offences, the fact that it was not an isolated case, the extent of the offender's involvement in the frauds, the extent to which he gained from the frauds, the hardship that he faced as a result, and the lack of remorse.

R. v. Gray, *[1995] O.J. No. 92* (Ont. C.A.)

177 This is another dated decision relied upon by Mr. Litkowski. The appellants were convicted of fraud and theft in the use of government funds in the amount of $5.835 million that were loaned for use on a scientific research project. Gray was sentenced to two years and six months and Greenberg to two years less a day. The trial judge found Gray to be the driving force and Greenberg to be a somewhat reluctant participant. Neither defendant received any of the money for their own personal use and Gray in fact put substantial funds of his own behind the money which was lost in an attempt to save the company.

178 The Court stated that "there are few crimes where the aspect of deterrence is more significant;" because this crime is "normally committed by a person who is knowledgeable and

should be aware of the consequences", and that awareness "comes from the sentences given to others" at para. 33. In my view this applies to all of the defendants in this case, even Mr. A. Tehrani who I found to be unsophisticated.

179 What I also found of importance in this decision is the Court's characterization of the crime as having an element of a breach of trust. The Court noted the following about the use of government funds:

> There is an element of trust in dealing with government monies directed to an amorphous purpose such as scientific research and a need to warn against the temptations to overreach when dealing with government sponsored tax incentive programs. (at para. 34, emphasis added)

180 This case, and others I will come to, suggest that although the case at bar is not a typical breach of trust case, there are elements of breach of trust in that the defendants were dealing with banks and with a government loan program set up for a specific purpose, which they took advantage of.

R. v. Ruhland, *[1998] O.J. No. 781* (Ont. C.A.)

181 This is another decision referred to me by Mr. Litkowski. The offender was convicted of one count of fraud and on appeal his sentence of three years was reduced to two years less one day. The Court of Appeal found that the trial judge assumed the loss was $2.6 million when in fact that was book value and not realizable value which was indeterminable but presumably viewed by the Court to be less. Given the date of this decision I did not find it relevant in terms of the sentence imposed but it does show how variable the length of sentence can be in fraud cases.

R. v. Nichols, *[2001] O.J. No. 3220* (Ont. C.A.)

182 This is another decision relied upon by Mr. Litkowski. The offender was found guilty of one count of fraud. He had paid back $800,000 of the $1 million fraud. On appeal the sentence of five years, three months was found to be unreasonably high and was reduced to four years. A key distinguishing factor from the case at bar is that the offender paid back almost all of the money taken.

183 The Court of Appeal concluded at para. 51, that the trial judge properly exercised his discretion to refuse the imposition of a fine, which would have "unreasonably affect[ed] the proportionality of the sentence". That conclusion is at odds with more recent authority from the Court of Appeal on the imposition of a fine in lieu of forfeiture that I will come to and so I have not relied on this aspect of the decision.

R. v. Dobis, *[2002] O.J. No. 646* (Ont. C.A.)

184 This is one of the key cases relied upon by the Crown although it too is dated. It does provide considerable guidance, however, as to when a penitentiary sentence is warranted for "large scale frauds", albeit committed by persons in what is considered a typical position of trust.

The offender pleaded guilty to fraud over $5,000 with regard to money that he misappropriated from a mid-sized family company where he was employed as the accounting manager. The fraud involved over $2 million. The Court found at para. 10, that Dobis was a senior employee and in a position of trust.

185 The trial judge considered Dobis' personal circumstances, including "his status as a first offender, his simple lifestyle and limited job prospects, and the strong support of his family," at para. 11. However, the Court of Appeal concluded at paras. 41-42 that these factors were not enough to warrant a reformatory rather than a penitentiary sentence given the serious nature and consequences of the offences. The Court of Appeal also confirmed at para. 28 that a prior criminal record (or lack thereof) "is always a factor entitled to some weight in a sentencing context." [Emphasis in original]

186 In concluding that the sentence should have been penitentiary rather than reformatory, the Court of Appeal noted at para. 33 that "a good deal of planning, skill and deception" was required to carry out the theft and fraud. The Court also stated at para. 42 that "[t]here is a real need to emphasize denunciation and, especially, general deterrence in the realm of large scale frauds committed by persons in positions of trust with devastating consequences for their victims." [Emphasis added] The Court also noted at para. 51 that "general deterrence is central to the sentencing process in cases involving large scale frauds with serious consequences."

187 Mr. Litkowski submitted that the Court imposed a custodial sentence of two years less a day but at para. 55 the Court said that an appropriate sentence at trial would have been, at a minimum, at the lowest point in the range suggested by the Crown, namely three years. The sentence imposed reflected the fact that the offender had served 9 1/2 months of his conditional sentence which included house arrest.

188 What is also important in this case is that the Court of Appeal stated at paras. 37 and 39, that there are fraud cases in which reformatory sentences have been upheld or imposed, but those cases involved "important mitigating or differentiating factors" (*e.g.* mother of three small children) which were not present in Dobis' case. Similarly, the Court commented at para. 54 that "extreme personal mitigating circumstances" [emphasis added] for example, being the sole provider and caregiver for the daughter and wife, who suffered from multiple sclerosis, existed in those large scale fraud cases where conditional sentences were imposed, none of which exist in the case at bar. This becomes significant to Mr. Inoue's argument that Mr. A. Tehrani should receive a conditional sentence.

R. v. Bogart, *[2002] O.J. No. 3039* (Ont. C.A.)

189 This is another case that the Crown places a great deal of reliance on. The offender was a physician and convicted of fraud over $5,000 for submitting false billings to OHIP totalling $923,780. The Court of Appeal stated at para. 36 that large scale frauds committed by persons in a position of trust usually attract penitentiary sentences that are three to five years long. The Court concluded at para. 21 that the need for general deterrence was one factor that warranted a jail term sentence, that deterrence is the "most important sentencing principle in major frauds"

and that the preferred sanction is incarceration when general deterrence is "particularly pressing", at para. 29.

190 The Court of Appeal acknowledged that there were a number of mitigating factors that were present in this case including the fact that the offender was a cancer survivor who overcame his disease to become a doctor, he served a sector of the population that few doctors served, and he pleaded guilty, but concluded at paras. 20-21 that these factors did not justify a conditional sentence. The Court also stated at para. 30 that mitigating factors are secondary to the principle of deterrence, referencing *R. v. Bertram* *(1990), 40 O.A.C. 317* (Ont. C.A.), where the Court observed that "most frauds are committed by well-educated persons of previous good character", as was the case for Mr. Bogart.

191 Although this was a case of a clear "egregious breach of trust", I note that the Court also found at para. 25 that Bogart breached "his duty of good faith to the government" as well as his fiduciary duty to his patients. It is also significant that in determining that a jail sentence was appropriate, the Court commented that although "some view a fraud on government or a government agency as a victimless crime" and they "assume governments have many deep pockets to recover the loss, frauds like the one in this case impose costs on the public health care system and those who rely on it," at para. 23. The same can be said of the case at bar in connection with the defendants' dealing with the banks and a government small business loan program. I do not consider the fact that it was Industry Canada, a federal government agency, and the major banks that suffered financial losses to mean that this was a victimless crime. Furthermore, these frauds had other non-monetary impacts on the CSBFP and other persons that I have already reviewed.

R. v. Drabinsky, *2011 ONCA 582*

192 The appellants were convicted of fraud and forgery. The financial statements of the appellants' partnership, which were relied on to promote an Initial Public Offering, were fraudulent and the appellants' corporation engaged in fraudulent accounting practices. Drabinsky was sentenced to seven years and Gottlieb was sentenced to six years of imprisonment. They both appealed their sentences.

193 The Court of Appeal noted at para. 18 that Drabinsky and Gottlieb received payments totaling slightly over $8.1 million between 1990 and 1993. At para. 181 the Court noted that with respect to the Livent fraud, that despite the inability to place a dollar figure on the fraud:

> does not mean that it was wrongly characterized as a "large scale" commercial fraud. The fraud went on for years and involved the systematic misrepresentation of the financial statements in amounts well in to the millions of dollars. Even though the Crown made no attempt to quantify the fraud, the evidence clearly justified the inference of significant economic harm to investors and creditors of Livent.

194 The Court of Appeal reduced Drabinsky's and Gottlieb's sentences to five years and four years respectively and stated the following about the appropriate range at para. 164:

> After reviewing several authorities, the trial judge fixed the appropriate range of sentence for large scale, premeditated frauds involving public companies at between five and eight

> years (para. 35). While one might quibble about both ends of that spectrum, the trial judge was correct in determining that crimes like those committed by the appellants must normally attract significant penitentiary terms well beyond the two-year limit applicable to conditional sentences. [Emphasis added]

195 With respect to deterrence, the Court noted that:

> [159] ...it would seem that if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people like the appellants who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risk against potential benefits before taking action; [citations omitted]
>
> [160] ...Denunciation and general deterrence most often find[s] expression in the length of the jail term imposed.

196 These passages make it clear that there can be fit sentences outside what is commonly referred to as the three to five year range. As well they state the reasons for the importance of general deterrence that I have already observed apply equally to the case at bar. The Court also observed at para. 165 that the trial judge understood that a "proper application of the mitigating factors could in some cases result in a fit sentence ... outside of the applicable range". Moreover, "[i]t is impossible to catalogue the factors that in combination could justify a sentence below the usually applicable range"; at para. 166.

197 Of particular significance to the case at bar, the Court of Appeal noted the high cost of prosecuting crimes like those that were committed in this case and stated that "[a]n early guilty plea coupled with full cooperation with the police and regulators and *bona fide* efforts to compensate those harmed ... has considerable value" and that those factors might justify imposing a sentence outside the range; at para. 166. [Emphasis added]

198 With respect to character references, the Court of Appeal stated at para. 168, that "prior good character and the personal consequences of the fraud cannot push the appropriate sentence outside of the range," but they are still relevant mitigating factors to be considered in determining where the sentence falls within the range. The Court went on to state the following:

> ... individuals who perpetrate frauds like these are usually seen in the community as solid, responsible and law-abiding citizens. Often, they suffer personal and financial ruin as a result of the exposure of their frauds. Those factors cannot, however, alone justify any departure from the range. The offender's prior good character and standing in the community are to some extent the tools by which they commit and sustain frauds over lengthy time periods. Considerable personal hardship, if not ruin, is virtually inevitable upon exposure of one's involvement in these kinds of frauds. It cannot be regarded as the kind of unusual circumstance meriting departure from the range. (At para. 167)

199 These observations apply equally to the case at bar where I have received character reference letters or otherwise have evidence of prior good character. Furthermore, it seems that all of the defendants have suffered financial hardship and personal ruin as a result of these charges and convictions.

200 Mitigating factors endorsed by the Court of Appeal included the appellants' contributions to the community, their family support, their "sterling reputations", and the absence of any criminal record, and in the case of Drabinsky, his significant physical disability. However, these did not justify departure from the range; at paras. 169-170. The Court also stated that although Drabinsky suffered from polio, his mobility impaired and is often in considerable pain, "there is no evidence that Drabinsky's health problems, while significant, cannot be addressed by the correctional authorities." (At para. 170)

201 One important fact that distinguishes the *Drabinsky* case from the case at bar is that the Court of Appeal noted, at para. 172, that the trial judge acknowledged that the appellants were not driven by pure greed. The trial judge found that this was not a case of funds misappropriated for the acquisition of material goods. At para. 173 the Court of Appeal stated that cases properly characterized as "scams" will normally call for significantly longer sentences than frauds committed in the course of the operation of a legitimate business. "Whether the absence of "pure greed" is viewed as a mitigating factor or simply as the absence of an aggravating factor would seem to make little difference in the ultimate calculation."

202 I have considered motivation with respect to each of the defendants. There is no doubt in my mind that pure greed was the motivator for Messrs. Kazman and Levy and, as I will come to, the Tehrani brothers were motivated primarily by greed as well.

R. v. Oton, *2012 ONSC 861*

203 This case was relied upon by both the Crown and the Defence. Oton was convicted of fraud over $5,000 (about $130,000) for defrauding the Government of Canada by filing tax returns with false charitable donation claims. The Crown only asked for a six month jail sentence presumably because the offender was 73 years old. This was accepted by the Court although the Court noted that a sentence of nine to twelve months would not be unreasonable, (at paras. 7-8). The Court noted at para. 28 that where the amount of the fraud approaches the "middle to large-scale range, jail sentences are almost always imposed in order to achieve the sentencing objectives of denunciation and deterrence." The cases relied upon were where the amount of the fraud ranged from $40,000 to $140,000. This assists how I should classify some of the frauds in this case and in particular what is meant by a "large-scale fraud".

204 The fact that Oton was a first-time offender, his friends said that his actions were "completely out of character" and that he may have succumbed to financial pressures of an unexpected divorce proceeding and child support obligations were considered mitigating factors, at para. 14. The minimal amount of personal gain (about $30,000) was also a mitigating factor, at paras. 14, 30.

R. v. Takeshita, *2013 ONSC 1385*

205 This is one of my cases, where I was upheld on appeal save the sentence was varied as I had inadvertently misapprehended the Crown's position as to the length of the sentence sought. Although the offender was 68 1/2 years old, I found at paras. 68-70 that given the amount and

nature of the fraud, and given there were absolutely no special circumstances, that a conditional sentence was not appropriate.

206 Mr. Inoue relies on this decision in support of his position that the fraud Mr. A. Tehrani was convicted of is not a "large scale fraud". I have already commented on *Oton* in that regard. In this case I reviewed a number of authorities and concluded at para. 50 that the fraud in this case of approximately $80,000 was at the lower end of a large scale fraud. This is consistent with *Oton* and I see no reason to come to a different conclusion in the case at bar.

R. v. Dieckmann, *2014 ONSC 717*; affirmed on appeal; *2017 ONCA 575*

207 This case is important both with respect to length of sentence and the law with respect to a fine in lieu of forfeiture. There were originally six defendants: Oke and Conroy pleaded guilty before trial, Davis and Hartman passed away before trial, and Dieckmann and Salmon proceeded to trial. Dieckmann and her 72-year-old father, Salmon, were convicted of fraud resulting from a scheme whereby they and their associates collected $5.7 million for source deductions from employees which they kept for themselves. Baltman J. found that some amounts went directly to Salmon and Davis and that of the remaining $5.1 million, Dieckmann divided it equally with Davis and Hartman Although Davis was the mastermind, Dieckmann managed the money.

208 Justice Baltman imposed a custodial period of four years for Dieckmann and a custodial period of two years less a day for Salmon; the difference reflecting their varying degrees of culpability. She rejected the submission that Salmon should receive a conditional sentence, finding that the crime was too serious and that important mitigating factors including a guilty plea, vastly lower amounts (nearly $400,000) or highly unusual personal circumstances were all absent.

209 The aggravating factors considered by Baltman J. included the fact that it was a large scale fraud[4] driven by greed; the complexity and length of the fraud, the careful orchestration required to execute the fraud, the fact that the fraud was motivated by greed, the large number of innocent parties involved in the scheme, the fact that public monies were stolen, and the offenders' involvement in a criminal organization; at para. 29.

210 In considering the fact the offenders stole public monies; the Court referred to *R. v. Williams, [2007] O.J. No. 1604* (SCJ) where Justice Hill stated, at para. 30, 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." I have already commented on the significance of this and how a fraud involving government funds is similar to a breach of trust case.

211 The fact that the defendants were first-time offenders and the support that they received from their family and friends were the only mitigating factors. There were no extenuating circumstances that motivated the crime; the driving factor was simple greed; at para. 30. Moreover, Justice Baltman noted that the offenders did not need to resort to criminality to properly look after themselves or their families (at para. 31). Although character witnesses testified as to Dieckmann's good repute, they were not aware of her "dark side"; at para. 32.

212 The Court of Appeal upheld the trial judge's decision, noting at para. 75 that Dieckmann played a "central role in a large-scale, long-term fraud on the public purse" where "[g]reed was her motivator." Even with strong mitigating circumstances, "individuals like Dieckmann ... can expect significant penitentiary sentences"; at para. 75. At para. 78, the Court of Appeal also deferred to the trial judge's exercise of her discretion and declined to interfere with the sentence imposed on Salmon.

213 Given the amount of the fraud in this case, it suggests the sentences proposed by the Crown in this case for Messrs. Kazman and Levy are somewhat high. However, the offenders in *Dieckmann* were not convicted of money laundering.

R. v. Khatchatourov, *2014 ONCA 464*

214 Crown counsel submitted that this case is closest to the case at bar factually save that the losses in the case at bar and the profits obtained by Messrs. Kazman and Levy are significantly greater and the trial before me was about five times longer. The two offenders were convicted of fraud for registering mortgages in other people's names and stealing the proceeds. The financial institutions involved in the transactions lost almost $1.2 million which was ultimately reimbursed by the Canada Mortgage and Housing Corporation (CMHC). Both offenders received a custodial sentence of four years' imprisonment, a restitution order and fines in lieu of forfeiture.

215 The Court of Appeal acknowledged that the fraud was "sophisticated, long term, [and] large scale"; at para. 45 and upheld the sentence, stating at para. 37 that the trial judge; A. O'Marra J., did not err in finding that the appropriate range was three to five years for this type of fraud, relying on *Dobis* and *Bogart*. It is very significant that in coming to this conclusion the Court rejected the argument by the appellants that sentences in this range are limited to cases where all three of the following factors are present: (1) a large scale fraud, (2) committed by a person in a position of trust, and (3) with devastating consequences for the victims. The Court of Appeal held, at para. 39, that:

> The four-year custodial sentences imposed are within the appropriate range for this large-scale, sophisticated fraud, even though the appellants were not in a position of trust with the financial institutions or, in a legal sense, with all of the personal victims and the consequences from the primary victim - the public purse - were not "devastating". [Emphasis added]

216 Also significant to the case at bar is the conclusion by the Court of Appeal, at para. 44, that "the fact the principal victim of the appellants' fraud was CMHC, a government agency, does not diminish the seriousness of the crime." A fraud on government is not a 'victimless crime' because it "takes money from the public purse and, therefore, from all those who rely on it: see *Bogart*, at para. 23".

R. v. Witen, *2014 ONCA 694*, (leave to appeal refused *[2015] S.C.C.A. No. 287*)

217 The appellant, a tax preparer, was convicted of fraud for helping clients make false expense claims in their tax returns, costing the public purse more than $1 million. He was

sentenced to three years in jail and a fine of approximately $450,000 was imposed. The Court of Appeal upheld the sentence, finding at para. 25 that the sentence was:

> ... well within the accepted range of sentence for this kind of crime. This was a serious fraud perpetrated over a lengthy period against the public purse by an individual who used his expertise to undermine the efficacy of the self-reporting income tax system.

218 Again this case is important as, like the case at bar, it was a fraud perpetrated against the public purse.

R. v. Atwal, *2016 ONSC 3668*

219 This is a decision of Justice Hill. In summarizing some of the key considerations that arise in cases of fraud at para. 42(4), Hill J. stated that a "sentence of six years is within the correct range of sentences for major frauds, and sentences in the 3 to 5 year range are common" and frauds involving $87,000 and $270,000 have been described as at the lower end of "large-scale frauds," while a $200,000 defalcation has been described as a large-scale fraud. [Citations omitted]. This is consistent with the conclusion that I came to in *Takeshita* as to what I considered to be a large-scale fraud.

Sentences for Fraud - Post-2011 Amendment

220 After November 1, 2011, s. 380(1.1) of the *Criminal Code* provides for a mandatory minimum of two years where the fraud is greater than $1 million. This amendment does not apply to any of the convictions in this case but Ms. Brun submitted that this amendment reflected Parliament's intent and desire to treat fraud as a serious criminal offence and that the cases decided after the amendment reflect an increase in sentences. There was only one case that I was referred to where the fraud was perpetrated after November 1, 2011. I am, therefore, not able to consider Ms. Brun's submission that sentences have since increased although I do agree with her submission as to the intent of Parliament with respect to this amendment.

R. v. Angelis, 2016 ONCA 675

221 In this case the respondent was the accounting manager of a corporation. He acquired cash, goods and services using a variety of methods and eventually was convicted for his fraudulent activities. The respondent pleaded guilty to three counts of fraud and the sentencing judge concluded that the amount of the fraud was $936,000. The trial judge sentenced the respondent to four years, three months' imprisonment, which was ultimately reduced to three years after applying a credit. This was a long sentence given the guilty plea.

222 The trial judge refused to impose a fine in lieu of forfeiture. The Crown appealed only the trial judge's decision not to order a fine in lieu of forfeiture. I will come back to this case when I deal with the cases relevant to ordering a fine in lieu of forfeiture.

Case Law - "Exceptional circumstances" required to justify a conditional sentence

223 Mr. Inoue is the only one who submitted that I should impose a conditional sentence on his

client, Mr. A. Tehrani. Accordingly, I have reviewed the cases provided to me by counsel where a conditional sentence was considered. I have already referred to a number of those cases. The others that I found of assistance are as follows.

R. v. Robinson, *[2003] O.J. No. 4722* (S.C.J.)

224 In *Robinson*, the fraud was around $200,000. Juriansz J., as he then was, stated at para. 26 that not imposing a period of incarceration, which is usually imposed in a case of fraud involving breach of trust, was justified because of the "unique and exceptional circumstances" that included the fact that the offender had a number of medical difficulties, the offender and her husband suffered from depression and the offender had a nine-year-old son who would be left in the care of his "suicidal and depressed father" if she was sent to jail, at para. 25.

225 Justice Juriansz said the following about deterrence and denunciation at para. 19:

> In the Supreme Court of Canada decision *R. v. Proulx* [*2000 CarswellMan 32* (S.C.C.)], the Supreme Court indicated that a conditional sentence can provide significant denunciation and deterrence depending on the terms imposed. The question is whether the requirement for general denunciation is so pressing in this case that a term of incarceration is required. The authorities provided by the Crown indicate that incarceration is considered appropriate in cases of large-scale fraud where there is a breach of trust. But while general deterrence may be the most important consideration in fraud cases involving breach of trust, there are other considerations such as the restorative objectives and the individual circumstances of the offender.

R. v. Siddiqui, *2008 ONCA 312*

226 This was a large-scale fraud case although the amount is not stated. The defendant pleaded guilty to fraud x6, personation x2, and conspiracy to commit fraud and was sentenced to 21 months in jail and three years' probation. The offender appealed his sentence arguing that the trial judge erred by failing to impose a conditional sentence. In upholding the trial judge's decision, the Court of Appeal stated the following about deterrence:

> The trial judge recognized that the paramount consideration in cases of large scale frauds such as this are denunciation and general deterrence. He turned his mind to whether a conditional sentence should be imposed in the particular circumstances including, as we read his reasons, the mitigating factors present in this case. The trial judge also took the mitigating factors into account by reducing the sentence that he otherwise thought fit. (at para. 2)

R. v. Kabiawu, *[2009] O.J. No. 1618* (S.C.J.)

227 In this case the defendants, a mother and her son, billed the Ontario Drug Benefits Plan $500,000 for prescriptions that were not delivered to customers. The mother was a pharmacist and the owner of a pharmacy. They pleaded guilty to fraud. Harvison-Young J. characterized the fraud as a serious case involving a breach of public trust; at para. 6. The son received a nine-month conditional sentence followed by one year of probation and order of restitution.

