ONTARIO COURT OF JUSTICE

CITATION: *R. v. Lawrence,* 2017 ONCJ 66
DATE: February 2, 2017
COURT FILE No.: Ottawa 15-20002

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

LESTON EVRIS LAWRENCE

Before Justice P. K. Doody
Heard on Jan. 25, 2017
Reasons for Sentence released on Feb. 2, 2017

David Friesen.....counsel for the Crown
Gary Barnes..... counsel for the accused

DOODY J.:

[1] On November 9, 2016, after a trial, I found the defendant guilty of the following charges:

(a) stealing gold from the Mint;

(b) conveying gold out of the Mint;

(c) having in his possession gold knowing it to have been obtained by the commission of an indictable offence;

(d) disposing of gold or proceeds of gold with intent to convert the gold or proceeds knowing it to have been obtained or derived by the commission of an indictable offence; and

(e) committing a breach of trust in connection with the duties of his public office contrary to s. 334, s. 459, s. 354(1)(a), s. 462.31(1)(a) and s.122 of the *Criminal Code*, respectively.

Part 1: The offences

[2] At the time of the offences, Mr. Lawrence had been employed at the Royal Canadian Mint for 7 years. His job required him to melt down bulk gold, jewelry, and other items containing gold and remove its impurities. He worked alone for much of the time. He was required to ladle out some of the molten gold when he thought it was 99.5% pure gold and test the cooled and hardened "puck" for purity. Instead of returning all of the pucks to the vat of molten metal, he kept 22 pucks and secreted them out of the Mint.

[3] The security system at the Mint had a number of gaps. Mr. Lawrence took advantage of those gaps on 22 separate occasions.

[4] While cameras recorded activity on the refinery floor, there were many places which the cameras did not show. Mr. Lawrence did much of his work in these "blind spots".

[5] To leave the refinery, he had to pass through a metal detection system. That system had weaknesses. Mr. Lawrence exploited those weaknesses by secreting the pucks in his rectum, thereby evading detection by hand-held metal detector wands used by security guards after he had set off the more sensitive archway he had initially walked through. The system, presumably concerned with the propriety of searching employees, was designed to waive through those who failed the archway detector but passed the weaker hand-held wands.

[6] Mr. Lawrence sold 18 of the pucks to Ottawa Gold Buyers, a business which purchases jewelry and other gold from consumers, between Nov. 27, 2014 and May 9, 2015. He received cheques from Ottawa Gold Buyers totalling $138,172.46. One of those cheques, in the amount of $7,966.27, was not cashed because the puck sold was seized by the RCMP and a stop payment put on the cheque. The amount of money received by Mr. Lawrence was, therefore, $130,206.19.

[7] 4 pucks were seized from Mr. Lawrence's safety deposit box. Had Mr. Lawrence been able to sell those pucks at the same rate as the others, he would have received at least $27,278.68.

[8] Consequently, had he been able to sell all the pucks, he would have received $165,451.14.

[9] The market value of the pucks was higher. Evidence at trial established that Mr. Lawrence was paid 70 to 80 percent of the market rate for pure refined gold. The market value of the stolen gold was thus between $206,813.93 and $236,358.77.

[10] Accounting evidence introduced at trial showed that Mr. Lawrence transferred a total of $32,559.91 to Jamaica to purchase a lot and home to be constructed (or perhaps a half interest in the lot and home) and $33,760.38 to the United States to purchase a half interest in a boat. He also wired $9,500 jointly to himself and "Marvin Lawrence" in Grenada. The balance of the funds were taken out of his account by cash withdrawals of $41,502, payments to credit cards and various purchases.

Part 2: The offender

[11] Mr. Lawrence is 35 years of age. He worked at the Mint for 7 years, earning between $50,000 and $60,000 in his last three full calendar years of employment. He lost his job in March 2015 after being charged with these offences. Since then, he has operated a small business in Ottawa repairing damaged windshields in cars and trucks.

[12] He has no criminal record.

[13] Mr. Lawrence's counsel has indicated that attempts are being made to make restitution. Mr. Lawrence's home in Ottawa was listed earlier this month and an agreement of purchase and sale was entered into on January 19, 2017. It is conditional on the purchaser obtaining financing. It has a closing date of March 30, 2017. After deduction of funds due on a mortgage and realtor's fees, that sale, if it goes through, will produce about $20,000 which the court has been advised will be available for restitution. The court was also advised that Mr. Lawrence is attempting to extricate his funds from the Jamaica builder and liquidate his interest in the partnership which owned the boat in the United States and used it to operate a business, but was having difficulty doing so.

[14] Despite these efforts, nothing has been paid by way of restitution.

Part 3: *Res judicata* – the *Kienapple* principle

(a) General principles

[15] Mr. Lawrence has been found guilty of 5 offences, all as a result of his having taken gold from the Mint to which he was not entitled. Where the same transaction gives rise to two or more offences with substantially the same elements and an accused is found guilty of more than one, the offender should be convicted of only the most serious. The other charges should be stayed. (*R. v. Kienapple*, [1975] 1 S.C.R. 729, *R. v. R.K.* (2005), 198 C.C.C. (3d) 232 (C.A.))

[16] As Chief Justice Dickson of the Supreme Court of Canada held in *R. v. Prince*, [1986] 2 S.C.R. 480:

> [T]he Canadian courts have long been concerned to see that multiple convictions are not without good