228 Harvison-Young J. stated at para. 52 that there are some fraud cases that justify a conditional sentence, and that this was the case for the son who was an employee, there was no evidence that he received any direct benefit, he was not a pharmacist, and other principles including rehabilitation may be given somewhat higher relative weight. She also considered other mitigating factors, including the son's age, the fact that some restitution had been paid, and that he and his mother eventually pleaded guilty.

229 Mr. Inoue relies on this decision in support of his position that Mr. A. Tehrani should receive a conditional sentence on the basis that the Court in that case found that the son did not benefit from the fraud. I will come to that argument but apart from that an important distinguishing factor is that the son in this case pleaded guilty and had made some restitution.

R. v. Collins, *2011 ONCA 182*

230 In this case the defendant pleaded guilty to one count of fraud over $5,000 for her part in a much larger fraud directed at the Ontario Works program. She fraudulently processed cheques totalling about $96,000. The offender was Aboriginal, had no criminal record, had a brain injury and a gambling addiction and was responsible for the full-time care of her child. Despite these mitigating factors, the Court of Appeal reluctantly concluded at para. 40 that this was not an appropriate case for a conditional sentence since the offence was too serious and the need for general deterrence and denunciation was overwhelming.

R. v. Garrick, *2012 ONSC 2528*

231 This is another case Mr. Inoue relied on in support of his position that Mr. A. Tehrani should receive a conditional sentence. Garrick was convicted of using deceit and other fraudulent means to defraud three individuals of approximately $139,000. Justice Ricchetti was referred to one of my decisions, *R. v. Gasparetto*, *[2008] O.J. No. 3840* (S.C.J.), where I imposed a conditional sentence of 18 months followed by three years' probation but there were mitigating circumstances including the fact the offender had mental health issues. Ricchetti J. decided that since there were no significant mitigating factors as in *Gasparetto* and another decision that he relied upon, he sentenced Garrick to a conditional sentence of 23 months. Garrick was 42 and there do not appear to have been any exceptional circumstances nor does it appear that Ricchetti J. was referred to the cases that I have reviewed.

232 In *Gasparetto*, there was a guilty plea, and at para. 21, I noted that both counsel agreed that the Court of Appeal had not established a particular range of sentence for this scale of fraud, which I said was something less than what the court considers a 'large scale fraud'. In *Gasparetto*, there were two victims, one lost about $5,500 to $8,000 and the other lost $185,500 for a total of $190,500.

233 Given that in *Gasparetto* both counsel submitted that the fraud was less than a "large scale fraud" I did not consider whether or not this was an accurate representation. As already stated, I did give this issue some consideration in *Takeshita.*

R. v. Gibb, *2014 ONSC 5316*

234 In this case two defendants were convicted of having defrauded two people of the sum of $100,000. The Court found this was not a large-scale fraud. Each offender was sentenced to a conditional sentence of two years less a day in addition to a fine in lieu of forfeiture and a restitution order. It does not appear that it was argued before the sentencing judge that exceptional circumstances were necessary for a conditional sentence to be imposed.

R. v. Curreri, *2017 ONSC 5652*

235 Allen J. imposed a conditional sentence of two years less a day on Curreri notwithstanding he was found guilty of a fraud totaling $3,362,000 with respect to eight properties. In doing so she focused on the fact that he admitted his role in the fraud, he played a subservient role, was 70 years old, he was simple, unsophisticated and suffered from an unaddressed learning disorder. His co-accused, L.L., was convicted of the same offence and was found to be fully engaged in the fraud but only with respect to one property. L.L. was also sentenced to a conditional sentence of two years less a day because Allen J. found she had a more disadvantaged life than Curreri that included abuse by a step-father and domestic abuse, and she had suffered from mental health issues for many years. L.L. was relatively young and also had good prospects for rehabilitation working as an office manager for her current employer.

236 Of interest on the issue of possession and control I note that Allen J. found that possession or control was satisfied by evidence that cheques that were made out to the offender Curreri and cashed by him (at para. 79) but that "[h]aving in mind Mr. Curreri's subservient role and his lack of sophistication with what was happening around him, I am not prepared to impose a fine for amounts that the evidence shows were not in reality under his control or possession;"(at para. 84). She found at para. 82 that funds that were deposited into a bank account for a numbered company by a different actor in the fraud were not in Curreri's control.

Sentences for Money Laundering

237 The only case I was referred to with respect to sentences for the money laundering convictions is *R. v. Banayos*, *2017 MBQB 195* where the offender was found guilty of trafficking cocaine and other offences including laundering proceeds of crime. With respect to the latter conviction the Court found that the offender's moral culpability was at the higher end in that he employed a fairly sophisticated approach to laundering some of the proceeds from his cocaine trafficking. The Court referred to *R. v. Battista*, *2011 ONSC 5770* where the Court noted that denunciation and deterrence are the primary sentencing principles referred to a number of other authorities and concluded that a 30-month sentence was appropriate. Based on this decision I would say that the Crown's position on sentence for the money laundering conviction for Messrs. Kazman and Levy is on the low side.

238 This case was also referred to with respect to the law concerning fine in lieu of forfeiture which I will come to.

Sentences for Criminal Organization Convictions

239 Section 467.14 of the *Criminal Code* provides that any sentence imposed on Messrs. Kazman and Levy for their convictions pursuant to s. 467.12 must be consecutive to any other sentence.

R. v. Beauchamp, *2015 ONCA 260*

240 This is the only case that was provided to me where a sentence was imposed for a conviction of committing fraud for the benefit of a criminal organization.

241 After a complex 45-day trial, the appellants were convicted of fraud-related offences arising out of a credit and debit card skimming scheme and all but one was convicted of participating in a criminal organization and committing an indictable offence for the benefit of a criminal organization. The loss to the financial institutions as a result of the credit card frauds amounted to $300 million a year.

242 Catral who was considered the mastermind, was sentenced to a total of seven years' imprisonment; four years concurrent on most of the non-criminal organization convictions, six months concurrent on the obstruction of justice conviction and three years consecutive for the criminal organization conviction and a $40,000 fine in lieu of forfeiture. Brunet, the second in command, was sentenced to two years on the credit card fraud related offences and two years consecutive on the criminal organization conviction.

243 At para. 362, the Court considered Beauchamp's attempt to justify a reduced sentence and noted that the trial judge accepted that he was used as "a front man" however, he also found that Beauchamp "actively and willingly" sold devices he knew were intended to be used to forge credit cards.

244 At paras. 260-261, the Court of Appeal endorsed the comments of the British Columbia Court of Appeal, in *R. v. Mastop*, *2013 BCCA 494*, at para. 46, leave to appeal to S.C.C. refused, *[2014] S.C.C.A. No. 23*, as to the overall purpose of s. 467 as follows:

> The overall objective of the criminal organization legislation is to protect society from the wide-ranging effects, violent and otherwise, of criminals who work together as a group, as well as to prevent and deter organized criminal activities. Offenders who regularly commit crimes together are a greater menace to society than an individual offender working alone. [Emphasis added]

245 The Court of Appeal held at para. 261 that "[p]rotection of the public, deterrence and denunciation are the primary sentencing objectives for s. 467 offences and at para. 262 that there is no established range of sentence for s. 467 offences. The Court, however, listed cases in para. 300 where sentences between two and one-half years and four years and four months imprisonment were ordered.

246 Finally, the Court held at para. 326 that a plain reading of s. 718.2(a) (iv) of the *Criminal*

Code confirms that evidence an offence was committed in association with or for the benefit of a criminal organization is an aggravating factor on sentencing for non-criminal organization offences, even when the offender is also convicted of a s. 467 offence. "Like any other statutory aggravating circumstance, it is but one of many factors to consider when fashioning an appropriate sentence".

Section 738 (1) (a) of the Criminal Code - Restitution

247 The Crown seeks restitution orders against each of the defendants pursuant to s. 738 (1) (a) of the *Criminal Code*. That section provides as follows:

> Where an offender is convicted ... of an offence, the court imposing sentence on ...the offender may, on application of the Attorney General..., in addition to any other measure imposed on the offender, order that that offender make restitution to another person as follows:
>
> (a) In the case of ...the loss...of, the property of any person as a result of the commission of the offence ..., by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable.

248 I note that the section does not require the court to consider the personal benefit to the offender but rather the replacement value of the property lost by the victim as a result of the offence.

249 Whatever the defendants pay on any restitution order that I make decreases the fine in lieu of forfeiture. Section s. 462.49(2) of the *Code* provides that restitution takes priority over a fine in lieu of forfeiture.

Case Law - Restitution

R. v. Hoyt (L.K.) (1992), 77 C.C.C. (3d) 289 (BCCA)

250 At pp. 297-298 the Court stated that a restitution order is properly regarded as punishment.

R. v. Spellacy, *1995 CanLII 9898* (NLCA)

251 At para. 87 the Court noted that assuming the appellant was released from custody at age 55 "he might hopefully have a working life of 15 years."

R. v. Devgan (1999), 44 O.R. (3d) 161 (Ont. C.A.)

252 This case is important in a number of respects. First of all the Court of Appeal reinforced the objectives and factors which are relevant to what constitutes a proper exercise of my discretion for the purpose of s. 725(1) [now s. 738(1)] at para. 26. Secondly, the Court concluded at paras. 17 and 20 that the fact that a civil judgment was made against the appellant

did not preclude the granting of compensation order for loss under s. 725(1) of the *Criminal Code*, which is discretionary. If anything, the existence of a civil judgment is "but a factor for the sentencing judge to consider in exercising this discretion;" at para. 20. The Court made it clear, however, that the restitution order cannot include the complainant's legal fees (at para. 39) and disbursements or interest (at para. 47) and that such an order is limited to "loss of or damage to property as a result of the commission of the offence;" at para. 44.

R. v. Chambers, *2007 ONCA 237*

253 In this case the Court of Appeal held that it is an error not to consider the impact that a restitution order will have on an offender's prospects for rehabilitation. Despite the offender's hard work and efforts the offender in this case had no ability to pay the restitution order, and as such was unable to obtain a pardon. "This is having a deleterious effect on her ability to obtain regular and more gainful employment in the field in which she has trained since conviction." (At para. 3).

R. v. Hameed, *2008 ONCA 51*

254 The Court of Appeal confirmed that in determining whether or not to grant a restitution order and if so, what the quantum should be, I must consider the evidence before me of the offender's ability to pay; at para. 3.

R. v. Popert, *2010 ONCA 89*

255 The Court of Appeal summarized at para. 40 that:

> Restitution orders are discretionary and, as such, are entitled to deference. They are to be made with restraint and caution. As this court has repeatedly stated, the ability of an offender to make restitution is an important factor that must be considered before a restitution order is imposed: see, for example, *R. v. Biegus* *(1999), 141 C.C.C. (3d) 245* at para. 15. As Feldman J.A. explains in para. 15 of *Biegus*:
>
> > ... [A restitution order] is not intended to be such a burden that it may affect the prospects for rehabilitation of the accused. That is why ability to pay is one of the factors which the court must consider.

R. v. Castro, *2010 ONCA 718*

256 The Court of Appeal affirmed that a restitution order forms part of a sentence, at para. 22; and the principle that a restitution order should not be made as a "mechanical afterthought to a sentence of imprisonment ... Care must be taken not to simply add a restitution order to a sentence of imprisonment which, in itself, is a fit punishment for the crime, as this can amount to excessive punishment and offend the totality principle" (at para. 23).

257 The Court went on at para. 24 to set out the factors to be considered as established by the Supreme Court of Canada in *R. v. Zelensky*, *[1978] 2 S.C.R. 940*. The Court of Appeal confirmed however, at paras. 27 and 33, that no single factor is itself determinative of whether a

restitution order should be granted and the weight to be given to individual considerations will depend on the circumstances of each case. The Court, however, emphasized the nature of the offence and when money has been taken, what has happened to the money and how this evidence factors into a determination of the ability to pay.

258 On the latter point the Court noted at para. 34 that tin cases of fraud here is "no reason why the court should accept an offender's bald assertion that he or she has no ability to make restitution because the money "is gone" when no evidence is proffered in support of this assertion." The offender asserting he has no ability to make restitution is in the best position to provide "transparency concerning what has happened to that money. A bald assertion that the money is gone should be given no weight." A trial judge should also consider an offender's future prospects in terms of earnings, (at para. 39).

259 I note that in this case the amount of the fraud was less than $200,000, which the trial judge considered to be at the lower end of the large-scale range (at para. 16) and despite the fact that the offender was only collecting monthly disability benefits of $900, the offender was ordered to make restitution in the amount of $141,752. In this case, however, the offender was 49 and considered to have many years of productive life ahead of him.

Case Law - Fine in lieu of forfeiture provisions -- s. 462.37 of the Criminal Code

R. v. Lavigne, *2006 SCC 10*

260 In *Lavigne*, the Supreme Court of Canada considered s. 462.37(3) of the *Criminal Code* and the court's ability to impose a fine in lieu of forfeiture of property that is the proceeds of crime. The Court summarized its conclusion at para. 2 that "the discretion granted under that provision is limited and that ability to pay may not be taken into consideration either in the decision to impose the fine or in the determination of the amount of the fine." [Emphasis added]

261 The Court began its analysis by considering the purpose of the forfeiture provisions. In essence, forfeiture ensures that the criminal act itself is punished and deprives the offender of any benefit from participating in the criminal act to ensure that "crime does not pay"; at para. 10. Parliament's intention in enacting the forfeiture provisions was to "give teeth to the general sentencing provisions" and deter the offender from committing crimes in the future; at paras. 16 and 26. Since forfeiture of the proceeds of crime is not always practicable, the court may impose a fine where forfeiture is not practicable which ensures that the offender does not benefit from his or her conduct; at para. 18.

262 Section 462.37(3) identifies five circumstances in which a fine may be imposed: (1) the proceeds cannot be located with due diligence, (2) the proceeds were transferred to a third party, (3) the proceeds are located outside Canada, (4) the proceeds have been substantially diminished in value or rendered worthless, or (5) the proceeds have been commingled with other property that cannot be divided without difficulty. Other circumstances might also justify the imposition of a fine if they are "similar in nature" to the five that are listed; at para. 24.

263 The Court found at para. 25 that while a fine is technically part of the sentence its purpose

is to replace the proceeds of crime and so it is "not regarded as punishment specifically for the designated offence." [Emphasis added]

264 The Court considered three possible interpretations of the word "may" in s. 462.37(3) and concluded at para. 24, that a "judge cannot transform circumstances in which a fine may be ordered instead of forfeiture into circumstances that justify not imposing a fine" and at para. 27 that the "effect of the word "may" cannot ... be to grant a broad discretion. The exercise of the discretion is necessarily limited by the objective of the provision, the nature of the order and the circumstances in which the order is made".

265 There are a few additional passages in *Lavigne* that are worth highlighting because they provide some indication of the scope of the court's limited discretion to impose (or not impose) a fine:

> [28] ... a court may face circumstances in which the objectives of the provisions do not call for a fine to be imposed. An example of this would be if the offender did not profit from the crime and if it was an isolated crime committed by an offender acting alone. ... The word may, "allows for an exercise of discretion that is consistent with the spirit of the whole of the provisions in question." [Emphasis added]
>
> [29] ... The factual circumstances that may give rise to an exercise of the discretion may vary, and it would be unrealistic to claim to foresee all of them. The court indicated that it only planned to discuss a "single factor": ability to pay.
>
> ...
>
> [32] The mere fact that the property has been used cannot therefore justify exercising the discretion to reduce the amount of the fine, especially where the property consists of cash. The fact that the offender no longer has enough money must not therefore serve as a way to avoid a fine. ...The purpose of the order, to replace the property, would be thwarted if the offender could avoid the fine simply by spending the proceeds of the crime.
>
> ...
>
> [34] ... The court's discretion applies both to the decision whether or not to impose a fine and to the determination of the value of the property. ...
>
> [35] ... The fine takes the place of forfeiture. ... The court's discretion applies ... to the determination of the value of the property. It must be exercised in light of the evidence. [Emphasis added]
>
> ...
>
> [44] ...the judge must determine the value of the property and impose a fine equal to that value. ... In short, the judge has a discretion that is limited both by the words of the provision and by its context.

266 The court also considered how to determine the value of the fine. Section 462.37(3) states that a court "may ... order the offender to pay a fine in an amount equal to the value of [the] property"; at para. 18; *Criminal Code*, at s. 462.37(3). On the facts of *Lavigne*, the Court

determined at para. 35 that the amount of the fine is intended to be equal to the value of the proceeds of crime it replaces and at para. 51 that the fine should have been $150,000 because that was the value of the proceeds of the crime.

R. v. Le, *[2006] O.J. No. 2789* (S.C.J.)

267 In dismissing a constitutional challenge to s. 462.37, at para. 33 the Court acknowledged the applicant's position that "accused persons with minor levels of involvement would arguably be unfairly treated by the application of the full force of the fine in lieu of forfeiture sections." However, the Court concluded that this alleged unfairness could be addressed "within the limited scope of discretion recognized in the interpretation of the legislation in *Lavigne*"; at para. 33.

R. v. S. (A.), *2010 ONCA 441*

268 The defendant was convicted of trafficking illegal drugs. He did not act alone and his actions extended over a considerable period of time. The sentencing judge declined to impose a $37,100 fine in lieu of forfeiture, which represented the amount he received on a drug deal; at paras. 1 and 9. When the Crown appealed that decision, the offender argued that he did not "benefit" from a major portion of the funds because this money went to the supplier who was higher up the supply chain (the smaller amount being used to feed his drug habit) and imposing a fine was therefore inappropriate. The Court of Appeal disagreed, finding that the defendant's subsequent use of the proceeds of crime was irrelevant and imposed a fine in the entire amount of $37,100.

269 At para. 11 the Court observed that in *Lavigne* the Court clarified that s. 462.37 does not require that the sentencing judge must impose a fine in lieu of forfeiture in every situation where an order of forfeiture is not possible and that "'may' is not equivalent to 'shall'"; giving the one example I have already set out from para. 28 in *Lavigne.* However, at para. 12 the Court of Appeal noted that the Court in *Lavigne* explained that the fact that the property has been used cannot justify exercising the discretion not to impose a fine and that in the case before the Court of Appeal, the fact that the money had been spent did not foreclose the possibility of a fine.

270 At para. 14, the Court wrote:

> Receiving the money was a "benefit" in keeping with the purpose of the provisions. What the respondent then chose to do with the money (i.e. pay his supplier, purchase drugs, etc.) need not be the subject of inquiry by the sentencing judge as the Supreme Court's decision in *Lavigne* illustrates.

271 Although it could be argued that the offender did receive a benefit in that he paid a debt and used some of the money for drugs for his own use, this case is clear that what an offender chooses to do with proceeds of crime "need not be the subject of inquiry".

R. v. Dwyer, *2013 ONCA 34*

272 The defendant was convicted of using fraudulent documents to steal mortgage proceeds.

The trial judge declined to impose a fine. Rosenberg J.A. speaking for the Court stated at para. 24:

> ...an order for a fine in lieu of forfeiture can be made under s. 462.37(3) only where the offender has possession or control of the property in question or at least had possession of the property at some point. This phrase flows from the use of the phrase "any property of an offender" in s. 462.37(3) and the definition of property" in s. 2. Such an interpretation is consistent with the objectives of s. 462.37, which are to deprive offenders of the proceeds of crime and ensure that they do not benefit from those proceeds ...Those objectives would not be furthered by making orders in relation to property that was never in the possession of the offender, over which the offender never had control and from which the offender did not benefit ... [all citations omitted, emphasis added]

273 Justice Rosenberg found that the only evidence offered by the Crown showed that at its highest the offender was in control of $10,700 (at para. 26) and so he ordered a fine in that amount; at para. 28.

R. v. Taylor, *2013 SKCA 33*

274 The trial judge imposed a fine of $5,000. Although the proceeds of crime exceeded $5,000, there was no evidence as to the exact amount; at para. 22. The Court of Appeal concluded at para. 24 that the trial judge's belief that he was "unable to safely award a fine greater than $5,000" was reasonable.

R. v. Khatchatourov, *2014 ONCA 464*

275 I have already referred to *Khatchatourov* in terms of the sentence imposed. Of a $1,167,869 total loss, this court ordered a fine of $423,580 for one offender (Khatchatourov) and a fine of $71,954 for the other (Reznik), plus a $495,535 restitution order; at paras. 2, 17 and 46. The trial judge imposed these fines in lieu of forfeiture on each offender based on the profits they received from their fraudulent schemes, as evidenced by the cheques that they received flowing from the various transactions; at paras. 2, 17. These "profits" were the result of the offenders obtaining fraudulent mortgage proceeds by duping recent immigrants and using their identities and then using those funds to take title to properties that were then sold to other straw purchasers whose false information was used to obtain mortgage financing. The mortgage proceeds were used, in part, to pay the "profits" from the artificial re-sale to the offenders; at para. 7.

276 In that case the evidence that established that funds had been in the control of each of the offenders was based on the cheques made payable to each offender, at para. 52. At para. 51 counsel conceded at the sentence hearing that the trial judge could reasonably infer that if a cheque is made payable to someone, then that person had control of the money.

277 This was upheld on appeal. MacPherson J.A., writing for the Court, added at para. 52:

> This common sense concession is consistent with the evidence, which was that Mr. Khatchatourov and Ms. Reznik received cheques, made out in their names, from the fraudulent transactions totaling the precise amounts of the two fines. Absent some

> evidence (for example, testimony from the appellants at their sentence hearing) that the appellants did not cash the cheques and receive the funds, I see no reason to impose a duty on the Crown to take additional steps (for example, a tracing exercise) to try to obtain further proof that the appellants actually received the money generated by their frauds. Their receipt of the cheques is enough. Even in the increasingly complicated world of Canadian criminal law, some things are obvious.

278 The Court noted at para. 55 that the objective of forfeiture is not punishment and that it is not an addition to the sentence. The Court also noted at para. 60 that if the appellants had:

> ... not paid their fines by the end of ... [the time they had been given]... the appellants would have a hearing before another court before serving time in default. That court would only issue a warrant of committal if the appellants had refused to pay or discharge the fine without reasonable excuse: s. 734.7(1)(b) ...The defaulting appellant would have the opportunity to show that he or she was unable to pay the fine. If the court determined that the appellants were unable to pay, this would constitute a "reasonable excuse" and a warrant of committal would not issue... The courts at that stage would have better information than this court has now about their willingness and ability to pay. [Emphasis in original]

R. v. Dieckmann, *2014 ONSC 717* and *2017 ONCA 575*

279 I have already referred to the facts of this case. It is also a very important case on the issue of a fine in lieu of forfeiture. The Crown sought a fine of approximately $5.1 million from Dieckmann. Baltman J. acknowledged, at para. 58, that although Dieckmann controlled the $5.1 million, either through sole or joint signing authority on the accounts the funds were deposited to, she must have ultimately shared these funds with Hartman and Davis and it would be unfair to hold her liable for the entire amount. Justice Baltman stated the issue as follows at para. 60:

> ... saying that the fine "must be equal" to the value of the property begs the question: what is the value of the property rightly attributable to a particular offender when she is a co-conspirator in a scheme that enriched all the participants, and there is no evidence as to how the spoils were divided amongst them? [Emphasis added]

280 Baltman J. at para. 67, went on to consider *S. (A.)* and *Dwyer*, and concluded that the court's emphasis on "benefit" in those cases was "consistent with the exception allowed by the Supreme Court in *Lavigne* ... for someone who 'did not profit'". Moreover, it was only because Dieckmann was the sole survivor that the Crown wanted to impose the entire $5.1 million on her rather than divide it among her and the other two defendants in proportion to their relative culpability; at para. 68. Baltman J. ultimately concluded that Dieckmann's fine should reflect her personal culpability and involvement in the matter; and ordered a fine that amounted to 25% of $5.1 million. She allocated 50% to Davis as he was "the driving force in this fraud and the main beneficiary of the spoils" and the remaining 25% to Hartman; trial level at paras. 69-71.

281 The Court of Appeal upheld the trial judge's decision, noting at paras. 90-91 that she had the discretion "to determine a value that was less than the full amount of the funds that had been under Ms. Dieckmann's possession and control". [Emphasis added] The Court of Appeal relied

on the Supreme Court's discussion of the limited discretion available in *Lavigne*, paraphrased at para. 96:

> ...the judge has a limited discretion... [T]he factual circumstances that may give rise to an exercise of the discretion may vary and it would be unrealistic to claim to foresee all of them. [Deschamps J.] therefore expressly limited her discussion to the single factor that was argued, namely ability to pay.

282 As I will come to, this case supports my decision as to how I must determine the amount of the fines in lieu of forfeiture for each defendant.

R. v. Dow 2014 NBCA 15

283 Dow was convicted of trafficking illegal drugs. He did not profit directly from the transactions because he was acting as a go-between for a man named Gallant and was trying to curry favour with Gallant. The trial judge imposed a $53,000 fine, which represented the total amount that Dow received on a sale of cocaine. The Court of Appeal found at para. 37 that the benefit does not need to be a material profit; neither does it have to be quantifiable; at para. 35. Dow's benefit was the "enhancement of his relationship with Mr. Gallant, with whom he was involved in profitable illegal tobacco sales;" at para. 35. Additionally, the Court commented that even individuals on the lower end of the chain of illegal activity play a critical role and have to be deterred; at para. 37. [Emphasis added]

R. v. Siddiqi, 2015 ONCA 374

284 Siddiqi was convicted of loan fraud. Before he was convicted, he transferred most of the proceeds to a third party outside of Canada. The amount of the fine that was imposed by the trial judge included the amount of the transferred funds. The Court of Appeal refused to lower the amount, finding that Siddiqi did not have to "personally benefit" from the funds in order to have a fine imposed against him -- he just had to have had possession and control over it at one point in time; at para. 6.

R. v. Piccinini, 2015 ONCA 446

285 The appellant was convicted of a telephone fraud scheme. Five others assisted with the scam, although the defendant was the "main boss"; (at para. 3). The Court of Appeal cautioned that directing a fraud does not "necessarily" demonstrate control, and that the Crown still must adduce evidence of control over the target property at some point in time on a balance of probabilities, at para. 10. For Piccinini, the trial judge found that he controlled the criminal organization that orchestrated the fraud and that he directed where the proceeds of crime went.

286 The Court of Appeal held:

> Not only was the appellant admittedly in control of the criminal organization that perpetrated the fraud in question, the evidence supported that he exercised control over the funds provided by the victims, which were the proceeds of the fraud. Each day he told his employees which Western Union location would be used as a destination for the funds, and the name of the person who was to retrieve the transferred funds (the runner).

> The appellant would obtain the [money transfer control number] provided by the victim and pass it on to the runner, who would claim the money at the other end. The appellant was the person who sent the runner to pick up the money. Whether or not the appellant personally received the money at the other end is irrelevant; the appellant clearly controlled the funds from when they left each victim until they were received. (At para. 14, Emphasis added)

287 The Court of Appeal rejected the defendant's argument that the amount of his fine should have been based on the amount that he benefitted from the proceeds stating: "[t]he 'value of the property' ... is the value of the property that was possessed or controlled by the appellant", [emphasis added] not "the benefit received by the appellant"; at para. 19.

288 The sentencing judge concluded that the value of the property the defendant had control over was "at least $500,000" and imposed a fine for this amount "rather than the entire proceeds that the appellant controlled, in order that the total amount of the fines imposed on all of the offenders did not exceed the gross proceeds of the fraud." at para. 20 [Emphasis added] The Court of Appeal declined to address whether or not the trial judge was entitled to apportion the amount as that issue was abandoned in oral argument and only benefited the offender; at para. 20.

R. v. Angelis, 2016 ONCA 675

289 I have already set out the facts with respect to this case. The Crown appealed only the trial judge's decision not to order a fine in lieu of forfeiture. The Court of Appeal overturned the trial judge's decision and ordered a fine in lieu of forfeiture. In coming to that conclusion, the Court stated at para. 35, that "[p]rovided the prerequisites in the section have been met, an order of forfeiture is mandatory; *Lavigne*, at para. 14."

290 The Court also considered the governing principles at para. 49-53, including the fact that a fine in lieu of forfeiture is not punishment or part of the global sentence imposed upon the offender, that subsequent imprisonment for failure to pay the fine in lieu of forfeiture is an enforcement mechanism to encourage payment by those with the resources to do so and that it is not to be consolidated with sentencing on a totality approach. Finally the Court held that the sufficiency of the carceral component of a sentence to satisfy the applicable sentencing objectives and principles cannot justify refusal to order payment of a fine in lieu of forfeiture where the conditions for its imposition have been established (at para. 53).

R. v. Way, 2017 ONCA 754

291 The offender was in the business of producing and selling child pornography and funneled the revenue through a corporation over which he had sole control. The gross sales generated by the sale of child pornography was $797,890 in revenue after a deduction for money already seized. The Crown appealed the quantum of the fine in lieu of forfeiture ordered by the trial judge who had accepted the offender's argument that his only benefit was his salary from the corporation.

292 On appeal the Court held that the trial judge erred by limited the fine in lieu of forfeiture to the proportion of Way's salary that the trial judge found could be attributed to producing child pornography, finding, at para. 6, that the corporation's gross sales proceeds of child pornography constituted a benefit or advantage that was "indirectly derived from the commission of the offence." [Emphasis added] The Court relied on s. 2 of the *Criminal Code* and the definition of property which includes "property originally in the possession or under the control of any person", and referred to *Dwyer* at para. 24. "As such, the gross sales proceeds amounted to proceeds of crime under s. 462.3(1) of the *Criminal Code*;" at para. 6.

293 On this basis, the Court substituted a fine of $797,890. Ms. Brun relies on this decision in support of her position that the court can look to the benefits an offender receives in calculating a fine in lieu of forfeiture, but I see it simply as a case that confirms that where there is one offender, the total amount of proceeds of crime that an offender has control over must be ordered as a fine in lieu of forfeiture.

R. v. Banayos, *2017 MBQB 195*

294 In *Banayos*, the defence argued that the Crown had not established that the offender had received the funds that the Crown relied upon in support of its claim for a fine in lieu of forfeiture and that it could not be assumed that these funds flowed through his possession. The Court reviewed the evidence and held at para. 47 that it was satisfied beyond a reasonable doubt that the offender received these proceeds of crime and that absent some evidence from the offender that he did not receive the funds, there was no duty on the Crown to take additional steps to obtain further proof that the offender actually received the money generated by the drug transactions.

Seven Steps for imposing a fine in lieu of forfeiture: section 462.37[5] of the Criminal Code

295 Section 462.37(1) provides for a mandatory order of forfeiture of property that is proceeds of crime where the designated offence was committed in relation to that property. The subsection provides as follows:

> 462.37 (1) Subject to this section and sections 462.39 to 462.41, where an offender is convicted ... of a designated offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the designated offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

296 There is no dispute that the convictions for fraud over $5,000 are "designated offences" within the meaning of s. 462.3(1)(a). The two main conditions then for invoking s. 462.37(1) are that the property is proceeds of crime and that the designated offence, in this case fraud, "was committed in relation to that property". The Crown did not rely on the money laundering or criminal organization convictions with respect to Messrs. Kazman and Levy in support of its request that they be ordered to pay a fine in lieu of forfeiture.

297 Where the conditions are met for an order for forfeiture of property, but the property cannot be made subject to a forfeiture order, for example, because it can no longer be located, s. 462.37(3) provides that the court "may order the offender to pay a fine." Section 462.37(4) mandates a term of imprisonment in default of payment of the fine in lieu of forfeiture, based on the amount of the fine.

298 Ms. Brun submitted that there are seven steps to be considered based on ss. 462.37(3) and 462.37(4) before a fine in lieu of forfeiture is imposed. This was not challenged by any of the defendants. The steps are as follows:

Step [1] Is there *property* which either fell or falls within the definition of "*proceeds of crime*", or which is otherwise *subject to forfeiture*?

299 The Court in *Lavigne* held at para. 12 that the term "property" in these sections has the meaning set out in s. 2 of the *Code*. Section 2 of the *Code* defines "property" to include:

> (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
>
> (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange,
>
> (c) [Does not apply.]

300 The meaning of "proceeds of crime" is set out in s. 462.3(1) and is defined broadly as:

> any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of
>
> (a) the commission in Canada of a designated offence, ... [Emphasis added]

301 In *R. v. Trac*, *2013 ONCA 246*, Doherty J.A. considered the meaning of "proceeds of crime" in the context of s. 490.1(1) of the *Code*. He stated at para. 79 that:

> Property is only the proceeds of crime if it is at least indirectly the product of crime. The definition of "proceeds of crime" brings to mind the concept of ill-gotten gains; see *R. v. Lavigne* ..."

302 The definition of proceeds of crime is very broad and money is clearly open to forfeiture (and fines in lieu of forfeiture) to the same degree as real property; see, for example, *Piccinini*, where the fine represented the gross proceeds of fraud; *Dow*, where the fine represented the total amount that a drug dealer received on a sale, despite his benefit being professional, not monetary; and *Dieckmann* and *Way*, where the money represented the money that flowed into accounts the offender controlled.

303 Ms. Brun's seven steps did not address the second condition I have referred to in s.

462.3(1)(a), namely that the designated offence, in this case fraud, was committed in relation to that property; the proceeds of crime.

304 No defendant suggested that the proceeds obtained by a fraudulent SBL are not property that falls within the definition of "proceeds of crime" or that the designated offence of fraud was not committed in relation to that property. In my view there could be no doubt that the fraudulently obtained SBL proceeds are proceeds of crime and that the frauds were committed in relation to those proceeds. As I will come to however, the Crown has advanced two arguments, one affecting the Tehrani brothers and the other affecting Messrs. Kazman and Levy, that do raise a serious issue as to whether or not proceeds or property obtained by the use by a defendant of the fraudulent SBL proceeds are caught by s. 462.37(1).

Step [2] Did any of the forfeitable property, at any point, constitute the "*property of an offender*" who is being sentenced?

305 At this stage the definition of "possession" in s. 4(3) of the *Code* is relevant:

> For the purposes of this Act,
>
> (a) A person has anything in "possession" when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person...

306 The cases are clear that once an offender has held possession and/or control of tainted property at any point and in any manner, fine in lieu of liability attaches to that property and to that offender. Ms. Brun submitted that the SBL proceeds obtained fraudulently constituted proceeds of crime and the minute those funds went into the borrower's bank account they were in the possession and control of the borrower and then the defendant who was the owner of the borrower as they were sole shareholders, directors and signing officers of their companies. As I will come to, only Ms. Barton raised an issue about possession and control in connection with Mr. M. Tehrani's conviction with respect to Uzeem. A different analysis is required for Messrs. Kazman and Levy save for when Mr. Levy was also a borrower with respect to Bluerock.

Step [3] Is there property of the offender which would be subject to forfeiture, but which is not, *practically speaking*, available for forfeiture?

307 Section 462.37(3) of the *Code* states:

> If a court is satisfied that an order of forfeiture under subsection (1) ... should be made in respect of any property of an offender but that the property ... cannot be made subject to an order, the court may, instead of ordering the property ... to be forfeited, order the offender to pay a fine in an amount equal to the value of the property ... In particular, a court may order the offender to pay a fine if the property ...
>
> (a) cannot, on the exercise of due diligence, be located;
>
> (b) has been transferred to a third party;

...

(e) has been commingled with other property that cannot be divided without difficulty.

308 There was no issue in this case that to the extent the proceeds of the fraudulent SBLs were in the possession or control of a defendant that those funds can now no longer be located. There is no suggestion that any of these proceeds can be traced save for the Crown's argument with respect to properties purchased and renovated by Messrs. Kazman and Levy but those properties have all been sold. Accordingly, if I find that forfeiture can be ordered with respect to any property pursuant to s. 462.37 (1), there is no impediment to ordering a fine in lieu of forfeiture.

Step [4] What is the *value* of the unforfeitable property of the offender?

309 I will come to the Crown's argument as to how I should apportion the value of the gross fine in lieu of forfeiture among the defendants. In this case, no defendant suggested that the value of the unforfeitable property should not be the amount of the proceeds from the fraudulently obtained SBL in question. As I have said, however, there is an issue as to whether or not proceeds or property obtained by the use by a defendant of the fraudulent SBL proceeds are caught by s. 462.37(1).

310 For the reasons I will come to I have decided to follow *Dieckmann* and apportion the fine in lieu of forfeiture in proportion to the relative personal moral culpability of each of the defendants.

Step [5] A fine in lieu of forfeiture will be imposed against the offender for that determined value.

311 The cases I have referred to make it clear that I have a very limited discretion to not impose a fine in lieu of forfeiture. The "proceeds of crime" is not a measure of the benefit personally received. Personal benefit to an offender is irrelevant and what the offender chooses to do with the money does not matter. Liability for proceeds of crime attaches for all tainted property which the offender possessed or controlled at any point in time; see *Angelis* at para. 30, *R. v. S. (A.)*, at para. 14, *R. v. Piccinini*, at para. 19 and *R. v. Siddiqi*, at para. 6. Furthermore, the ability to pay a fine in lieu of forfeiture is irrelevant, and cannot be considered. "When determining whether to order a fine in lieu of forfeiture of a particular quantum, ability to pay is not a lawful consideration" *Lavigne,* at paras. 44, 48, and 52.

Step [6] How much *time in default of payment* is to be imposed in accordance with s. 462.37(4)?

312 Section 462.37(4) provides for the imposition of mandatory, consecutive jail time in the case of unpaid fines in lieu of forfeiture as follows:

Time in default	Amount of the fine in the $1,000's
Up to 6 months	under 10

6-12 months	10 - 20
12-18 months	20 - 50
18-24 months	50 - 100
2-3 years	100 - 250
3-5 years	250 - $1 Million
5-10 years	$1 Million or more

Step [7] How much *time to pay* the fine in lieu of forfeiture is to be granted to the offender?

313 The ability of a defendant to pay a fine in lieu of forfeiture is considered only when determining if time to pay a fine in lieu of forfeiture is required. Where the trail of evidence last places funds or property in the possession of an offender, no time to pay may be appropriate where it remains reasonable to presume the offender still is in possession of the unforfeitable property or its derivatives; see *Lavigne,* at paras. 45-48 (12 months to pay), *Khatchatourov*, at para. 60 (four years to pay from release), *Dieckmann*, at para. 75 (one year from release), *Angelis,* at para. 86 (ten years to pay from release).

What property/proceeds of crime is caught by s. 462.37(1)?

314 Ms. Brun submitted that each offender is liable for the entire amount of the proceeds of crime, *i.e.* the amount of the fraudulent SBL, irrespective of what the offender did with the property. For example, the Crown could ask for a fine in lieu of a forfeiture order with respect to Mr. A. Tehrani for the full amount of the fraudulent SBL proceeds of $188,190 received by Alta. The Crown, however, does not take that position. Instead, based on an analysis by Mr. Coort[6] the Crown requests that I order a fine in lieu of forfeiture against Mr. A. Tehrani in the amount of $30,000, although Ms. Brun also said that she is leaving the amount of the fine to me. This is based on $1,900, which is the total amount of cash withdrawals made by Mr. A. Tehrani from the Alta account that came from the SBL proceeds and a further $27,468 that came from the Alta account after the SBL proceeds were spent. The Crown's position is that although I found no evidence that Mr. A. Tehrani profited from the Alta fraud, that he did profit in the sense that but for the fraudulent SBL he would not have been able to access the money that he withdrew from the Alta account.

315 Similarly with respect to Mr. M. Tehrani, based on the same analysis by Mr. Coort, the Crown requests that I order a fine based on funds Mr. M. Tehrani withdrew from the Kube and Uzeem accounts that came from the SBL proceeds and further funds Mr. M. Tehrani received from these accounts after the SBL proceeds were exhausted as well as funds he received from Alta, Mosaic, Modernito and Bluerock. Like the position taken with respect to Mr. A. Tehrani, the Crown's position is that I should consider the benefits that Mr. M. Tehrani received directly from the fraudulent SBL proceeds as well as the money he received as a result of his involvement in these frauds.

316 The Crown's position raises difficult issues as to my jurisdiction to calculate the fines in lieu of forfeiture on the basis sought. Ms. Barton submitted that what the Crown was proposing is an illegal sentence. She did so as an officer of the court, recognizing that the Crown's position

benefits her client over what she believes the law requires. In particular, it is Ms. Barton's position that s. 462.37(3) of the *Code* only applies if the court is satisfied that an order of forfeiture under subsection (1) or (2.01) should be made and that since the Crown is not relying on subsection 2.01, any fine in lieu of forfeiture can only be made with respect to the actual SBL proceeds. Ms. Barton submitted that the strict wording of s. 462.37(1) means that only the SBL proceeds that were fraudulently obtained are subject to a fine in lieu of forfeiture in that they are the proceeds of crime that the frauds were committed "in relation to". She argued that if this interpretation is correct, the fraudulent SBL proceeds cannot be followed to the second stage that the Crown argues, namely what the defendants were able to obtain financially because of the use of those SBL proceeds.

317 Ms. Brun submitted that if I come to the conclusion that Ms. Barton is correct then I must fall back on allocating the SBL proceeds fraudulently obtained among those defendants found guilty of fraud in connection with that SBL based on moral culpability.

318 Ms. Brun made a variation of her argument with respect to Messrs. Kazman and Levy. In their case the Crown seeks to add to the fine in lieu of forfeiture, calculated in the same way as the fines for the Tehrani brothers, an amount equal to the alleged profit Messrs. Kazman and Levy earned when properties were purchased and/or renovated with fraudulent SBL proceeds and then sold for a profit during the period of the Indictment. The Crown argues that but for the fraudulent SBL proceeds Messrs. Kazman and Levy would not have been able to purchase and fix up these properties and sell them for a profit as they did. The Crown also submits that based on *Siddiqi* at para. 6, I could attribute more to Messrs. Kazman and Levy because the other individuals like Ms. Cohen and their other partners are not before the court.

319 The specific amount sought for Mr. Kazman is a fine in lieu of forfeiture in the amount of $850,171.23[7] based on Mr. Kazman's share of the nine fraudulent SBLs that he was convicted of and an additional $1,607,750[8] based on his ownership share of seven properties the Crown alleges were purchased/and or renovated during the Indictment period. With respect to Mr. Levy, the Crown seeks a fine in lieu of forfeiture in the total amount of $1,906,991[9] with respect to the 12 fraudulent SBLs that I convicted Mr. Levy of. In addition the Crown argues that I should add another $2,818,500[10] for profit the Crown alleges Mr. Levy made on properties that he owned during the period of the Indictment, on the same basis as the claim was made against Mr. Kazman. I have concerns with how the quantum was calculated but those concerns do not affect the jurisdiction argument.

320 Counsel for Messrs. Kazman and Levy did not argue that these profits were not caught by s. 462.37(1) but did argue that the Crown had not proven the quantum of these profits.

321 In my view these two arguments from the Crown raise different issues with respect to the question of what property/proceeds of crime is caught by s. 462.37(1) and in particular what is meant by the phrase "that the designated offence was committed in relation to that property". Counsel did not provide any case law that might assist me in deciding this issue. Fortunately I had the benefit of the assistance of my law clerks and provided the results of their searches to all parties. I have reviewed the cases that they found as well as some of the cases referred to in those cases and have considered the following.

322 As Mr. Barton pointed out, it is significant that s. 462.37(3) does not refer back to s. 462.37(2). Since a fine is meant to take the place of forfeiture and it must be equal to the value of the property that could be forfeited; see *Lavigne* at para. 35, I do not understand why Parliament intended that a fine cannot be imposed where property that would be subject to forfeiture under subsection (2) is not available for forfeiture. However, given the wording of subsection (3), clearly resort cannot be had to subsection (2) to justify the Crown's position. The question then is whether or not s. 462.37(1) can apply to money or property obtained by the defendants from the use of fraudulent SBL proceeds.

323 With respect to the language in s. 462.37(1) in *Lavigne*, the Court stated:

> [15] The broad meaning of the expressions "proceeds of crime" and "in relation to", combined with the fact that no discretion whatsoever is provided for in s. 462.37(1), is significant. Parliament has made this provision mandatory by requiring forfeiture and making the provision apply to the widest possible range of property.
>
> ...
>
> [17] The severity shown by Parliament is further illustrated by s. 462.37(2), which provides that where the evidence does not establish a connection between property and the offence of which an offender has been convicted, the property may nevertheless be forfeited if it is proven to be proceeds of crime. [Emphasis added]

324 Ms. Brun argued that the definition for proceeds of crime is very inclusive and would include not only the SBL proceeds fraudulently obtained but also property Mr. Kazman and Mr. Levy bought or fixed up with SBL proceeds that were obtained fraudulently and then sold for a profit. She submitted that the profit would also be proceeds of crime. In support of this argument the Crown also relied on s. 354 of the *Code* for the proposition that if tainted funds are comingled with untainted funds the entirety of the funds can be considered proceeds of crime. No case law was provided in support of this argument.

325 I agree with Ms. Brun that the broad definition of "property" in s. 2(b) of the *Code* combined with the broad definition of "proceeds of crime" in s. 462.31 would include other property and money obtained by a defendant from the use of the fraudulent SBL proceeds originally under the control of the defendant as that property and/or money would be "any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange". As I have said the issue, however, is the meaning of the words "in relation to that property" in s. 462.37(1).

326 In *Trac*, Doherty J.A. considered the meaning of the phrase "in relation to" in the context of s. 490.1(1) of the *Code*. His comments are of assistance here as s. 490.1(1) also includes the phrase "that the offence was committed in relation to that property". Justice Doherty stated that:

> [92] The phrase "in relation to" commonly appears in statutes and other legal writing. It describes in broad terms a connection between two things [citation omitted]. In s. 490.1(1) it describes a connection between the property sought forfeited and the offence.

> [93] ... I will not attempt an exhaustive definition. I think it is fair to say, however, that the requirement that the offence be committed "in relation to that property demands a more direct connection between the property and the offence than would be necessary to find that property was "used in any manner in connection with the commission" of the offence. For example, although property such as a bank account used to conceal or disguise money laundering, would be considered "offence-related property", it is arguable that the crime of money laundering could not be said to have been committed "in relation to that property". [Emphasis added]

327 In *Wilson v. Canada*, *1993 CanLII 8665*, the Court of Appeal, at p. 3 held:

> The effect of s. 462.37(1) is clarified by considering its application to this case. Garth Hibbert was convicted of an enterprise crime (possession of property obtained by crime). Virtually all of the seized funds were found to be the proceeds of crime as defined in s. 462.3. Furthermore, the enterprise crime for which Garth Hibbert was convicted was committed in relation to those funds. Consequently the Crown met the criteria set down in s. 462.37(1) and ... the trial judge was required to make the forfeiture order. [Emphasis added]

328 In considering this issue, I have also considered the meaning of s. 462.37(2) as in my view that will inform what Parliament intended with respect to subsection (1). Obviously I cannot interpret s. 462.37(1) so broadly as to render subsection (2) meaningless. Section 462.37(2) states as follows:

> **Proceeds of crime derived from other offences -** Where the evidence does not establish to the satisfaction of the court that the designated offence of which the offender is convicted ... was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

329 The observation from *Lavigne* at para. 17, as to the meaning of s. 462.37(2) that I have already referred to is consistent with the Supreme Court's reference to s. 462.37(2) in *Chatterjee v. Ontario (Attorney General)*, *2009 SCC 19*, at para. 44: "if the court is satisfied beyond a reasonable doubt that the property in question represents the proceeds of crime, the court may order forfeiture even without showing that the offence was committed in relation to that property (s. 462.37(2))".

330 I note the introductory language of subsection (2) suggests that this subsection applies to proceeds of crime "derived from other offences". In *R. v. Hape*, *[2005] O.J. No. 3188*, the Court of Appeal held at para. 40 that:

> s. 463.37(2) contemplates a nexus between the offence which was the subject of the trial giving rise to the conviction and sentencing proceedings and the property the Crown seeks forfeited. That is not to say that the property must be the proceeds of the crime for which the accused was convicted. If that were the case, the property would be properly forfeited under s. 462.37(1). The property must, however, have been the subject matter of the allegations made at trial. If at the end of the trial the

> property that was the subject matter of the allegations on which the trial was based is determined to fall within the definition of proceeds of crime, but is not the proceeds of the offence for which the accused was convicted at trial, s. 462.37(2) may have application. [Emphasis added]

331 In *R. v. Rosenblum* *(1998), 130 C.C.C. (3d) 481*, at para. 36, the British Columbia Court of Appeal found that the definition of property in s. 2(b) of the *Code* "clearly permits a court to determine if property, that is, money, has been converted into personalty or realty and to follow it as the evidence permits." There the Court referred to *Wilson* and found the trial judge had erred by not connecting the money that was proceeds of crime to the real property subsequently acquired with those funds and ordering forfeiture pursuant to s. 462.37(1). In coming to that conclusion the focus appears to have been on the definition of property. No analysis was made of the requirement that the offence be committed in relation to that property. For that reason I have real concerns about taking the same approach in the case at bar.

332 Another case I have considered is *R. v. Honickman*, *2015 ONCJ 770*. In that case the offender pleaded guilty to both charges of fraud and attempted fraud. One of the issues was that the offender argued that certain funds in a bank account that the Crown wanted to seize were "clean" and that the money obtained by the fraud was gone. The Court held at para. 33 that but for the existence of the illicit funds those "clean" funds would have been spent on rent and food and so the "clean" funds only existed because of the illicit funds. At para. 37 the Court held that a forfeiture under s. 462.37(1) was mandated of the funds in the bank account in that the offender had generated a total of $84,500 in proceeds of crime and that given the very broad definition of proceeds of crime the $20,000 he still had in his bank account constituted proceeds of crime even if there was "no direct linkage back" in that "[a] dollar is a dollar." The Court also found that the offences were committed in relation to the money that went into the possession of the offender as a result of the fraud. In the alternative the Court found that s. 462.37(2) would apply. Again Ms. Barton's argument was not considered in this case.

333 In considering this difficult issue, I find the guidance from Doherty J.A. in *Trac* to be of the most assistance. Although it can be argued that the money the Tehrani brothers earned from the businesses they operated as a result of obtaining fraudulent SBLs has a connection to the offence of fraud, in that it is proceeds of crime resulting from the offence, I would not say that the offence of fraud was committed in relation to that money. In fact when the offence of fraud was committed "that property"; *i.e.*, the money, did not exist. Clearly it is not enough to establish that that money is proceeds of crime as that would render the words "in relation to" meaningless.

334 Although the situation before me is different than *Trac*, using the words of Justice Doherty at para. 93; the requirement that the fraud be committed "in relation to that property"; in my view in this case the earnings of the Tehrani brothers from the businesses they opened with the fraudulently obtained SBLs, demands a more direct connection between those earnings and the fraud than the connection that exists. Those earnings would have been subject to forfeiture under s. 462.37(2) had they still been in the possession of the Tehranis but for these reasons I do not believe that the monies can be included in a fine in lieu of forfeiture.

335 As for the profits that the Crown alleges that Messrs. Kazman and Levy made on the sale

of properties they acquired and/or renovated with the proceeds of the fraud, I have come to the same conclusion for the same reason. Although, to the extent the Crown can prove that fraudulently obtained SBL proceeds were used to purchase and/or renovate properties which were then sold for a profit can be argued to constitute the profit Messrs. Kazman and Levy earned and that that profit has a connection to the offence of fraud, in that it is proceeds of crime resulting from the offence, I would not say that the offence of fraud was committed in relation to that profit. Again, when the offence of fraud was committed "that property" *i.e.* the profit, did not exist. Those profits would have been subject to forfeiture under s. 462.37(2) had they still been in the possession of Messrs. Kazman and Levy but for these reasons I do not believe that they can be included in a fine in lieu of forfeiture.

336 Had I ruled otherwise, I would not have agreed with the Crown's calculations. I disagree with Mr. Litkowski that the burden on the Crown would be to prove these profits beyond a reasonable doubt but I do find that the Crown must prove on a balance of probabilities that fraudulent SBL proceeds were used to purchase and/or renovate a property, before that property could be pursued by way of forfeiture. This would require much more than the calculations provided by the Crown for all properties associated to Messrs. Kazman and Levy during the period of the indictment. I did make some findings in my Judgment with respect to some payments made towards the purchase of some properties from fraudulently obtained SBL proceeds but those amounts would only represent some of the purchase price. I did not make these findings with respect to all of the properties purchased during the period. Findings as to the use of fraudulently obtained SBL proceeds to renovate properties purchased by Messrs. Kazman and Levy were also made but would be difficult to quantify. Finally, proving net as opposed to gross profit and how the net profit was distributed would be impossible unless it could be concluded that the evidentiary burden shifted to Messrs. Kazman and Levy to establish this. In short, had I ruled otherwise, the additional fine would likely have been significantly less than the amount requested by the Crown.

337 In any event for the reasons I have given I concluded that I am not able to apportion the fines in lieu of forfeiture using the method requested by the Crown.

How should the fines in lieu of forfeiture be calculated?

338 I turn then to the question of how should the fines in lieu of forfeiture be calculated? When the Crown first suggested apportionment of the fine in lieu of forfeiture, it struck me as being inconsistent with the cases that have held that the fine that must be imposed must be equivalent to the amount of the proceeds that was at some point in the possession or control of the offender, regardless of how that amount was transferred or used afterwards and regardless of whether that amount is proportionate to the offender's degree of involvement in the criminal activity; see, for example, *S. (A.)*, *Siddiqi* and *Dwyer.*

339 More recently, however, the cases I have reviewed have moved to accord with the Crown's general suggestion that the quantum of the fine should be apportioned among the defendants. In *Piccinini*, for example, as I have said, the sentencing judge apportioned the amount of the fine and the Court of Appeal noted at para. 20 that this was done in order that the total amount of the fines imposed on all of the offenders did not exceed the gross proceeds of the fraud. Although

the issue was not argued on appeal and the Court of Appeal did not deal with it, in *Dieckmann*, the Court of Appeal at paras. 90-92 upheld a fine that was *less* than the value of the proceeds of crime that the defendant possessed or controlled because, in the court's view, "it is open to the court to exercise its discretion to adjust the quantum of the fine" when there is "evidence ... that establishes or admits of an allocation of benefit". In that case Baltman J. concluded that Dieckmann's fine should reflect her personal culpability and involvement in the matter; and ordered a fine that amounted to 25% of $5.1 million. She also allocated 50% to Davis as he was "the driving force in this fraud and the main beneficiary of the spoils" and the remaining 25% to Hartman; trial level at paras. 69-71. This was upheld by the Court of Appeal who relied on the Supreme Court's discussion in *Lavigne* of the limited discretion available to the court, namely, its comment that the factual circumstances that may give rise to an exercise of discretion may vary and that it would be unrealistic to claim to foresee all of them (at para. 93).

340 In my view, since apportionment is beneficial to the defendants, I will accept the Crown's position that the fine in lieu of forfeiture can be apportioned among the defendants found guilty with respect to a particular SBL. Since I have concluded that I cannot do so on the basis suggested by the Crown I have decided to follow the approach of Baltman J. in *Dieckmann* and will consider the personal moral culpability and involvement of each defendant in determining what portion of the fine in lieu of forfeiture they should each pay. I will also consider the personal moral culpability of Ms. Cohen and Mr. Salehi and their involvement in the frauds, as Ms. Brun did, and as was done in *Dieckmann,* even though they are no longer before this Court.

Position of the Crown

Overall Position of the Crown

Length of Sentence

341 The Crown's position in connection with Messrs. Kazman and Levy in support of the Crown's position on sentence consisted of eight points as follows:

a) This was a sophisticated, large-scale, intricate, multi-layered, multi-person, multi-property, multi-million dollar fraud of the Government of Canada's CSBFP;

b) The victims of the fraud were Industry Canada and five of the major banks. As a result, losses were suffered by Canadian taxpayers and anyone who held bank accounts with any of these banks. I would add to this the shareholders of the banks;

c) Mr. Levy advised the borrowers to use various branches of the banks and different banks to avoid detection;

d) A number of people were used to complete the fraud from two groups namely the principals of the criminal organization (Ms. Cohen and Messrs. Kazman and Levy) and various "straw" men and women. A high level of planning was required between these two groups;

e) A number of primary companies (the borrowing companies) and dozens of secondary companies (the sham construction companies and other companies

owned by Ms. Cohen, and Messrs. Kazman and Levy) were used to funnel proceeds from the fraud in various directions. To this point I would add that the main way this was done was by the sham construction companies issuing fraudulent invoices to the borrowing companies for leaseholds, fixtures, furniture and equipment in that all the work was not done and/or all the products were not supplied;

f) Dozens of properties were used, some owned by Messrs. Kazman and/or Levy and others by unsuspecting victims; innocent third party landlords;

g) Mr. Levy falsified GICs, T1 Generals, NOAs; and

h) The fraud would have continued but for Dianna Coutts, a fraud investigator employed by RBC, who uncovered the fraudulent scheme. In other words it did not stop because the defendants thought they were doing something wrong.

342 I agree with these submissions and many of these points apply as well to the Tehrani brothers. They were all willing participants in a sophisticated fraud that caused losses to the banks and Industry Canada, they used different banks to avoid detection, they knew that invoices from the sham construction companies they were submitting to the banks for leaseholds and fixtures, furniture and equipment were frauds and they did not stop because they thought they were doing anything wrong but because they were caught.

343 The Crown's position is that the Court of Appeal has been clear that in these circumstances the primary sentencing goal is denunciation and general deterrence. The Crown submits that the appropriate range of sentence for cases of this nature is commonly three to five years but that sentences can be higher than this, referring, for example, to the cases set out by Justice Hill in *Atwal* at para. 42(4), where six-year sentences were found to be in the correct range. The Crown also submitted that more recent case law has moved away from the need to find a breach of trust and that the 2011 amendment which made the mandatory minimum sentence two years if the amount of the fraud is greater than $1 million reflects Parliament's intent to drive home there will be serious consequences from fraud.

344 It is also the position of the Crown that for a "large scale fraud," a conditional sentence is appropriate only in exceptional circumstances, which are not present in the case of any of the defendants.

Restitution

345 The Crown's position on restitution is based on allocating the total loss among the responsible defendants. The Crown acknowledged that ability to pay is to be considered. The Crown submitted that if I feel the need to prioritize the restitution orders, I should put Industry Canada in the first position as they are the true victims in this case. I will set out the specific amounts the Crown seeks when I consider the position of each defendant.

346 The Crown's initial position, relying on calculations prepared by Mr. Coort, was that the total loss for the various SBLs should include legal costs, other costs and interest. Those items

however, cannot be subject to a restitution order; see *Devgan*, at paras. 39 and 47. The restitution order must be limited to the "loss of the property as a result of the commission of the offence" at para. 44. Accordingly, for the purpose of calculating the total loss in each case I have used the amount of the SBL actually advanced and then the numbers calculated by Mr. Coort as the "principal outstanding" as this accounts for payments made towards the principal amount of the loan and taken into account any restitution.

Fine in lieu of forfeiture

347 Ms. Brun submitted that the purpose of ordering a fine in lieu of forfeiture is to 1) remove the benefits of crime so that crime does not seem to pay and restore parties to their pre-crime position; 2) to deter crime by ordering the disgorging of benefits obtained by crime; 3) to dismantle the crime organization; 4) to prevent proceeds of crime from being used to fund further crime; and 5) to deter money laundering of the proceeds of crime.

348 As I have already stated, I have concluded that I do not have jurisdiction to order fines in lieu of forfeiture on the basis suggested by the Crown. Instead I will apportion the fines on the basis of the personal moral culpability of each of the defendants in the frauds.

349 I will now turn to the Crown's position with respect to each offender. I will deal with them in the order in which I heard submissions as to sentence.

Ali Vaez Tehrani

350 I convicted Mr. A. Tehrani of Count 5; fraud over of the CIBC and Industry Canada in connection with his company Alta. The Crown submits that Mr. A. Tehrani should be incarcerated for a period of 12 to 15 months plus three years' probation. The Crown vigorously opposed a conditional sentence as suggested by Mr. Inoue, relying primarily on my findings of what Mr. A. Tehrani's role was in the Alta fraud. Ms. Brun submitted that Mr. A. Tehrani was not a relatively simple dupe or a victim of Mr. Levy but rather had a significant role in the planning of this multi-layered fraud and that my findings which led to his conviction of fraud are highly relevant to sentencing.

351 No money was recovered by the CIBC and the bank did not make a claim to Industry Canada. Some payments were made towards principal, leaving a principal outstanding of $170,268. For reasons already stated, that is the amount of the loss that I will consider in terms of the Crown's request for restitution and fine in lieu of forfeiture orders.

352 Ms. Brun requested that Mr. A. Tehrani be ordered to make restitution to the CIBC for one-third of the Alta loss given that Messrs. Kazman and Levy were also convicted of this particular fraud and the Crown has asked that they share equally in making restitution. In other words, based on my math, the Crown's position is that Mr. A. Tehrani be ordered to make restitution in the amount of $56,756 in connection with Alta to the CIBC. This is lower than the original amount claimed by the Crown of $65,738[11], and later $62,730[12] because of the different starting number that I have used.

353 The Crown also seeks a fine in lieu of forfeiture from Mr. A. Tehrani. Ms. Brun's position is that Mr. A. Tehrani was in control of the entire SBL proceeds as they were deposited into his bank account and the case law is clear that what he chose to do with the money is irrelevant. As she pointed out, he could have gone to the bank or called police. As I have said despite this position Ms. Brun requests that I apportion the fine and order that Mr. A. Tehrani pay a fine in the amount of $30,000.

Madjid Vaez Tehrani

354 I convicted Mr. M. Tehrani of two counts of fraud over; Count 1 in connection with his company Uzeem and Count 5 in connection with Kube. The Crown initially sought a sentence for Mr. M. Tehrani of two and a half to three years' incarceration. However, during the course of the day, as I heard submissions, I was advised that Ms. Barton and Ms. Brun had reached an agreement with respect to aspects of Mr. M. Tehrani's sentence. In particular, I received a joint submission that Mr. M. Tehrani be sentenced to two years in the penitentiary plus three years' probation on conditions that I would be advised of. I was provided with those agreed conditions on the last day of the sentencing submissions and have incorporated those into my decision with respect to Mr. M. Tehrani and Mr. A. Tehrani.

355 The Crown seeks a restitution order against Mr. M. Tehrani and that was opposed by Ms. Barton. The Crown's position is that Mr. M. Tehrani should pay $44,296 with respect to Kube and $88,977 with respect to Uzeem[13]. These amounts later changed to $55,500 with respect to Kube and $108,796 with respect to Uzeem[14] for a total of $164,296.

356 The Crown argued that Mr. M. Tehrani is responsible for one third of the loss with respect to Kube. Mr. M. Tehrani paid the bank $18,500 in restitution. The Crown deducted this amount from the total loss and submitted that the remainder be allocated equally between Mr. M. Tehrani and Messrs. Kazman and Levy but it occurs to me that that is not fair as Messrs. Kazman and Levy should not receive a benefit from Mr. M. Tehrani's payment.

357 The SBL in the case of Kube was $166,500 and the principal outstanding was $150,643. Assuming that this amount should be allocated between Mr. M. Tehrani and Messrs. Kazman and Levy evenly that would mean they would each be responsible for $50,214[15]. Mr. M. Tehrani's share would be reduced by his payment of $18,500 to $31,714. This amount is lower than the amount requested by the Crown of $55,500.

358 The Crown argues that Mr. M. Tehrani is responsible for one half of the loss with respect to Uzeem. Mr. M. Tehrani paid the bank $11,500 in restitution. The original SBL was $217,592 and the principal outstanding was $210,046. The Crown's position that Mr. M. Tehrani and Mr. Levy share equally in this loss means that they would each be responsible for $105,023. By my calculations, after deducting the $11,500 paid by Mr. M. Tehrani, he would be responsible for $93,523. This is higher than the original amount suggested by Ms. Brun of $88,977[16] but lower than the amount later suggested of $108, 796[17].

359 As I have already stated, Ms. Brun also seeks a fine in lieu of forfeiture against Mr. M.

Tehrani based on an analysis by Mr. Coort[18] and the funds Mr. M. Tehrani made from the Kube and Uzeem accounts that came from the SBL proceeds. As I have already explained, in my view I have no jurisdiction to increase the fine by any amount I might find Mr. M. Tehrani profited on the basis of his use of the fraudulent SBL proceeds.

Marshall Kazman

360 The five counts of fraud that I convicted Mr. Kazman of involved nine SBLs; Count 1 as it relates to ELFI and CDI; Count 2 as it relates to ELI; Count 3 as it relates to LHC and Modernito; Count 4 as it relates to LSC and Contempo; Count 5 as it relates to Alta and Kube. The total amount of the SBL proceeds for these nine SBLs is over $1.5 million.

361 The Crown seeks a sentence for Mr. Kazman on the convictions for fraud; Counts 1-5, of five years on each count, to run concurrently. On the conviction of Count 6; money laundering; the Crown submits the sentence should be one year, concurrent to Count 1 and on Count 7; the criminal organization conviction, a sentence of two years, which is required to be consecutive, pursuant to s. 467.14 of the *Code* for a total sentence of seven years.

362 Mr. Rinaldi submitted that Mr. Kazman was one of the masterminds of these frauds, along with Mr. Levy and that the need for general deterrence puts Mr. Kazman in the upper part of the three to five year range. He submitted that I should look at Mr. Kazman's role as an individual and his role in the criminal organization.

363 It was also Mr. Rinaldi's position that specific deterrence is important with respect to Mr. Kazman given the LSUC's findings. In addition there is the added statutory aggravating factor set out in s. 718.2 (iv) of the *Code* since the offences were committed for the benefit of a criminal organization. He submitted that given Mr. Kazman's role in the frauds, a sentence of five years for the frauds is appropriate, particularly given my decision to sentence Mr. M. Tehrani to a two year sentence.

364 Mr. Rinaldi also argued that I can consider the fact Mr. Kazman used SBL proceeds to renovate properties which he then flipped and sold at a profit as an aggravating factor on sentence. He submitted that Mr. Kazman received a benefit from the SBL proceeds and that I can find this to be an aggravating factor even if I did not find Messrs. Kazman or Levy guilty of an offence with respect to a particular SBL. Mr. Rinaldi did agree that if it is clear that there were no findings of fraud in respect of a particular property that it should not be included in the fine calculation.

365 I will consider the Crown's more specific submissions on mitigating and aggravating factors when I consider what a fit sentence is for Mr. Kazman.

366 With respect to the SBLs where I found Mr. Kazman guilty of fraud, the Crown also seeks a restitution order against Mr. Kazman in favour of Industry Canada in the amount of $303,613[19] and restitution to the banks in the amount of $166,660,[20] for a total restitution order of $470,273. In calculating these amounts the Crown advised that the restitution made by Ms. Cohen was factored in. At exhibit 7 there are two cheques totaling $120,000 dated August 18 and 26, 2011

and the Crown's position with respect to the fine for Mr. Kazman was that these restitution amounts were paid by Ms. Cohen and they have subtracted what she paid. These cheques were drawn from accounts in the name of Ms. Cohen. The Crown 's position that Mr. Kazman has not paid any restitution, is at odds with the submissions of Mr. Rinaldi as to the final payment made by Ms. Cohen of $120,000 that I have already referred to and so Mr. Kazman should be credited with restitution already paid in the amount of $60,000.

367 As already stated, the Crown also seeks a fine in lieu of forfeiture against Mr. Kazman in the amount of $850,161 based on Mr. Kazman's share of the fraudulent SBLs that he was convicted of. As I have already explained, in my view I have no jurisdiction to increase the fine by any amount I might find Mr. Kazman profited on the basis of properties purchased and/or renovated with fraudulent SBL proceeds.

Gad Levy

368 The five counts of fraud that I convicted Mr. Levy of involved 12 SBLs; Count 1 as it relates to ELFI, CDI, Uzeem and Homelife; Count 2 as it relates to ELI; Count 3 as it relates to LHC and Modernito; Count 4 as it relates to LSC and Contempo; and Count 5 as it relates to Alta, Kube and Bluerock. The total amount of the SBL proceeds for these 12 SBLs is almost $2.3 million.

369 The Crown seeks a sentence for Mr. Levy on the convictions for fraud; Counts 1-5, of six years on each count, to run concurrently. On the conviction of Count 6; money laundering; the Crown submits the sentence should be one year, concurrent to Count 1, and on Count 7; the criminal organization conviction, a sentence of two years, which is required to be consecutive, pursuant to s. 467.14 of the *Code* for a total sentence of eight years.

370 The Crown's position is that Mr. Levy, along with Mr. Kazman, was one of the main players in this criminal organization and described Mr. Levy as the mastermind; the creator of the fraudulent scheme. A lot of the submissions that the Crown made with respect to Mr. Kazman were made with respect to Mr. Levy. The Crown relies on how I characterized Mr. Levy's evidence and in particular that I found essentially that he lied in court and that he tried to interfere with the administration of justice when he tried to sway Mr. M. Tehrani's evidence. After Mr. Levy's relationship broke down with Mr. Kazman, Mr. Levy engaged in the most brazen fraud of all with respect to Bluerock. The Crown submitted that this in and of itself lends support for the proposition that Mr. Levy considered himself untouchable; the "emperor". He made no effort to cover up this fraud. The Crown also submits that Mr. Levy, like Mr. Kazman, made baseless allegations against others which demonstrates his lack of insight into his fraudulent conduct.

371 The Crown seeks an order of restitution against Mr. Levy in the amount of $566,185 to Industry Canada and $566,834 to the banks.

372 As I have already said, the Crown seeks a fine in lieu of forfeiture in the total amount of $1,906,991 with respect to the 12 fraudulent SBLs that I convicted Mr. Levy of. As I have already explained, in my view I have no jurisdiction to increase the fine by any amount I might

find Mr. Levy profited on the basis of properties purchased and/or renovated with fraudulent SBL proceeds.

Position of the Defence

Ali Vaez Tehrani

373 Mr. Inoue initially submitted on November 25, 2017, that Mr. A. Tehrani should be sentenced to a conditional sentence and that a sentence at the higher end would not be unreasonable. This was after the joint submission was made with respect to Mr. M. Tehrani. Then on December 18, 2017, when Mr. Inoue finished his submissions, he submitted that Mr. A. Tehrani should only receive a one-year conditional sentence. He argued that Mr. A. Tehrani's limited role in the Alta fraud was an exceptional circumstance justifying a conditional sentence. He also argued that Alta was not a "large scale fraud".

374 Mr. Inoue submitted that parity is his main argument. He acknowledged that Mr. A. Tehrani did not plead guilty but he argued that he is less culpable than Ms. Cohen and Mr. Salehi and that any deviation in the sentence I impose on Mr. A. Tehrani as compared to those offenders has to be explained. He relied on *R. v. Choquette*, *2007 ONCA 571* at para. 21 for the proposition that where the only basis for the length of a sentence is the parity principle it is an error for the trial judge to impose a longer sentence on an offender than another while purporting to apply the parity principle.

375 Mr. Inoue submitted that the weight I should give to the guilty pleas by Ms. Cohen and Mr. Salehi is an exercise of my discretion; see *R. v. Shah*, *2017 ONCA 872* at para. 13. He argued that Mr. Salehi was motivated to plead guilty because of the need to take care of his son, presumably suggesting that Mr. Salehi was not sincere when he pleaded guilty. There is absolutely no evidence to support this submission; it is pure speculation and so I reject this submission.

376 Ms. Brun requested that Mr. A. Tehrani be ordered to make restitution to the CIBC for one-third of the Alta loss which, based on my calculations, would be $56,756. Mr. Inoue submitted that any restitution order should be limited to $1,900 as Mr. A. Tehrani is on a disability pension and has no means to pay. It was at this point that the issue of Mr. Inoue and Ms. Barton needing to file evidence of impecuniosity arose.

377 As for the Crown's request for a fine in lieu of forfeiture, Mr. Inoue took no issue with the Crown's suggested seven steps and he made no submission with respect to the amount of any fine. He suggested, however, that where the money went matters, that it all went to the contractors and that I have discretion to take that into account. My reading of the authorities does not lead to that conclusion.

Madjid Vaez Tehrani

378 Ms. Barton conceded that the fraud scheme in this case was on the whole complex and required a fair amount of planning over a long period of time but she submitted that this did not

apply to Mr. M. Tehrani. He had successfully paid off two SBLs and for him it was a crime of opportunity presented by Mr. Levy who she submitted was charismatic and impressive. She argued that there was no breach of trust in this case in that Mr. M. Tehrani did not use his position in society to commit the crime.

379 It is Ms. Barton's position that the amount requested by the Crown for restitution would cripple Mr. M. Tehrani and that given Mr. M. Tehrani's current financial condition whatever I order in restitution, he will never be able to repay it over the rest of his working life of 15 to 20 years. She also relied on the delay in getting to trial as discussed in *Schertzer* at para. 28, which I have already discussed. Notwithstanding this position, Ms. Barton advised that she is not submitting that Mr. M. Tehrani should not pay any amount in restitution but that whatever I order can only be paid according to a reasonable schedule.

380 As for the fine in lieu of forfeiture, as I have already stated, Ms. Barton submitted that what the Crown was proposing was an illegal sentence. In addition with respect to Uzeem, Ms. Barton submitted that unlike the case of Kube, Mr. M. Tehrani was never in possession of the fraudulent SBL proceeds as the BNS forwarded the money to pay the contractor invoices directly to Mosaic and the SBL proceeds never went into the Uzeem account. She submitted that there is no evidence of how the SBL proceeds got to Mosaic. Furthermore, Ms. Barton submitted that based on the Coort Analysis no amount of the SBL proceeds with respect to Kube and Uzeem went back to Mr. M. Tehrani.

381 Ms. Barton also argued that the way the Crown is allocating the amounts for restitution and fine in lieu of forfeiture is arbitrary, especially since Mr. M. Tehrani did not know Mr. Kazman was involved with Kube. I don't know that that matters but the allocation is arbitrary in the sense that it does not necessarily reflect the personal moral culpability of each defendant involved in a particular fraud.

382 Finally Ms. Barton referred to the fact that the defendants, including Mr. M. Tehrani, were sued by the RBC and the BNS and the banks obtained civil judgments. These judgments against Mr. M. Tehrani did not survive his bankruptcy. In any event, based on *Devgan,* this does not preclude the ordering of a fine in lieu of forfeiture.

Marshall Kazman

383 It is Mr. Litkowski's position that Mr. Kazman's role in the offences was subsidiary to that of Mr. Levy. He conceded that the value of the SBLs for the counts Mr. Kazman was found guilty of is about $1.5 million. He submitted that Mr. Kazman should serve a sentence in the range of three years; two years concurrent on the five fraud convictions, one year concurrent on the money laundering conviction and one year consecutive on the criminal organization conviction (which I note adds up to a total of three years).

384 Mr. Litkowski submitted that at the time of these frauds Mr. Kazman was looking for a way to earn a living, he had paid the ultimate price of losing the privilege of practicing law and that this led to his participation in the frauds. He urged me to consider the totality principle.

385 It is Mr. Litkowski's position that Mr. Kazman has no ability to pay a restitution order. He relied on the *Castro* decision and submitted that given Mr. Kazman's age, his prospects are limited and that it is less likely that as a disbarred lawyer convicted of a serious fraud, that he will be able to pay. He asked rhetorically what practical job could Mr. Kazman do on release?

386 As for the fine in lieu of forfeiture, Mr. Litkowski did not take issue with the Crown's calculation based on the total fraudulently obtained SBL proceeds but he argued that there is an insufficient evidentiary basis to include alleged profits from the sales of properties associated with Mr. Kazman in that there is insufficient evidence to draw the necessary inferences that proceeds from SBLs were used to purchase and/or renovate these properties and the evidence with respect to the ultimate sales of those properties does not support the Crown's apportionment figures. As I have already stated I have concluded that I do not have jurisdiction to add in the alleged profits in any event.

Gad Levy

387 Mr. Worsoff asked that the penitentiary sentence I impose on Mr. Levy be in the range of two and a half years in total, two years for the frauds, one year concurrent on the money laundering and six months consecutive on the criminal organization conviction.

388 Mr. Worsoff submitted that the crux of Mr. Levy's wrongdoing was preparing fraudulent documents for other individuals. He argued that Mr. Levy can distinguish himself from the others as he never signed or submitted any documents nor did he ever default on any loans. Mr. Worsoff kept emphasizing the fact that Mr. Levy never defaulted on any of the SBL loans. He admitted however, that he was not saying that the "getaway driver", who he was analogizing to Mr. Levy, was any less culpable than the person with the gun, which I assume he was analogizing to the individual borrowers. This argument failed to address Bluerock where Mr. Levy was a borrower and the fact that I have found that Mr. Levy was in fact part of the criminal organization that was orchestrating these frauds.

389 As for mitigating circumstances, Mr. Worsoff submitted that Mr. Levy is 51 years old, he has no criminal record, he is the sole provider for his family, he has lost all of his assets, he is surviving on the generosity of friends and family, he didn't have any counsel at trial, the process took six and a half years and prejudice as a result can be a mitigating factor quite apart from a s. 11(b) *Charter* application. He also submitted that this is not a breach of trust case and that a bank is not a victim like a person. He referred to a number of the cases that I have already summarized, including *Dobis*, *Bogart*, *Oton*, *Atwal* and *Roberts*. He also stressed that Mr. Levy has the support of his family as a mitigating factor. He submitted as well that this was not a criminal organization that involved violence.

390 Mr. Worsoff submitted that Mr. Levy does not have any property left in his name and that it was all sold by the banks through power of sale proceedings. He argued that the co-defendants were able to sell their properties but Mr. Levy didn't have that luxury. It is Mr. Worsoff's position that Mr. Levy is no position to pay any restitution. He advised that an affidavit from Mr. Levy was

still coming with respect to his financial situation but that was not received by me prior to the finalization of these reasons for sentencing.

391 As for the fine in lieu of forfeiture, Mr. Worsoff submitted that I should exercise restraint as it seems "draconian" given that the banks have taken all of Mr. Levy's properties.

Analysis

General

Length of Sentence

392 Before I consider what a fit sentence is for each of the defendants, there are some general observations and conclusions that apply to all of them.

393 I accept the Crown's submission that certainly with respect to Messrs. Kazman and Levy, this was a pre-meditated, sophisticated, "large scale," multi-million dollar complex fraud of the Government of Canada's CSBFP and five major banks. It involved a high level of planning and orchestration, skill, deception and covert behaviour that took place over a lengthy period of time; many months and in some cases years. There were multiple victims, the principal ones being the Canadian taxpayers.

394 In the case of the Tehrani brothers, I did not find them to be part of the criminal organization and their personal moral culpability is less but nevertheless their role in these frauds was pre-meditated and they were part of the planning, deception and covert behaviour that was required over a period of many months in order to pull off these frauds, causing losses to multiple victims.

395 I accept the Crown's submission that the appropriate range of sentence in this case, particularly with respect to Messrs. Kazman and Levy, is three to five years, as the Court of Appeal made it clear in *Khatchatourov,* even though the defendants were not in a typical position of trust with the financial institutions. Although that is a range established by the Court of Appeal cases that I have referred to, some of those cases also make it clear that sentences outside either end of the range may be warranted in certain circumstances. Like any range established by the Court of Appeal, it is meant to be a guide for sentencing judges and is not to be applied as a fixed formula.

396 Although the case at bar is not a typical breach of trust case, the banks and the government relied on and trusted that the defendants would act in good faith and with honesty in applying for and using the SBL proceeds they obtained. As the Court of Appeal said in *Bogart* at paras. 23 and 25, a fraud on a government agency is not a victimless crime. It involves an "egregious breach of trust" and a breach of the "duty of good faith to the government." In *Gray*, the Court of Appeal stated at para. 34, that there is an "element of trust in dealing with government monies" and in *Khatchatourov* at para. 44 the Court of Appeal held that "the fact the principal victim of the appellants' fraud was CMHC, a government agency, does not diminish the

seriousness of the crime. A fraud on government is not a 'victimless crime' because it "takes money from the public purse and, therefore, from all those who rely on it."

397 All of these observations apply with equal force to the case at bar as the defendants were dealing with banks and a federal government loan program. There is no doubt that general deterrence must be the primary goal of the sentences that I impose provided I find that each defendant is guilty of what can be characterized as a "large-scale" fraud. The Court of Appeal has made this clear as early as the cases; *Dobis*, at paras. 42 and 51 and *Bogart*, at para. 29. As I will come to, in my view, the Alta fraud committed by Mr. A. Tehrani is a large-scale fraud as well.

398 The reason for the emphasis on general deterrence was explained in *Drabinsky*, at paras. 159-160, where the Court of Appeal stated "it would seem that if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people like the appellants who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risk against potential benefits before taking action" and "[d[enunciation and general deterrence most often find[s] expression in the length of the jail term imposed." Given these pronouncements by the Court of Appeal, in my view I should not have regard to the cases Mr. Litkowski relies on of *Edwards* and *W.J.*

399 In this case an aggravating factor for both Mr. Kazman and Mr. Levy is the fact that they have also been convicted of money laundering since the Crown has submitted a one-year sentence for this conviction to run concurrently to the fraud convictions. Furthermore, the fact that I found they were part of a criminal organization is a statutory aggravating factor.

400 As the Crown submitted, the evidence is clear that all of the defendants would have continued their fraudulent activity had they not been caught; in other words none of the defendants stopped their fraudulent activity because they realized they were doing something wrong. Save for perhaps Mr. Salehi, there were no extenuating circumstances that led to these offences. The defendants did not need to resort to criminality to properly look after themselves. In my view this includes Mr. Kazman as he had established a paralegal business and had a bottled water business.

401 One important fact that distinguishes the *Drabinsky* case from the case at bar is that the Court of Appeal noted, at para. 172, that the trial judge acknowledged that the appellants were not driven by pure greed. The trial judge found that this was not a case of funds misappropriated for the acquisition of material goods. At para. 173 the Court of Appeal stated that cases properly characterized as "scams" will normally call for significantly longer sentences than frauds committed in the course of the operation of a legitimate business. "Whether the absence of "pure greed" is viewed as a mitigating factor or simply as the absence of an aggravating factor would seem to make little difference in the ultimate calculation."

402 Unlike the *Drabinsky* case, the Crown submits that all of the defendants were driven by pure greed. In my view this can clearly be said of Messrs. Kazman and Levy. Ms. Barton submitted that this does not apply to Mr. M. Tehrani and I will consider that argument when I get

to his sentence and as well consider if it applies to Mr. A. Tehrani given there was no obvious evidence that he profited from the fraud.

403 In considering sentence I have to consider the relative personal moral culpability of each of the defendants. Ms. Barton relies on the reasons of McMahon J. in sentencing Mr. Salehi in support of her position that in many ways Mr. M. Tehrani was a victim of Mr. Levy. Mr. Inoue takes the same position on behalf of Mr. A. Tehrani. Justice McMahon was, of course, not as familiar with the facts of this case as I am and was relying on the ASF accepted by Mr. Salehi. Bearing that in mind, as I have already stated, he did find that in some ways Mr. Salehi was exploited by Mr. Kazman and the Levy brothers. As already stated, I acquitted Mr. Armand Levy of all charges.

404 I agree that in some ways the Tehrani brothers were exploited by Messrs. Kazman and Levy. Mr. M. Tehrani in particular, demonstrated that he obtained a legitimate SBL for Meez Ltd. which he repaid. That business was exactly the type of business that the CSBFP was intended to help. No doubt Mr. Levy persuaded him to become involved in the fraudulent scheme that he and Mr. Kazman were pursuing. I would not say that the Tehrani brothers were victims however. They knew what they were doing and freely participated and played their part in the frauds. Mr. M. Tehrani also became involved in money laundering for Mr. Levy. Although I did not find that he knew about Mr. Kazman or the criminal organization, Mr. M. Tehrani's role in the fraud went beyond his participating in Kube and Uzeem. This fact rebuts any suggestion he was a victim of Mr. Levy although I have not used this uncharged conduct otherwise as an aggravating factor.

405 Common to all of the defendants is the fact that they did not plead guilty. This is a neutral factor but it does mean that they do not get the benefit of the significant deduction in sentence that was given to Ms. Cohen and Mr. Salehi. They both saved the province the cost of engaging in a trial with respect to them that was expected to be lengthy and complex, both legally and factually, and we now know required five months of evidence and lengthy closing and sentencing submissions, at great expense to the taxpayer.

406 Mr. Inoue in particular emphasized the principle of parity and that I must consider this in sentencing Mr. A. Tehrani as he was not as culpable as Ms. Cohen who admitted to five frauds and Mr. Salehi who admitted to three frauds. The principle of parity is of course important for all defendants but as already stated, Ms. Cohen pleaded guilty at the first reasonable opportunity that she had and Mr. Salehi did so very early on in the trial. The cases I have referred to make it clear that this justified a substantial deduction of what would otherwise have been a fit sentence, particularly given the length, cost and complexity of the trial that proceeded before me.

407 In addition, Ms. Cohen and Mr. Salehi each made restitution before they pleaded guilty and in particular Ms. Cohen paid back a substantial amount before she was charged. Furthermore, there were exceptional circumstances in each of those cases that are not present in the case of any of the four defendants before me now.

408 The Crown submitted there has been no acceptance of responsibility or expression of remorse by any of the defendants. I will consider the defendants individually, but I agree with the Crown that there has not been any expression of remorse. I recognize that lack of remorse is

not ordinarily a relevant aggravating factor on sentencing, but as the Court of Appeal stated in *Shah*, absence of remorse is a relevant factor in sentencing with respect to the issues of rehabilitation and specific deterrence as it may indicate a "lack of insight into and a failure to accept responsibility for the crimes committed, and demonstrate a substantial likelihood of future dangerousness"; at para. 8.

409 In terms of mitigating factors that apply to all four defendants, none of the defendants have criminal records. These are their first criminal convictions and in *Dobis* the Court of Appeal confirmed at para. 28 that a prior criminal record (or lack thereof) "is <u>always</u> a factor entitled to <u>some</u> weight in a sentencing context." [Emphasis in original]. Accordingly I accept that the fact these defendants are first offenders is a mitigating factor and entitled to some weight as is the principle of restraint as argued by Mr. Litkowski. However, this was true of most of the cases relied upon as to sentence so to that extent those cases are comparable.

410 As stated, I have received some evidence in the form of character reference letters, particularly on behalf of Mr. Kazman and Mr. M. Tehrani. None were filed on behalf of Mr. Levy but his wife testified on his behalf. The cases are clear that prior good character is a mitigating factor as is the fact that the defendants have the support of family and friends. However, as I have already stated, this is quite typical in the sentencing of fraud cases I have referred to and so to that extent those cases are comparable. As the Court of Appeal stated in *Bogart* at para. 30, referencing an earlier decision of the court; *Bertram* "most frauds are committed by well-educated persons of previous good character." In *Drabinsky* the Court of Appeal stated at para. 168, that "prior good character and the personal consequences of the fraud cannot push the appropriate sentence outside of the range," but they are still relevant mitigating factors to be considered in determining where the sentence falls within the range.

411 I accept, as the Court of Appeal said in *Schertzer* at para. 28, that delay which does not amount to a deprivation of the right to trial within a reasonable time can be a mitigating factor as it causes prolonged uncertainty and "ruin and humiliation". I accept that this applies in the case at bar. It has taken a long time for this case to be tried and during that time the defendants have been under a cloud of suspicion. The defendants have all suffered loss of reputation and financial ruin as a result of these convictions; in fact they assert this happened after the charges were laid. Certainly the loss of reputation that flows from these convictions was brought down on the defendants by themselves. It is, however, something that will act as a specific deterrent and does factor into the length of sentence required to achieve that objective.

412 As I have stated, after I was presented with a joint submission of two years of incarceration with respect to Mr. M. Tehrani, and recognizing the law that cautions sentencing judges to not interfere with a joint submission unless it can be concluded that it is well outside the appropriate range, I advised all counsel that I would accept this joint submission. The total amount of the fraudulent SBLs for Kube and Uzeem that Mr. M. Tehrani was convicted of is $360,709. This was clearly a large-scale fraud and the joint submission as to sentence was below the range I have identified for large-scale frauds of three to five years. Although this joint submission was below this range, I accepted it as a sentence in the appropriate range of fit sentences, albeit at the low end. I will use Mr. M. Tehrani's sentence in particular when I consider what an appropriate sentence should be for Mr. A. Tehrani and Messrs. Kazman and Levy.

413 The other factors I will consider in determining the length of sentence, will include the number of offences, including the number of fraudulent SBLs that I found the defendant to be involved with, the extent of the defendant's involvement in the frauds, the extent to which he gained from the frauds and the hardship that he faced as a result.

Restitution

414 Only Mr. Kazman and Mr. M. Tehrani have made any restitution to the banks involved in their fraudulent loans. I will come to that.

415 I considered whether or not the payments of principal on a particular SBL should be considered as restitution by the borrower although no one argued this. I have decided not to do so as it is not at all clear what the source was for any principal payments on the SBLs. Typically the SBL proceeds were exhausted by paying the fraudulent contractor invoices for leaseholds, fixtures, furniture and equipment. I could not find that the Tehrani brothers paid down the principal from their own funds. I have therefore only used the principal amount outstanding for each fraudulent SBL as the starting number for any restitution or fine in lieu of forfeiture.

416 I did have some difficulty with the Crown's calculations because the numbers changed somewhat over the course of submissions. I have tried to track those changes but have remained true to my view as to how the loss amounts should be determined for the purpose of calculating what the Crown seeks as restitution orders and relied only on the principal outstanding in each case for the reasons I have already set out.

417 The Crown initially argued that any restitution order be made jointly and severally among those defendants found guilty of any particular fraud but early on in the sentencing submissions the Crown abandoned that request. The Crown asks that any amount ordered for restitution and then paid should be paid first to Industry Canada as in cases where Industry Canada paid out a claim, 85% of the loss was suffered by Industry Canada and 15% by the banks. In a few cases Industry Canada did not pay out a claim and so the entire loss was incurred by the bank that granted the SBL. This happened for example with respect to Mr. A. Tehrani and Alta, where Industry Canada did not pay a claim.

418 Finally although the Crown concedes that ability to pay is a factor I should consider in deciding whether or not to make a restitution order and if so the amount, the Crown submits that Mr. Kazman and Mr. Levy have not proven that they are indigent.

Fine in Lieu of Forfeiture

419 As I have already stated, there is no question that the fraudulent SBL proceeds are caught by s. 462.37(1) of the *Code*. Section 462.37(3) identifies five circumstances in which a fine may be imposed in lieu of forfeiture and in my view the first; that the proceeds cannot be located with due diligence, clearly applies. No one suggested otherwise.

420 There is no dispute that the example of circumstances set out in *Lavigne* at para. 28 that

might justify the exercise of discretion to refuse to order a fine are not present here in the case of any of the defendants. In my view I have no alternative but to impose a fine in lieu of forfeiture on each of the defendants.

421 As Ms. Brun submitted, confiscating proceeds of crime does not equal punishment and considering a forfeiture order in the totality of the sentence is an error of law. Forfeiture is independent and a separate component of the sentence; see *Lavigne* at paras. 25-26. Ability to pay is not a factor I should consider in making an order that a defendant pay a fine in lieu of forfeiture; see *Lavigne* at para. 1. The penalty for non-payment of a fine is further custody as stipulated by s. 462.37(4). As the fine is paid it first reduces any amount ordered for restitution.

422 With respect to proceeds of crime, the actual benefit received personally by an offender is irrelevant. It attaches to all tainted property the offender controlled at any time. Ms. Barton has made an argument that Mr. M. Tehrani was not in possession or control of the fraudulent SBL proceeds received by Uzeem, which I will come to, but apart from that in the case of Messrs. A. Tehrani, Mr. M. Tehrani and Mr. Levy, there can be no issue that they were in control of the fraudulently obtained SBL proceeds received by their respective borrowing companies. I found that in each case they owned the borrowing company and that they were the sole signing officers. The SBL proceeds that were fraudulently obtained were therefore completely in their possession and control. For these reasons, I agree with Ms. Brun that each defendant could be liable to a fine in lieu of forfeiture in the full amount of the fraudulent SBL proceeds that was in the possession of the defendant at any point and that what the defendant chose to do with the money is not relevant.

423 On this basis there is no doubt in my view that Mr. A. Tehrani could be fined the total amount of the outstanding amount of the Alta SBL, Mr. M. Tehrani could be fined in the total amount outstanding amount of the Kube SBL and subject to Ms. Barton's argument the Uzeem SBL and Mr. Levy could be fined in the total amount of the Bluerock SBL when those proceeds were paid by the bank into their business accounts.

424 The facts are different with respect to Messrs. Kazman and Levy where they were not a borrower as they did not receive the fraudulent SBL proceeds directly from the bank. Those funds went first to one of the borrowing companies owned by Ms. Cohen, one of the Tehrani brothers, Mr. Salehi or, in the case of Bluerock, to Mr. Levy. However, in those cases, given my findings of how Messrs. Kazman's and Levy's criminal organization worked, I have found that Messrs. Kazman and Levy each knew, in the cases where I have found them guilty, that the SBL proceeds were obtained fraudulently and they each had a role in ensuring that after those proceeds were paid by the bank to the borrower, those proceeds were paid out to one of their sham construction companies and thereafter they shared in the benefit of those funds. In my view this extra step does not change the analysis in deciding whether or not Messrs. Kazman and Levy had the proceeds of crime in their control and possession; they clearly did. This was not disputed by their counsel.

425 For the reasons already stated, however, I find that I do not have the jurisdiction to accept the Crown's position that each defendant should pay a fine in the amount of money that the defendant actually received by way of benefit (as opposed to control) from the fraudulent SBL

proceeds and the amount of money that the defendant gained as a result of the use the SBL proceeds were put to.

426 With respect to those SBLs where I found that the business operated, like for example Kube located at 677 Queen St., Ms. Brun queried whether the rent should be included in the fine. She came up with a fine amount of $850,171.[21] She did not explain the basis for this position and in light of the analysis I have already done of my jurisdiction, I am going to limit my decision in fixing the amounts of the fines to finding a reasonable way to apportion the principal amounts outstanding on the fraudulently obtained SBLs.

427 None of the defendants suggested that the amount of the frauds was less than the value of the SBL proceeds. In some cases I did find that some leasehold improvements were done and/or furniture supplied. I considered whether this should result in a deduction from the SBL outstanding principle amount and the value of the fraud. I concluded that this is not necessary. Typically the fraudulent invoices submitted by the sham construction companies for leaseholds, fixtures, furniture and equipment totalled considerably more than the amount of the SBL. This was the case, for example, with respect to Kube where the three Mosaic invoices totalled about $205,500 which was about $55,500 more than the principal outstanding on the SBL. In my view that differential is more than enough to cover whatever work was done and equipment supplied and so I will use the amount of the principal outstanding on the SBLs to determine the total gross possible fine in lieu of forfeiture that needs to be allocated among the defendants who participated in a particular fraud. This conclusion is reinforced in my findings that many of the borrowing companies did not operate very seriously or for very long before going into default. Considering the principal outstanding as the gross value of the fraud is reasonable in the circumstances from the perspective of the Crown and the defendants.

428 I turn then to how I should apportion the gross possible fines in lieu of forfeiture. As I have said, I plan to do so based on the personal moral culpability of each defendant. For the reasons I will come to, I find that Mr. Kazman and Mr. Levy are both personally morally culpable to the same extent. Based on the Coort Analysis, Mr. Levy obtained a much larger share of the fraudulent SBL proceeds than Mr. Kazman but since the question here is possession and control and they were both in possession and control of the entire SBL proceeds, I find that they should each be apportioned 40% of the gross total fine. As for the Tehrani brothers, their culpability is considerably less than Messrs. Kazman and Levy but they had control of the entire fraudulently obtained SBL proceeds initially and so in my view their share of the fine should be 20% of the total. I will have to consider whether and how this percentage should differ where, for example, only Mr. M. Tehrani and Mr. Levy were involved in a fraud.

429 In my view the considerations are different in calculating the restitution amounts as those amounts should also reflect personal gain to the extent that can be determined.

430 I will now turn to a consideration of sentence with respect to each of the defendants. I will begin with Mr. M. Tehrani because as I have stated, the sentence he will receive is important to the principle of parity that I must apply in determining the sentences of the other defendants.

Madjid Vaez Tehrani

Length of Sentence

431 I convicted Mr. M. Tehrani of two counts of fraud over; Count 1 in connection with his company Uzeem and Count 5 in connection with Kube. I have already set out my findings of fact as to Mr. M. Tehrani's role in the Uzeem and Kube frauds. Although these two frauds were also committed by Mr. Levy and Mr. Kazman in the case of Kube and by Mr. Levy as well in the case of Uzeem, and I have found that they both had a more significant role in the frauds generally, I accept the submissions of Ms. Brun that my findings show a level of complexity of the two frauds and that Mr. M. Tehrani was fully involved in them which is a highly aggravating factor. Those two frauds totalled $360,709, clearly a large-scale fraud. I also found that in certain respects Mr. M. Tehrani was not a credible witness at trial and that he was actually untruthful.

432 The Crown argued that I can also consider my findings that Mr. M. Tehrani was involved in money laundering for Mr. Levy although he was not charged or convicted of this. I found as a fact that most if not all of the $557,000 paid by Mr. Levy's companies to Mr. M. Tehrani's companies was paid as part of a fraudulent scheme with respect to the SBLs that involved both Mr. Levy and Mr. M. Tehrani. This included a finding that Mr. M. Tehrani assisted Mr. Levy in laundering $130,000 of the SBL proceeds received by Bluerock. Mr. M. Tehrani, however, was not charged with money laundering. Ms. Brun argued that I could consider this finding as an aggravating factor in my determination of sentence. Ms. Barton vigorously opposed that suggestion.

433 I appreciate that a judge may consider any uncharged offences as an aggravating factor if they form part of the circumstances of the offence, pursuant to s. 725(1)(c) of the *Criminal Code*. If those facts are considered they must be noted on the Indictment pursuant to s. 725(2)(b). I appreciate that there may be a sufficient nexus between the money laundering and the fraud committed with respect to Uzeem as described in *R. v. Larche*, *2006 SCC 56*, at para. 25, and at paras. 90-97 of *R. v. Shin*, *2015 ONCA 189*, but once the joint submission was presented this issue was not fully argued. It is not necessary for me to make a formal finding on this issue as I have already found that the sentence proposed jointly for Mr. M. Tehrani is on the low end and so I decline to do so. I do agree with Ms. Brun, however, that these findings make it clear that Mr. M. Tehrani was not just a minor player being manipulated by Mr. Levy and being told by him what to do.

434 Mr. M. Tehrani chose not to make any statement to the court for me to consider in sentencing and so I have no evidence to suggest that he has any feelings of remorse or any insight into his fraudulent behaviour.

435 As I have already stated, I agree that in some ways the Tehrani brothers were exploited by Mr. Levy. Mr. Levy needed people like the Tehrani brothers to play along to make his fraudulent scheme work. Ms. Barton submitted that by the time they got involved Mr. Levy had honed his fraudulent scheme into perfection. However, as I have also said, in my view they were not victims; they knew they were engaged in fraud. They played an active role in the frauds I convicted them of.

436 Ms. Barton argued that there are mitigating circumstances in that Mr. M. Tehrani has a very supportive family and I accept that. He has filed a significant amount of character letters which has some mitigating effect, although as I have stated, prior good character is not uncommon in these types of cases. Another mitigating circumstance is the fact that Mr. M. Tehrani has already made some restitution payments.

437 Ms. Barton also submitted that there is no likelihood that Mr. M. Tehrani will re-offend. Certainly the fact that he has no criminal record and his character references give some support for that position. Furthermore, he did demonstrate he was able to run a business that obtained a SBL honestly. However, need for specific deterrence is not determinative in a case like this. General deterrence is paramount.

438 Ms. Barton submitted that Mr. M. Tehrani's motivation was not pure greed in that he wanted to expand his businesses. She submitted that all of the proceeds he received from the SBLs went into his businesses and were gone by the time that he declared bankruptcy. I accept that Mr. M. Tehrani used the SBL proceeds to pay invoices for purported leaseholds, fixtures, furniture and equipment but, like Mr. A. Tehrani, I would not conclude that Mr. M. Tehrani did not benefit from these frauds particularly given all of the money that was passing back and forth between his companies and Mr. Levy's companies. Furthermore, he did withdraw $53,000 from the Uzeem SBL proceeds. Ms. Barton also submitted that unlike some of the other SBLs, his businesses; Kube and Uzeem, were operating businesses. This is true, but in my view that is not a significant mitigating factor.

439 It was also Ms. Barton's position that it cannot be said that but for the fraud that Kube and Uzeem would not have existed given Mr. M. Tehrani had already run successful businesses. That submission I do not accept for a number of reasons. Had Mr. M. Tehrani disclosed his outstanding SBLs, by his own admission he would not have received these SBLs and there is no evidence that he would have been able to open these businesses without these SBLs.

440 There are clearly no exceptional circumstances here to justify a conditional sentence and that was never suggested for Mr. M. Tehrani. After considering the general aggravating and mitigating factors that I have set out apply to all of the defendants and those that apply specifically to Mr. M. Tehrani and the circumstances of his involvement in the Kube and Uzeem frauds, I was satisfied that I should accept the joint submission and sentence Mr. M. Tehrani to a period of incarceration of two years plus three years' probation on conditions that counsel agreed to.

Restitution

441 As I have already set out, the Crown seeks a restitution order against Mr. M. Tehrani and that was opposed by Ms. Barton. I have explained how I have recalculated the Crown's numbers. In the case of Kube, assuming that this should be allocated between Mr. M. Tehrani and Messrs. Kazman and Levy evenly, that would mean that Mr. M. Tehrani's share after considering his payment of $18,500, is $31,714, if I accept the Crown's position. As for Uzeem, by my calculations, after deducting the $11,500 paid by Mr. M. Tehrani, he would be responsible

for $93,523. Accordingly, the total amount requested by the Crown for restitution as I have recalculated the numbers is $125,237.

442 In my view a restitution order is appropriate in this case, in addition to the sentence that I have already decided to impose and the restitution Mr. M. Tehrani has already made. It makes Mr. M. Tehrani responsible for making further restitution to his victims. I have considered the factors established by the Supreme Court of Canada in *Zelensky* as they apply to Mr. M. Tehrani. I must consider Mr. M. Tehrani's financial circumstances and his ability to pay this order. Any order I impose should not affect the prospects for Mr. M. Tehrani's rehabilitation.

443 I accept the evidence from Mr. M. Tehrani that he no longer has any assets and that his current income is very low; barely enough to cover his needs. I have considered the Coort Analysis[22] and although Mr. M. Tehrani did not withdraw much from the fraudulent SBL proceeds themselves for Kube, he did withdraw $53,000 from the Uzeem SBL proceeds. Furthermore, I would not conclude that Mr. M. Tehrani did not benefit from these frauds in other ways particularly given all of the money that was passing back and forth between his companies and Mr. Levy's companies. However I do not believe allocating one-third of the loss to Mr. M. Tehrani is fair. More of the money went to Messrs. Kazman and Levy which in my view is a factor for any restitution order I make. I have also considered the fact that Mr. M. Tehrani has made some restitution but that has been taken into account in determining the amount of restitution the Crown seeks that he pay.

444 Mr. M. Tehrani is 55 years old and after serving his sentence I expect he will be able to earn a reasonable income again for a number of years. I appreciate that having a fraud conviction will make that more difficult but he impressed me as a smart and resourceful man. I have also considered the fact that in *Castro,* the amount of the fraud was less than $200,000 and despite the fact that the offender was collecting monthly disability benefits of $900; the offender was ordered to make restitution in the amount of $141,752 and this was upheld on appeal.

445 Considering all of the circumstances, I have concluded that Mr. M. Tehrani should make restitution in the amount of $70,000. I will hear from counsel as to what terms for payment are reasonable.

Fine in Lieu of Forfeiture

446 Ms. Barton submitted that with respect to Uzeem, unlike the case of Kube, Mr. M. Tehrani was never in possession of the fraudulent SBL proceeds as the BNS forwarded the money to pay the contractor invoices directly to Mosaic and the SBL proceeds never went into the Uzeem bank account. She submitted that there is no evidence of how the SBL proceeds got to Mosaic and argued that the fact Mr. M. Tehrani may have had the ability to assert control over the funds and direct the BNS to pay them directly to Mosaic did not constitute possession for the purpose of s. 462.37(3) of the *Code*. The definition of "possession" however in s. 4(3) of the *Code* is relevant and constructive possession has been interpreted to include knowledge and control.

447 Ms. Brun argued in response that it is clear from my Judgment that I found a high level of

collusion between Mr. Levy and Mr. M. Tehrani and relied in particular on my finding that they both presented a grossly inflated Mosaic invoice to the BNS for payment. Ms. Brun also relied on my finding that Mr. M. Tehrani was money laundering for Mr. Levy in support of her collusion argument.

448 I have reviewed the Coort Analysis with respect to Uzeem and Mr. Coort states that a total of $217,825 in two separate payments by BNS drafts were made payable to Mosaic but they did not appear in Uzeem's account with the BNS.

449 I agree there is merit to Ms. Brun's submissions, but in my view what answers Ms. Barton's argument completely is that even if the SBL funds did not pass through Uzeem's business account at the BNS, as Mr. M. Tehrani was the sole signing officer of that account (see para. 223(e) of my Judgment), he had knowledge of the SBL proceeds and was the only one that had control over the SBL funds from the perspective of the BNS. The BNS would not have paid a third party invoice using SBL proceeds belonging to Uzeem without Mr. M. Tehrani's consent and direction. In my view Mr. M. Tehrani had control over the total SBL proceeds in the revised amount of $217,591. As the Court found in *Dieckmann*: "[s]he had authority over the accounts into which the proceeds were paid and disbursed and as such the stolen funds were within her possession and control," at para. 86.

450 In my view in determining the value of the property in Mr. M. Tehrani's possessions and control, I should apportion the amount of the fraudulent SBL proceeds among the defendants who had control over those proceeds. In the case of Kube that included Mr. Kazman and Mr. Levy. In the case of Uzeem, it was only Mr. M. Tehrani and Mr. Levy.

451 Since I have determined that I cannot apportion the fine in the way suggested by the Crown, as I have stated, I have decided to do so based on their respective personal moral culpability. In the case of Uzeem, where Messrs. Kazman, Levy and M. Tehrani were involved, the split should be 40%, 40%, 20% (M. Tehrani). In the case of Kube, where only Messrs. Levy and M. Tehrani were involved, I have decided the split should be the same as essentially the role of Mr. M. Tehrani was the same; *i.e.* 80% Mr. Levy and 20% Mr. M. Tehrani. This time Mr. Levy did both what he usually did and what Mr. Kazman usually did.

452 In the case of Kube, the principal outstanding was $150,643. Based on the apportionment I have decided, Mr. M. Tehrani's share is $30,129 and Mr. Levy's and Mr. Kazman's share is $60,257 each for a total of $120,514. Mr. M. Tehrani's fine should be reduced by the amount he paid the bank of $18,500 to $11,629 as that must not benefit Mr. Levy and Mr. Kazman

453 With respect to Uzeem, the principal outstanding was $210,046 and apportioned between Mr. M. Tehrani and Mr. Levy, the amounts of the fine would be $42,009 for Mr. M. Tehrani and $168,037 for Mr. Levy. Mr. M. Tehrani paid the bank $11,500 and so I assess his fine for Uzeem at $30,509.

454 Accordingly the total fine in lieu of forfeiture I shall order to be paid by Mr. M. Tehrani is $42,138. Pursuant to s. 462.37(3)(iii) in default of payment, Mr. M. Tehrani shall be imprisoned for a term of 16 months, which shall be served consecutively to any sentence that he is serving.

I am prepared to hear submissions from counsel as to how long I should give Mr. M. Tehrani to pay this fine.

Ali Vaez Tehrani

Length of Sentence

455 I convicted Mr. A. Tehrani of one count of fraud; Count 5; fraud over of the CIBC in connection with his company Alta.

456 I set out the relevant facts with respect to Mr. A. Tehrani's role in the Alta fraud when I set out the circumstances of the fraud offences. Although this fraud was also committed by Mr. Levy and Mr. Kazman, who had a more significant role in the frauds, as Ms. Brun argued, my findings show a level of complexity to this fraud and Mr. A. Tehrani was fully involved in it, along with Mr. Salehi, which is a highly aggravating factor.

457 Mr. Inoue stressed in his oral submissions that at para. 839 of my Judgment I state that there was no evidence that Mr. A. Tehrani profited from the Alta fraud. Mr. Inoue submitted that the contractors profited, not Mr. A. Tehrani, and that the fraud was not "successful" from Mr. A. Tehrani's perspective. I pointed out to Mr. Inoue that that finding was not the same as a positive finding that Mr. A. Tehrani in fact did not profit from the Alta fraud. If I had to consider that factual issue now, I would have to say that it is likely that he did benefit in some way because he gave up a very good job with Leon's to open three furniture stores in short succession that ostensibly were not very successful. Although the bulk of the money from the Alta fraud clearly went to Messrs. Kazman and Levy, given the money going back and forth and given the amounts that were paid to Mr. M. Tehrani that I found to be money laundering, there are simply too many possibilities of ways in which money could have flowed to Mr. A. Tehrani for me to make a positive finding that he did not profit from the Alta fraud. That said unlike the other defendants, there is no positive evidence of a financial benefit of any significance.

458 Mr. Inoue also relied on my finding at para. 117 of my Judgment that Mr. A. Tehrani came across as a very unsophisticated witness and perhaps as someone who is not very smart and that some of this could be attributed to the fact that English is not his first language. I also said however, that it was part of his defence, as he repeated many times, that he trusted Mr. Levy. I also did not accept that his memory was as he stated. As the Crown submitted I did not believe much of Mr. A. Tehrani's evidence. I found his claim to lack of memory to be a ruse and extreme and selective. Things he was certain of were surprising and self-serving; the best example being the yellow envelope where he adopted what he knew his brother was going to testify to.

459 Based on my finding as to Mr. A. Tehrani being "very unsophisticated" and "not very smart", Mr. Inoue argued that Mr. A. Tehrani was a victim of the criminal organization and likened him to Mr. Ghatan who I found Mr. Levy preyed upon in that he lacked the skill and time to appreciate that he was being charged for work that had already been done. Mr. Inoue misses the point. Although I had serious doubts about Mr. A. Tehrani's evidence that he did not pay any attention to the work Mr. Levy was purportedly doing and that was a principal reason why I acquitted him of the alleged fraud in connection with Qua and Contempo, Mr. A. Tehrani was

clearly not a victim of Mr. Levy with respect to Alta. In fact as I stated in my Judgment, Mr. A. Tehrani admitted that he and Mr. Salehi came up with the idea that he would operate Alta from half of Mr. Salehi's store CDI. He did not testify that it was Mr. Levy's idea. I do accept however, that to some extent Mr. A. Tehrani was exploited by Messrs. Kazman and Levy as found by Justice McMahon. He and his brother were the type of people they needed to perpetuate the criminal organization and their fraudulent schemes. However, that does not excuse his fraudulent conduct.

460 Mr. Inoue argued it was relevant that after a very lengthy trial I acquitted Mr. A. Tehrani of two charges. I fail to see the relevance of this and Mr. Inoue provided no authorities in support of his position. He seemed to suggest that this meant that Mr. A. Tehrani had no opportunity to plead guilty but I disagree. Mr. A. Tehrani could have pleaded guilty to the Alta fraud and contested the other two charges. That would have given him the benefit of a guilty plea in sentencing.

461 Finally, Mr. Inoue's position was that Mr. A. Tehrani was not convicted of a "large scale" fraud. He agreed that the term is not defined and that it is related to the amount of the fraud. I have already commented on the cases of *Oton* and *Takeshita* in that regard. In the *Takeshita* case I reviewed a number of authorities and concluded at para. 50 that the fraud in the amount of approximately $80,000 was at the lower end of a large scale fraud. The Alta fraud was in the amount of $170,268. I see no reason to come to a different conclusion in the case at bar. In my view the Alta fraud was clearly a large-scale fraud.

462 I have already set out the aggravating and mitigating circumstances that apply to all defendants including Mr. A Tehrani. Mr. A. Tehrani filed one character reference which confirms he has a friend who supports him. I have also considered the evidence filed on his health and financial situation.

463 Mr. A. Tehrani had a very good job at Leon's and he was under no financial stress that could explain why he left that job and chose to commit fraud. I can only find that he must have been motivated by greed. Although there is no evidence that he profited from the fraud, clearly he did not open three furniture stores in short succession for altruistic reasons.

464 Like the other defendants Mr. A. Tehrani cannot be penalized for insisting on his right to a trial but he does not get the benefit of a reduced sentence because of a guilty plea. When he addressed me in court it is clear that any remorse he feels is because he was caught. There was no insight into the fact that he committed a serious fraud. I do not rely on this as an aggravating factor but it is relevant to a consideration of whether or not Mr. A. Tehrani is at risk of re-offending. I am certainly not satisfied that he would not likely re-offend. This is one reason why in my view a conditional sentence is not appropriate.

465 I agree with Mr. Rinaldi's submissions that there is no parity between Ms. Cohen or Mr. Salehi and Mr. A. Tehrani. Although arguably Mr. A. Tehrani was not as culpable in the overall fraud scheme as Ms. Cohen or Mr. Salehi, he was not a minor player. Furthermore, both Ms. Cohen and Mr. Salehi were entitled to a substantial discount for pleading guilty and sparing the taxpayer of the expense of a long trial. Ms. Cohen in particular made substantial restitution and

Mr. Salehi had made some restitution as well. They both had special circumstances that called out for a conditional sentence as well.

466 In my view none of these factors apply to Mr. A. Tehrani. He was a willing and active participant in the Alta fraud and the Crown proved his guilt after a five-month trial. He did not plead guilty, he made no admissions during the trial, and in fact I found he lied during the trial. He has not expressed any remorse nor has he made any restitution. Although I accept that he has some health concerns, in my view they do not amount to the exceptional circumstances that the courts look for, for example, as set out by the Court of Appeal in *Dobis*, in deciding to impose a conditional sentence in a case of a large-scale fraud. I also find they are not serious enough to amount to any mitigation of sentence. I agree with the Crown that even though the Crown is seeking a reformatory sentence and so I have jurisdiction to give Mr. A. Tehrani a conditional sentence, such a sentence would be manifestly unfit.

467 The Crown has asked that Mr. A. Tehrani should be incarcerated for a period of 12 to 15 months plus three years' probation. In my view, in the interests of parity, my best guide is the sentence of 24 months that I have decided to give to Mr. M. Tehrani. I appreciate that he was convicted of two frauds but otherwise their involvement in the frauds was comparable. Although it is tempting to say Mr. A. Tehrani's sentence should be half of his brother's, the Alta fraud was brazen in many respects and Mr. A. Tehrani was fully involved. In all of the circumstances, in my view Mr. A. Tehrani should be sentenced to 14 months of incarceration to be followed by three years' probation on the same terms as Mr. M. Tehrani.

Restitution

468 As I have stated, Ms. Brun requested that Mr. A. Tehrani be ordered to make restitution to the CIBC for one-third of the Alta loss in an amount I have calculated to be $56,756.

469 Mr. Inoue submitted that any restitution order should be limited to $1,900 as Mr. A. Tehrani is on a disability pension and has no means to pay. If I impose the amount requested by the Crown, Mr. Inoue asks that I give Mr. A. Tehrani time to pay.

470 I have considered the factors established by the Supreme Court of Canada in *Zelensky*. In my view a restitution order is appropriate in this case, in addition to the sentence that I have already decided to impose. It makes Mr. A. Tehrani responsible for making some restitution to his victim; the CIBC. I appreciate that I must consider Mr. A. Tehrani's financial circumstances and his ability to pay this order and that I should exercise restraint and caution. I accept the evidence from Mr. A. Tehrani that he no longer has any assets and that his sole source of income is a disability pension from Ontario. I have also considered the Coort Analysis[23] and the Crown's argument as to how Mr. A. Tehrani benefited financially from the operation of Alta. However, I do not believe allocating one-third of the loss to him is fair. More of the money went to Messrs. Kazman and Levy which in my view is a factor for any restitution order I make.

471 Any order I impose should not affect the prospects for Mr. A. Tehrani's rehabilitation. I do not have his exact age save that he is older than his brother, Mr. M. Tehrani. He will still have a number of productive years after he is released from jail. In my view, particularly as Mr. A.

Tehrani has made no restitution, he should be ordered to make some restitution. As I have already said in *Castro,* the amount of the fraud was less than $200,000 and despite the fact that the 49-year-old offender was collecting monthly disability benefits of $900; the offender was ordered to make restitution in the amount of $141,752 and this was upheld on appeal.

472 The principal outstanding for Alta was $170,268. In my view in considering all of the circumstances, I have concluded that Mr. A. Tehrani should make restitution in the amount of $30,000. I will hear from counsel as to what terms for payment are reasonable.

Fine in Lieu of Forfeiture

473 There is no doubt that Mr. A. Tehrani received the entire SBL proceeds from the CIBC into his company Alta. He owned Alta and was the sole signing officer and so there is no doubt that he had control of the full amount of the fraudulent funds. As the Court said in *Dieckmann* at para. 86, Mr. A. Tehrani had sole authority over the Alta account into which the SBL proceeds were paid and disbursed and as such the funds obtained fraudulently were within his possession and control.

474 Using the same approach I have used with Mr. M. Tehrani, in my view in determining the value of the property in Mr. A. Tehrani's possession and control, I should apportion the amount of the fraudulent SBL proceeds of $170,268 among the defendants who had control over those proceeds; which in the case of Alta included Mr. Kazman and Mr. Levy. For the reasons already stated, the allocation based on personal moral culpability will be 20% for Mr. A. Tehrani and 40% each for Messrs. Kazman and Levy.

475 Accordingly, the total fine in lieu of forfeiture I shall order to be paid by Mr. A. Tehrani is $34,054. Pursuant to s. 462.37(3)(iii) in default of payment, Mr. A. Tehrani shall be imprisoned for a term of 14 months which shall be served consecutively to any sentence that he is serving. I am prepared to hear submissions as to how long I should give Mr. A. Tehrani to pay this fine.

Marshall Kazman

Length of Sentence

476 The five counts of fraud that I convicted Mr. Kazman of involved nine SBLs; Count 1 as it relates to ELFI and CDI; Count 2 as it relates to ELI; Count 3 as it relates to LHC and Modernito; Count 4 as it relates to LSC and Contempo; Count 5 as it relates to Alta and Kube. The total amount of the SBL proceeds for these nine SBLs is over $1.5 million. I have already set out my findings of fact as to Mr. Kazman's role in these frauds that are relevant to sentencing.

477 Mr. Litkowski made submissions in an effort to establish that Mr. Kazman was not as culpable as Mr. Levy in the frauds. He conceded that the value of the SBLs for the counts Mr. Kazman was found guilty of is about $1.5 million. Mr. Litkowski relied on various passages from my Judgment. As he pointed out, for each of the loans where I found Mr. Kazman guilty it was Mr. Levy that I found prepared the Business Plans, Mr. Levy who was responsible for altering the documents provided to the banks, where I have found fraud, Mr. Levy who prepared the

fraudulent invoices and I found that Mr. Levy, as a self-admitted "control freak", was "the front of this organization", was the SBL specialist and experienced contractor who could not only ensure the SBL was approved but then also provide a "turnkey operation". With the exception of the Cohen SBLs and the two obtained by Ms. Chapkina, Mr. Kazman ensured he was not known to the borrowers. He clearly was smart enough to distance himself as best he could from the frauds.

478 Mr. Kazman, however, had a key role to play in the criminal organization. His legal experience allowed him to incorporate Ms. Cohen's borrowing companies and was used in a couple of cases where he prepared fraudulent leases and promissory notes to evidence loans from Ms. Cohen to various borrowers. In the case of some of the sham construction companies, Mr. Kazman arranged for people he knew to incorporate them and open bank accounts that he later took over. This allowed him to take on his most significant role, the person in the criminal organization who was principally involved in laundering the fraudulently obtained SBL proceeds. Although I found that the evidence was overwhelming that the distribution of the fraudulent SBL proceeds and the circulation of those funds back and forth between companies owned by Messrs. Kazman and Levy and by Ms. Cohen was with the knowledge and intent of all three of them to conceal the fact that those monies were obtained from the banks by fraud, Mr. Kazman was the one making the deposits and writing the cheques. This was a critical role in this criminal organization to avoid detection.

479 I am not able to determine who originally conceived of the sophisticated scheme used to implement these frauds. Certainly it seems that Mr. Kazman was the one who had the strongest connection to Ms. Cohen. Regardless, in my view both Mr. Kazman and Mr. Levy are equally personally morally culpable in the frauds where I found Mr. Kazman guilty, the money laundering and the creation of the criminal organization that allowed it all to happen. What distinguishes Mr. Levy is that he received the largest share of the spoils and after his relationship with Mr. Kazman broke down, he continued the fraudulent scheme on his own with respect to Uzeem, Homelife and Bluerock. To that extent Mr. Levy's sentence must be more severe.

480 Mr. Litkowski relied on the Coort Analysis with respect to the flow of funds from the SBLs where Mr. Kazman was convicted to companies and or accounts associated with certain individuals. The difficulty with that submission is that I made different findings in my Judgment than the assumptions made by Mr. Coort. I agree, however, as I have already said, that Mr. Levy was the primary beneficiary of the fraudulent proceeds.

481 In terms of mitigating factors, Mr. Litkowski argued that the considerable number of character reference letters filed on Mr. Kazman's behalf by his family and friends portray a side of Mr. Kazman that "perhaps was not apparent at the trial". I accept the positive statements made in these letters show a different side of Mr. Kazman but as I have said, that is typical of fraud cases. Furthermore, although the character letters typically state that the author was shocked when they learned of Mr. Kazman's convictions, given what they believed about Mr. Kazman's character and they all suggest that his convictions are out of character, no one seems to have been aware of the fact that Mr. Kazman was disbarred. Nevertheless, I accept these character reference letters have some mitigating impact on Mr. Kazman's sentence.

482 Although I accept that there will be some impact on Mr. Kazman's son during the period he is incarcerated, it is not what I would consider to be an exceptional circumstance that could serve to reduce the period of incarceration. First of all, SD has improved as he has gotten older and he lives with his mother. There is no comparison in the situation of SD to what I know of Mr. Salehi's son who has severe mental and physical disabilities and requires 24/7 care and supervision just to keep him alive. In my view this is not a circumstance that could justify any reduction of what would otherwise be a fit sentence for Mr. Kazman.

483 I have also considered Mr. Kazman's health concerns. As Mr. Rinaldi pointed out, despite Mr. Kazman's heart attack in September 2013, he made court appearances in the OCJ on September 4 and October 23, 2013 and hundreds of appearances in both courts over the years following. Mr. Kazman complained of his diagnosis of ADHD and migraine headaches from time to time but he was able to defend himself over the course of a five-month trial and prepare written submissions. His heart was never a reason given to me when he was not feeling well during the trial. In my view Mr. Kazman does not have any medical concerns that cannot be addressed while he is in custody or would justify any reduction of what would otherwise be a fit sentence.

484 In terms of aggravating factors, the fact that Mr. Kazman was found guilty of professional misconduct by the LSUC with respect to five real estate transactions and disbarred as a result is an aggravating factor that is unique to him. As Mr. Rinaldi submitted, the chronology of events is significant. Mr. Kazman was found guilty of professional misconduct in December 2005 and he was disbarred on September 16, 2006. While his appeal was underway he got in involved in the frauds before me. The TD fraud with ELI began in May 2007, the BNS fraud with ELFI and CDI began in June 2007, and the BOM fraud for LHC and Modernito began in September 2007. Mr. Kazman's appeal was heard by the Appeal Committee on October 17, 2007. While that decision was under reserve, by December 2007 the LSC and Contempo fraud of the RBC had begun. Mr. Kazman's appeal was dismissed in May 2008 and while his appeal to the Divisional Court was pending, by May 2008 the Alta and Kube frauds for CIBC had begun.

485 At trial Mr. Kazman testified that the effect of his disbarment was a "devastating blow". As Mr. Rinaldi submitted I would have thought or at least hoped that given what Mr. Kazman was going through with the LSUC process, thinking that he could be disbarred, that he would have ensured his law practice was squeaky clean and he would have ensured he was not engaging in any improper conduct. Instead, while the LSUC proceedings were ongoing, he was now a major player in an elaborate fraud scheme run by what I have found was a criminal organization. Clearly the threat of the loss of his licence to practice law was not enough to deter Mr. Kazman from further misconduct. I agree with Mr. Rinaldi that this chronology does not bode well for Mr. Kazman's ability to rehabilitate. Certainly this does not suggest that Mr. Kazman can be easily deterred from improper conduct. In my view, there is a significant risk that Mr. Kazman would reoffend.

486 The Crown also submits that Mr. Kazman, like Mr. Levy, not only did not express any remorse, they have both made baseless allegations against others which demonstrates their lack of insight into their fraudulent conduct. They have tried to blame the RCMP, the Crowns

and others as conspiring against them. For example, Mr. Kazman swore an affidavit on October 9, 2015 in support of a *certiorari* application to quash the direct Indictment. In that affidavit he alleged that Mr. Rinaldi and another Crown who acted on the preliminary hearing "may have been acting in bad faith, with the acquiescence or complicity of the Attorney General's Office, and Corporal Thompson." He went on to say that in fact both Crowns were acting in bad faith towards him in conjunction with Corporal Thompson. During the trial Mr. Kazman tried to advance the theory that the charges were a conspiracy by the banks and the RCMP, and in particular Ms. Coutts of the RBC and Corporal Thompson of the RCMP.

487 Mr. Rinaldi also referred to a lack of insight on Mr. Kazman's part when he was asked questions about the Bochners, who were his clients at the time. I give the detail of this in my Judgment and Mr. Rinaldi is correct that Mr. Kazman responded at one point "who cares if I ripped off the Bochners?" This was certainly a callous response and even more significantly, Mr. Kazman put Ms. Chapkina into a situation of financial risk in what could only be considered a very unconventional way of supposedly helping a client.

488 Mr. Rinaldi also referred to my conclusion in my Judgment that Mr. Kazman completely resiled at trial from an affidavit he had prepared and filed in litigation with the RBC with respect to Contempo. Given my findings at trial, the affidavit was true and Mr. Kazman's evidence at trial was a lie. I agree that this is another factor that undermines the weight to be given to Mr. Kazman's character reference letters.

489 The Crown's position is that the *Khatchatourov* case is the closest case factually to the case at bar. In that case the frauds consisted largely of duping and manipulating recent immigrants and using their identities to obtain mortgage financing and to take title to properties, usually in order to obtain mortgage advances that financial institutions would not otherwise have made. The losses were suffered originally by banks and they were reimbursed from the public purse by CMHC. I agree that there are many similarities but as the Crown submitted that the losses in the case at bar are significantly greater than the $1,167,870 lost by the CMHC, the profits received by Messrs. Kazman and Levy were much greater that the profits the offenders made in *Khatchatourov* of about half a million dollars. The fraud involved the purchase and sale of 11 residential properties and whether or not the scheme itself was as complex as the case at bar, the volume of the frauds in the case at bar led to a much longer trial as compared to the 37-day jury trial in *Khatchatourov.* There were also no convictions in that case of money laundering or criminal organization.

490 Mr. Rinaldi also submitted that the sentence imposed on Mr. M. Tehrani has created a "sentencing floor" and that Mr. Kazman as one of the masterminds requires a sentence well above Mr. M. Tehrani's in terms of the "pecking order".

491 The *Khatchatourov* case certainly justifies a sentence for more than four years on Messrs. Kazman and Levy for the frauds and money laundering convictions. If the sentence for the money laundering conviction is to run concurrently, clearly that conviction should be considered as an aggravating factor. Given the amount of laundering that was done of the fraudulent proceeds and the period of time over which those funds were laundered and the thousands of deposits and cheques used by Mr. Kazman to effect that laundering of the proceeds, in my view

this is a significant aggravating factor. Furthermore, I must consider the fact that these offences were committed for the benefit of a criminal organization which is a statutory aggravating factor also of significant importance.

492 Mr. Litkowski's submission that Mr. Kazman should serve a sentence of two years concurrent on the five fraud convictions and one year concurrent on the money laundering conviction would clearly be an unfit sentence. There is absolutely no reason why Mr. Kazman's sentence should be so far out of the lower end of the range.

493 I have also considered the general aggravating and mitigating circumstances I have already referred to. In my view the Crown's position that Mr. Kazman should serve a sentence of five years on his five convictions for fraud to run concurrently and one year concurrent on his conviction of money laundering is very reasonable.

494 As for Mr. Kazman's conviction on Count 7; the criminal organization conviction, in my view the Crown's submission that the sentence of two years, which is required to be consecutive, pursuant to s. 467.14 of the *Code* is also reasonable and well within the range of the cases I have been referred to.

495 If I decide to impose the sentence requested by the Crown, I have to consider the totality of that sentence, including the restitution order that I have decided to make, that I will come to. I have concluded, considering all of the circumstances of these frauds and the money laundering and Mr. Kazman's role in the criminal organization, as well as the cases I have referred to that even as a first offender, a total sentence of seven years does not offend the totality principle and in my view it is a fit sentence for Mr. Kazman on all Counts.

Restitution

496 The Crown seeks a restitution order against Mr. Kazman in the amount of $303,613 in favour of Industry Canada[24] and $166,660 in favour of the five banks[25] as follows: RBC - $27,653, TD - $5,814; BOM - $51,172; BNS - $10,358; and CIBC - $71,663, for a total restitution order of $470,273. The Crown calculations take into account the amounts paid in restitution by Ms. Cohen and Mr. Kazman and apportion the losses equally among those found guilty of the frauds, including Ms. Cohen.

497 These numbers require adjustment given my finding that the principal outstanding is the starting number to be used and given the findings I have made with respect to the Tehrani brothers. Furthermore, I would not allocate the loss three ways for the purpose of restitution as Mr. Levy received significantly more of the fraudulent SBL proceeds. I do not propose to do a detailed calculation; however, as I have concluded that I should not impose the full amount requested by the Crown for restitution for the reasons that follow.

498 In my view a restitution order is appropriate in this case, in addition to the sentence that I have already decided to impose for the same reasons I have imposed one for the Tehrani brothers. Although I have given Mr. Kazman some credit for making some restitution it was a

paltry amount compared to how much he profited from these frauds. Making further restitution makes him responsible to his victims.

499 I have considered the factors established by the Supreme Court of Canada in *Zelensky*. In particular, I should exercise restraint and caution in making a restitution order. I must consider Mr. Kazman's financial circumstances and his ability to pay this order. Any order I impose should not affect the prospects for Mr. Kazman's rehabilitation. He is 62 years old and he is facing a lengthy sentence and so any income he can be expected to earn will only be for a few years. I appreciate that having a criminal record with these convictions for fraud, money laundering and being a member of a criminal organization will make that much more difficult and certainly Mr. Kazman will not be able to work even as a paralegal but he is clearly a smart and resourceful man.

500 The more difficult question is whether or not Mr. Kazman has satisfied me that he is in fact impecunious. The Crown does not dispute that Mr. Kazman is on social assistance but does not accept the suggestion that Mr. Kazman has no assets. As I have already set out, after what was a very thorough *Rowbotham* hearing Mr. Kazman did not persuade Justice Clark that he was indigent and at para. 35 of his decision Justice Clark concluded "to say that Mr. Kazman's financial situation is murky is to indulge in understatement. On the basis of what has been put before me, I am not satisfied that Mr. Kazman is, in fact, impecunious."

501 Mr. Kazman was self-represented during the trial and so it cannot be said that he exhausted any assets he had on legal fees. He filed even less evidence before me of his assets. Unlike the Tehrani brothers, Mr. Kazman filed no affidavit before me or any other evidence of his financial situation. I have just a copy of a T5007 Statement of Benefits setting out his social assistance payments for 2016 totaling just under $10,000 and the submissions of Mr. Litkowski that Mr. Kazman has no assets.

502 I accept the fact that some or all of the properties Mr. Kazman owned at the time the fraud was discovered were sold by way of power of sale proceedings as that is reflected in the evidence at trial and I accept that as a result Mr. Kazman likely did not receive any proceeds from those sales. He did, however, purchase and sell a significant number of properties during the course of the period of time covered by the Indictment. Mr. Litkowski argued that Mr. Kazman did not actually profit from these sales but I do not believe that.

503 The only evidence before me in support of Mr. Kazman's position is copies of the various ledger statements for properties sold by Mr. Kazman which Mr. Litkowski submits shows that Mr. Kazman did not receive much in the way of proceeds from the sale of these properties. I note that those only deal with a few of the properties sold by Mr. Kazman and as Justice Clark found, the claim, for example, with respect to 3042 Keele, is dubious. These properties were all sold at a profit and it is impossible to believe that Mr. Kazman did not profit.

504 Furthermore, there is no accounting for the cash Mr. Kazman received from the frauds through various companies that he owned. I have no evidence as to what the status of any of those companies is or their assets. In short I do not have much more than a bald assertion that Mr. Kazman cannot pay any restitution order.

505 As the Court of Appeal said in *Castro,* at para. 34, there is no reason why I should accept Mr. Kazman's "bald assertion that he ... has no ability to make restitution because the money "is gone" when no evidence is proffered in support of this assertion." The offender asserting he has no ability to make restitution is in the best position to provide "transparency concerning what has happened to that money. A bald assertion that the money is gone should be given no weight."

506 Considering all of the circumstances, I have concluded that Mr. Kazman should make restitution in the amount of $300,000. Counsel agreed that this will be a free-standing order and that I have no jurisdiction to order terms for payment.

Fine in Lieu of Forfeiture

507 As already stated the Crown also seeks a fine in lieu of forfeiture against Mr. Kazman in the amount of $850,161. This number was arrived at following a detailed calculation[26] that Mr. Litkowski took no issue with. Rather than looking at how to allocate the losses, this calculation looks at how the fraudulent SBL proceeds were distributed and takes the findings of fact that I made in my Judgment into account as to who was in control of the various companies that received the fraudulent SBL proceeds.

508 As I have already stated, in my view even though Mr. Kazman was never in control of a borrowing company that directly received the fraudulent SBL proceeds from a bank, given how the criminal organization worked, he was in control along with Mr. Levy and Ms. Cohen when those fraudulent SBL proceeds were then paid to what I found to be a sham construction company and then laundered to the various companies he and Mr. Levy and Ms. Cohen owned. As such Mr. Kazman was in possession and control of the total fraudulent SBL proceeds of all of the fraudulent SBLs I found him guilty of.

509 The Crown's calculations are based on the Coort Analysis and I have gone back to that. What I realized is that the Crown's calculations include payments to the sham construction companies and companies owned by Mr. Kazman that exceed the fraudulent SBL proceeds. For example, the Crown is correct that with respect to ELI, Eastern Contracting received two payments; $88,510 and $117,021 and Mr. Kazman's company Cramarossa Design and Renos received $40,000. However, the total SBL proceeds were only $153,000. Setting aside whatever minor adjustment might be required if principal payments were made, clearly some of the money the Crown relies upon in support of the fine it seeks was circulation of the $100,000 that was advanced to ELI from an unknown source at the time of startup. As Mr. Coort noted, the $205,531 paid to Eastern Contracting represented more than the SBL proceeds and 81.2% of this "seed" money.

510 In my view the fine in lieu of forfeiture must be based only on the fraudulent SBL proceeds received by the sham construction companies or other companies owned by one of Messrs. Kazman and Levy. In other words the gross fine with respect to the frauds that Mr. Kazman was convicted of would be about $1.5 million which Mr. Litkowski conceded was the value of the SBLs for the counts Mr. Kazman was found guilty of. From that amount, the amount I have ordered for a fine in lieu of forfeiture with respect to the Tehrani brothers for Alta and Kube,

which totals $45,683 must be deducted. The balance of $1.45 million must be split equally between Messrs. Kazman and Levy and Ms. Cohen, given my conclusion that they were equally personally morally culpable for these frauds.

511 On this basis in my view the total fine in lieu of forfeiture I shall order to be paid by Mr. Kazman is $483,334. Pursuant to s. 462.37(3)(vi) in default of payment, Mr. Kazman shall be imprisoned for a term of four years which shall be served consecutively to any sentence that he is serving. I am prepared to hear submissions as to how long I should give Mr. Kazman to pay this fine.

Gad Levy

Length of Sentence

512 The five counts of fraud that I convicted Mr. Levy of involved 12 SBLs; Count 1 as it relates to ELFI, CDI, Uzeem and Homelife; Count 2 as it relates to ELI; Count 3 as it relates to LHC and Modernito; Count 4 as it relates to LSC and Contempo; and Count 5 as it relates to Alta, Kube and Bluerock. The total amount of the SBL proceeds for these 12 SBLs is almost $2.3 million.

513 I have already set out my findings of fact as to Mr. Levy's role in these frauds. I have also already set out my reasons for finding that Mr. Kazman and Mr. Levy were equally morally responsible for these frauds, the money laundering and the creation of the criminal organization that allowed it all to happen. As I have said, what distinguishes Mr. Levy is that he received the largest share of the spoils, more than Mr. Kazman and Ms. Cohen and after his relationship with Mr. Kazman broke down, he continued the fraudulent scheme on his own with respect to Uzeem, Homelife and Bluerock. The Bluerock fraud in particular was brazen and the largest individual fraud of them all by a significant margin. To that extent Mr. Levy's sentence must be more severe.

514 Another aggravating factor in this case that demonstrates how far Mr. Levy is prepared to go even when what he is doing is improper, there is the evidence I accepted at trial that he attempted to interfere with the evidence of Mr. M. Tehrani. I say this is an aggravating factor because it gives me a great deal of concern that Mr. Levy would not hesitate to re-offend if the opportunity presented itself.

515 I did hear mixed views about Mr. Levy's character from witnesses I heard at trial. I am prepared to accept that generally he had a positive reputation in the community but some definitely had a very different view. Unlike Mr. Kazman I do not have any character reference letters filed on behalf of Mr. Levy. I did hear the evidence from his wife, Karen Levy, and it seems that Mr. Levy is a good husband and father to his children but as I have repeatedly said, that is typical of fraud cases. The only other mitigating factor is that like the other defendants Mr. Levy has no criminal record but again that is typical of the fraud cases I have reviewed.

516 In terms of aggravating factors, the Crown submits that Mr. Levy, like Mr. Kazman not only did not express any remorse, they have both made baseless allegations against other which demonstrates their lack of insight into their fraudulent conduct. They have tried to blame the

RCMP, the Crowns and others as conspiring against them. Mr. Levy was the most vocal about this during the trial and he repeatedly told me that he was the "victim" in this case because he has lost everything. He repeated this theme when he spoke to me after the sentencing submissions were complete. If in fact Mr. Levy has lost everything, which the Crown disputes, it was as a result of being caught, as a result of his role in this fraud scheme.

517 I have already given my reasons for why I accept the Crown's position that the *Khatchatourov* case is the closest case factually to the case at bar and why the facts of the case at bar would suggest a stiffer sentence for Mr. Kazman and particularly Mr. Levy. Mr. Levy was involved in three more fraudulent SBLs than Mr. Kazman and those he orchestrated on his own save for Uzeem where I also found Mr. M. Tehrani guilty. The total amount of the SBL proceeds for these 12 SBLs is almost $2.3 million, $800,000 more than the total of the fraudulent SBLs he orchestrated with Mr. Kazman and Ms. Cohen.

518 Mr. Worsoff's submission that Mr. Levy's penitentiary sentence be in the range of two and a half years in total; two years for the frauds, one year concurrent on the money laundering and six months consecutive on the criminal organization conviction is clearly well outside what, on any view of the case law, would be a proper sentence. To suggest that Mr. Levy and Mr. M. Tehrani were equally culpable is not a serious submission. Like Mr. Kazman, and with even more force, there is absolutely no reason why Mr. Levy's sentence should be so far out of the lower end of the range of sentence for large scale frauds. Furthermore, considering all of the mitigating and aggravating circumstances, there is good reason to fix his sentence above the typical range given all of the circumstances of this case.

519 For these reasons in my view the Crown's position that Mr. Levy should serve a sentence of six years on his five convictions for fraud to run concurrently and one year, concurrent on his conviction of money laundering is very reasonable. As for Mr. Levy's conviction on Count 7; the criminal organization conviction, in my view the Crown's submission that the sentence of two years, which is required to be consecutive, pursuant to s. 467.14 of the *Code* is also reasonable and well within the range of the cases I have been referred to. There is no reason why on this count Mr. Levy's sentence should be lower or higher than Mr. Kazman's sentence. This would bring Mr. Levy's total sentence to eight years.

520 If I decide to impose the sentence requested by the Crown, I have to consider the totality of that sentence, including the restitution order that I have decided to make, that I will come to. I have concluded, considering all of the circumstances of these frauds and the money laundering and Mr. Levy's role in the criminal organization and these frauds, as well as the additional three fraudulent SBLs that I found he was involved in and the cases that I have referred to that even as a first offender, a total sentence of eight years does not offend the totality principle and in my view it is a fit sentence for Mr. Levy on all Counts.

Restitution

521 The Crown seeks a restitution order against Mr. Levy in the amount of $566,185 in favour of Industry Canada[27] and $566,834[28] in favour of the five banks as follows: RBC - $27,653, TD - $5,814; BOM - $51,172; BNS - $60,582; and CIBC - $421,663, for a total restitution order of

$1,133,019. The Crown calculations apportion the losses equally among those found guilty of the various frauds, including Ms. Cohen.

522 As I have already said, these numbers require some relatively minor adjustments and I must consider the fact that Mr. Levy received significantly more of the fraudulent SBL proceeds than Mr. Kazman and Ms. Cohen and the Tehrani brothers. I would not allocate the loss three ways for the purpose of restitution. As I said with Mr. Kazman, I do not propose to do a detailed calculation as I have concluded that I should not impose the full amount requested by the Crown for restitution for the reasons that follow. I am satisfied that the amount I have decided to impose is well within the amount the Crown could seek.

523 In my view a restitution order is appropriate in this case, in addition to the sentence that I have already decided to impose for the same reasons I have imposed one for the Tehrani brothers and Mr. Kazman. Mr. Levy has not paid a single dollar in restitution and so requiring him to do so, given the amount of profit he received from these frauds, will make him responsible for some restitution to his victims.

524 As I have done for the other defendants, I have considered the factors established by the Supreme Court of Canada in *Zelensky*. In particular, I should exercise restraint and caution in making a restitution order. I must consider Mr. Levy's financial circumstances and his ability to pay this order. Any order I impose should not affect the prospects for Mr. Levy's rehabilitation. Mr. Levy is only 51 years old and although he is facing a lengthy sentence upon his release, he can be expected to make a living for a number of years; as many as 15. As I have said with respect to Mr. Kazman, that will be more difficult with his convictions for fraud, money laundering and being a member of a criminal organization but he too is clearly a smart and resourceful man.

525 The Crown alleges that Mr. Levy is not impecunious. The only evidence I have on that subject is the evidence from Ms. Levy but she did not bring any documents to support her position save for notices of eviction hearings. The fact that she testified that the family qualified for support in the amount of $1,000 which they refused, does suggest they are not as destitute as she suggested.

526 Like Mr. Kazman, Mr. Levy was self-represented during the trial and so it cannot be said that he exhausted any assets he had on legal fees. I have no sworn evidence from Mr. Levy or any supporting documents despite his being given ample opportunity to do so. He has had counsel since January 4, 2018 and the law is clear that there is an onus on a defendant to establish that he has an inability to pay restitution.

527 Like Mr. Kazman there is no accounting for the significant amount of cash Mr. Levy received from the frauds through various companies that he owned. I have no evidence as to what the status of any of those companies is or their assets. I accept the fact that the properties Mr. Levy owned at the time the fraud was discovered were sold by way of power of sale proceedings as that is reflected in the evidence at trial and I accept that as a result Mr. Levy likely did not receive any proceeds from those sales.

528 Like Mr. Kazman, based on the evidence at trial, Mr. Levy, through his various companies purchased, renovated and sold properties for substantial profits. I have no accounting as to what happened to that money. I checked the copies of the various ledger statements for properties sold by Mr. Kazman which Mr. Litkowski provided but they do not show payments to Mr. Levy and in any event are for only three properties.

529 In short I do not have much more than a bald assertion that Mr. Levy cannot pay any restitution order. For the reasons expressed in connection with Mr. Kazman, in reliance on *Castro,* at para. 34, there is no reason why I should accept Mr. Levy's "bald assertion" that he has no ability to make restitution because the money "is gone" when no evidence is proffered in support of this assertion. He was in the best position to explain what happened to all of the money he made as a result of the frauds.

530 Considering all of the circumstances, I have concluded that Mr. Levy should make restitution in the amount of $725,000. Counsel agreed that this will be a free-standing order and that I have no jurisdiction to order terms for payment.

Fine in Lieu of Forfeiture

531 As already stated, the Crown also seeks a fine in lieu of forfeiture against Mr. Levy in the amount of $1,906,991 with respect to the 12 fraudulent SBLs that I convicted Mr. Levy of. As I have already explained, in my view I have no jurisdiction to increase the fine by any amount I might find Mr. Levy profited on the basis of properties purchased and/or renovated with fraudulent SBL proceeds.

532 This number was arrived at following a detailed calculation[29] that Mr. Worsoff took no issue with. It was calculated in the same way as the number was calculated for Mr. Kazman and I have the same concerns, save for Bluerock to the extent the amount claimed is limited to the SBL proceeds from that loan. Because the same approach was used for Mr. Levy, I have the same concerns that I expressed with respect to the fine calculation for Mr. Kazman.

533 In my view the fine in lieu of forfeiture must be based only on the fraudulent SBL proceeds received by the sham construction companies or other companies owned by one of Messrs. Kazman and Levy and then for the additional three fraudulent SBLs, by Mr. Levy. In other words the gross fine with respect to the frauds that Mr. Levy was convicted of would be about $2.3 million. In my view of the first $1.45 million of this fraud, Mr. Levy's fine should be the same amount as Mr. Kazman of $483,334. In addition to that amount Mr. Levy's share of the additional $700,000 that his fraud exceeded Mr. Kazman's total fraud must be added. For those frauds; Homelife, Uzeem and Bluerock, Mr. Levy is responsible for the full amount less the fine I have apportioned to Mr. M. Tehrani of $30,509, i.e. $669,491.

534 On this basis in my view the total fine in lieu of forfeiture I shall order to be paid by Mr. Levy is $1,152,825. Pursuant to s. 462.37(3)(vi) in default of payment, Mr. Levy shall be imprisoned for a term of six years which shall be served consecutively to any sentence that he is serving. I am prepared to hear submissions as to how long I should give Mr. Levy to pay this fine.

Final Disposition

Madjid Vaez Tehrani

535 Mr. Madjid Vaez Tehrani, please stand.

536 On your conviction of Count 1 in connection with Uzeem, I sentence you to incarceration for a period of two years.

537 On your conviction of Count 5 in connection with Kube, I sentence you to incarceration for a period of two years, which sentence shall run concurrently to your sentence on Count 1.

538 Following completion of your sentence, you will be placed on probation for a period of three years. In addition to the compulsory conditions of this probation order, provided for by section 732.1(2) of the *Criminal Code*, the additional conditions of the order pursuant to s. 732.1(3) of the *Code* are as follows:

(a) Report within 2 working days of your release, in person, to a probation officer and thereafter as required by the probation officer;

(b) Make reasonable efforts to find and maintain suitable employment and/or upgrade your employment skills and provide progress reports to your probation officer as directed;

(c) Do not have any contact with, or be in the company of, or associate with directly or indirectly with Marshall Kazman or Gad Levy;

(d) Do not have in your possession any instruments of credit that are not in your own personal name;

(e) Do not apply for any small business loans from or through any financial institutions that are administered by the Government of Canada's Canada Small Business Financing Program through Innovation, Science and Economic Development Canada or any other government program;

(f) Do not do any banking with the Bank of Nova Scotia or the Canadian Imperial Bank of Commerce; and

(g) Do not conduct any business or apply for any business loans with Ali Vaez Tehrani.

539 In addition there will be a restitution order pursuant to s. 738(1) directing that you pay the amount of $70,000 to the benefit of Industry Canada, CIBC and the BNS. This amount may be paid in installments in an amount to be determined per month. I ask that counsel agree to the form of a free-standing restitution order that will set out these terms and how payments are to be apportioned as between Industry Canada and the banks.

540 Finally, I make an order for a fine in lieu of forfeiture pursuant to s. 462.37(3) in the amount of $42,138. In considering your financial circumstances I am prepared to give you time to pay

this fine after release from incarceration as I determine is reasonable in all the circumstances. In default of payment of the fine, you shall be imprisoned for a term of 16 months consecutive to your other terms of imprisonment in accordance with s. 462.37(4)(a)(iii).

Ali Vaez Tehrani

541 Mr. Ali Vaez Tehrani would you please stand.

542 With respect to the conviction on Count 5 in connection with Alta, I sentence you to incarceration for a period of 14 months.

543 Following completion of your sentence, you will be placed on probation for a period of three years. In addition to the compulsory conditions of this probation order, provided for by section 732.1(2) of the *Criminal Code*, the additional conditions of the order pursuant to s. 732.1(3) of the *Code* are as follows:

(a) Report within 2 working days of your release, in person, to a probation officer and thereafter as required by the probation officer;

(b) Unless you are receiving Ontario Disability Support Payments, make reasonable efforts to find and maintain suitable employment and/or upgrade your employment skills and provide progress reports to your probation officer as directed;

(c) Do not have any contact with, or be in the company of, or associate with directly or indirectly with Marshall Kazman or Gad Levy;

(d) Do not have in your possession any instruments of credit that are not in your own personal name;

(e) Do not apply for any small business loans from or through any financial institutions that are administered by the Government of Canada's Canada Small Business Financing Program through Innovation, Science and Economic Development Canada or any other government program;

(f) Do not do any banking with the Canadian Imperial Bank of Commerce; and

(g) Do not conduct any business or apply for any business loans with Madjid Vaez Tehrani.

544 In addition there will be a restitution order pursuant to s. 738(1) directing that you pay the amount of $30,000 to the benefit of CIBC. This amount may be paid in installments in an amount to be determined per month. I ask that counsel agree to the form of a free-standing restitution order that will set out these terms.

545 Finally, I make an order for a fine in lieu of forfeiture pursuant to s. 462.37(3) in the amount of $34,054. I am prepared to give you time to pay this fine after release from incarceration as I determine is reasonable in all the circumstances. In default of payment of the fine, you shall be imprisoned for a term of 14 months consecutive to your other terms of imprisonment in accordance with s. 462.37(4)(a)(iii).

546 Mr. Madjid Vaez Tehrani and Mr. Ali Vaez Tehrani, a copy of the Probation Order will be given to you by the court officials. Please pay very careful attention to all of these conditions. Seek advice of your counsel if you have any questions or need to make any changes to the terms. I must tell you that breach of any of these conditions will be taken very seriously by this Court. You must appreciate that further incarceration will likely result if any of the conditions of your probation are breached.

Marshall Kazman

547 With respect to the conviction on Count 1 as it relates to ELFI and CDI, I sentence you to incarceration for a period of five years.

548 With respect to the conviction on Count 2 as it relates to ELI, I sentence you to incarceration for a period of five years, which sentence shall run concurrently to your sentence on Count 1.

549 With respect to the conviction on Count 3 as it relates to LHC and Modernito, I sentence you to incarceration for a period of five years, which sentence shall run concurrently to your sentence on Count 1.

550 With respect to the conviction on Count 4, as it relates to LSC and Contempo, I sentence you to incarceration for a period of five years, which sentence shall run concurrently to your sentence on Count 1.

551 With respect to the conviction on Count 5, as it relates to Alta and Kube, I sentence you to incarceration for a period of five years, which sentence shall run concurrently to your sentence on Count 1.

552 With respect to the conviction on Count 6, I sentence you to incarceration for a period of one year, which sentence shall run concurrently to your sentence on Count 1.

553 With respect to the conviction on Count 7, I sentence you to incarceration for a period of two years, which sentence shall run consecutively to your sentence on Count 1.

554 Accordingly your total period of incarceration shall be seven years.

555 In addition there will be a restitution order pursuant to s. 738(1) directing that you pay the amount of $300,000 to the benefit of Industry Canada, the BNS, TD, BOM, RBC and CIBC. I ask that counsel agree to the form of a free-standing restitution order that will set out these terms and how payments are to be apportioned as between Industry Canada and the banks.

556 Finally, I make an order for a fine in lieu of forfeiture pursuant to s. 462.37(3) in the amount of $483,334. I am prepared to give you time to pay this fine after release from incarceration as I determine is reasonable in all the circumstances. In default of payment of the fine, you shall be

imprisoned for a term of four years consecutive to your other terms of imprisonment in accordance with s. 462.37(4)(a)(vi).

Gad Levy

557 Mr. Gad Levy would you please stand.

558 With respect to the conviction on Count 1 as it relates to ELFI, CDI, Homelife and Uzeem, I sentence you to incarceration for a period of six years.

559 With respect to the conviction on Count 2 as it relates to ELI, I sentence you to incarceration for a period of six years, which sentence shall run concurrently to your sentence on Count 1.

560 With respect to the conviction on Count 3 as it relates to LHC and Modernito, I sentence you to incarceration for a period of six years, which sentence shall run concurrently to your sentence on Count 1.

561 With respect to the conviction on Count 4, as it relates to LSC and Contempo, I sentence you to incarceration for a period of six years, which sentence shall run concurrently to your sentence on Count 1.

562 With respect to the conviction on Count 5, as it relates to Alta, Kube and Bluerock, I sentence you to incarceration for a period of six years, which sentence shall run concurrently to your sentence on Count 1.

563 With respect to the conviction on Count 6, I sentence you to incarceration for a period of one year, which sentence shall run concurrently to your sentence on Count 1.

564 With respect to the conviction on Count 7, I sentence you to incarceration for a period of two years, which sentence shall run consecutively to your sentence on Count 1.

565 Accordingly your total period of incarceration shall be eight years.

566 In addition there will be a restitution order pursuant to s. 738(1) directing that you pay the amount of $725,000 to the benefit of Industry Canada, the BNS, TD, BOM, RBC and CIBC. I ask that counsel agree to the form of a free-standing restitution order that will set out these terms and how payments are to be apportioned as between Industry Canada and the banks.

567 Finally, I make an order for a fine in lieu of forfeiture pursuant to s. 462.37(3) in the amount of $1,152,825. I am prepared to give you time to pay this fine after release from incarceration as I determine is reasonable in all the circumstances. In default of payment of the fine, you shall be imprisoned for a term of six years consecutive to your other terms of imprisonment in accordance with s. 462.37(4)(a)(vi)

568 With respect to each of the restitution orders I have made, they shall take priority over

payment of the fine in lieu of forfeiture orders and the fine in lieu of forfeiture shall be reduced by any amount paid pursuant to the restitution order by the offender in question. With the exception of the restitution order and fine in lieu of forfeiture order made against Mr. A. Tehrani, Industry Canada is in first position for the receipt of any and all payments made by each defendant.

569 I ask that the Crown ensure that once I have signed the formal restitution orders that copies of these orders are given to Industry Canada and the five banks as required by s. 741.1 of the *Code*.

N.J. SPIES J.

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Appendix "A"

Chronology with Respect to Ms. Cohen's Guilty Plea

[1] The first appearance on the first indictment, which charged only Ms. Cohen and Messrs. Kazman and Levy, with respect to the four Cohen SBLs, was on July 14, 2011 in the Ontario Court of Justice. There were about 30 charges for fraud and fraud related offences and offences under the *Canada Finance Act*.

[2] The Crown's disclosure, which Mr. Rinaldi said was voluminous and complex, was made on the first and second appearance and was completed by September 2011. The defendants needed some time to understand it.

[3] On October 6, 2011, Ms. Cohen and Mr. Kazman, who had requested a meeting, met with Mr. Rinaldi and Corporal Thompson. Ms. Cohen expressed a desire to resolve the matter but Mr. Rinaldi was not prepared to discuss her case because Mr. Kazman was present. Mr. Rinaldi also stressed that they needed counsel.

[4] At the Judicial Pre-Trial (JPT) on October 26, 2011, Ms. Cohen still did not have counsel. Between November 16, 2011 and January 30, 2012, Mr. Rinaldi was still pressing Ms. Cohen and Mr. Kazman to retain counsel and Ms. Cohen still wanted to resolve the matter. Mr. Rinaldi had received copies of some releases from some of the banks and became aware of the fact that starting in 2009, Ms. Cohen had been making payments to the banks.

[5] On January 30, 2012, the first set of preliminary inquiry dates were set for October 5, 2012 to run for three weeks. On October 3, 2012, two days before the start of the preliminary hearing, Mr. Kazman and Ms. Cohen served an application to adjourn the preliminary hearing so that they could get counsel. That adjournment was granted on consent.

[6] On November 24, 2012, Pringle J. conducted a JPT for Ms. Cohen but she still did not have counsel. New preliminary hearing dates were set for September 30, 2013 for three weeks.

[7] On November 1, 2012, a second information was prepared which did not include the charges with respect to the Cohen SBLs. It included Ms. Cohen, Messrs. Kazman and Levy and the other defendants before me. They made their first appearance but there was no disclosure and the matter was adjourned to November 29, 2012. On January 18, 2013 another JPT with Pringle J. was held. The issue then was whether the two sets of charges should be joined. It was agreed that if Ms. Cohen and Messrs. Kazman and Levy waived their s. 11(b) *Charter* rights that the charges would be joined. They did so and so the two informations were joined.

[8] By February 22, 2013 the new informations were combined for all charges with all counts and all defendants in a 30-count indictment. Everyone appeared on that date in the set date court. Given the period of disclosure Mr. Rinaldi's position is that the first reasonable opportunity for Ms. Cohen to resolve the matters in the new indictment was in early 2013.

[9] On March 26, 2013 another JPT was held before Pringle J. It was decided there was no point in having the preliminary hearing proceed on September 30, 2013 and so new preliminary hearing dates were set for March 3, 2014 for a period of five weeks.

[10] JPTs continued with a further one occurring on May 10, 2013 and another on June 4, 2013. Ms. Cohen was continuing to have JPTs and by this time had hired counsel so she could resolve the matter. Three separate JPTs were held with Ms. Cohen only on December 12, 2013 and January 14 and January 24, 2014.

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Appendix "B"

Chronology with Respect to

Mr. Salehi's Guilty Plea

[1] Mr. Salehi's first appearance was on November 1, 2012 with respect to the second set of charges. The preliminary hearing began as scheduled on March 3, 2014 and carried on to the end of April 2014 when the Crown applied for a direct indictment which was issued in December 2014.

[2] The first appearance in the Superior Court of Justice (SCJ) was on May 20, 2015. The first JPT with McMahon J., who case managed this case in the SCJ, was on June 24, 2015 and thereafter they were held monthly. On July 22, 2015 McMahon J. asked the Crown to give resolution positions to all of the defendants. On September 26, 2015, Mr. Armstrong in open court set out the position of the Crown for all of the parties except for Mr. Kazman and Mr. Levy. Mr. Armstrong offered Mr. Salehi a conditional sentence and Ms. Brun advised me that that never changed after that other than the passage of time.

[3] Thereafter there were ongoing discussions with Mr. Harnett, counsel for Mr. Salehi. At that time Mr. Harnett was also representing Mr. M. Tehrani. The Crown knew before October 26, 2015 that Mr. Salehi wanted to resolve his matter and on that date Mr. Harnett stated that his

two clients would likely plead guilty. A JPT for just Mr. Salehi and Mr. M. Tehrani was set for November 16, 2015 so they could agree on the facts. It was adjourned to November 19, 2015 for Messrs. M. Tehrani and Salehi and a further JPT was held on November 18, 2015 for the rest of the defendants. On November 25, 2015 a third JPT was held for Messrs. M. Tehrani and Salehi with McMahon J. Despite three meetings in seven days the parties could not agree on the facts and the matter was put over to December 14, 2015.

[4] Mr. Salehi was not prepared to admit certain facts but once the trial began he changed his mind. Ms. Brun advised me that when she first started giving her position on resolution to Mr. Harnett, she hadn't discussed Paul Coort's final analysis. Essentially although the conditional sentence was available as an offer for some time, once she and Mr. Harnett fully digested Mr. Coort's final analysis, information came to light for both sides that allowed resolution. As a result, Ms. Brun advised me that the facts Mr. Salehi had to admit had become easier for him to accept.

[5] Mr. Salehi's plea discussions began again early after the trial started on September 12, 2016 and continued as the trial progressed. Early on in the trial I granted Mr. Salehi's motion to allow him to not attend court every day because of the extraordinary circumstances I was aware of with respect to his son. As Ms. Brun submitted, this was an extraordinary remedy to allow Mr. Salehi to not physically attend the entire trial. Ms. Brun also advised that it was difficult for Mr. Harnett to have discussions with Mr. Salehi and that it took six weeks to work out the agreed statement of facts even though there were almost daily discussions between Ms. Brun and Mr. Harnett.

[6] Ms. Brun advised that the Crown offered Mr. Salehi a conditional sentence to avoid a long, complex trial. She referred to *R. v. Dieckmann*, *2014 ONSC 717*; affirmed *2017 ONCA 575*, in support of her submission that this was a huge mitigating factor in that Mr. Salehi did not have to participate in the trial.

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1 All references in this decision to Mr. Levy are references to Gad Levy.

2 I will continue to refer to Industry Canada as that is the name of this government entity used during the trial.

3 All dollar amounts in this judgment exclude cents and where there are cents in the original number the dollar amount has been rounded to the closest dollar.

4 I note that Baltman J. considered the 2011 amendment; s. 380(1.1), but the frauds occurred between 2002 and 2006 and so it did not in fact apply.

5 The Crown did not rely on subsections 462.37(2.01) -- (2.07).

6 Ex.1.

7 Ex. 9.

8 Ex.10.

9 Ex. 20 and 21.

10 Ex. 13, Tab 5.

11 Based on Ex. 1

12 Based on Ex. 23.

13 Based on Ex. 1.

14 Ex. 22 and 23.

15 I am going to round all amounts to the nearest dollar.

16 Based on Ex. 1.

17 Based on Ex. 22 and 23.

18 Ex. 1.

19 Ex. 6.

20 Ex. 8.

21 Ex. 9

22 Ex. 1.

23 Ex. 1.

24 Ex. 6.

25 Ex. 8.

26 Ex. 9.

27 Ex. 22.

28 Ex. 23.

29 Ex. 21.

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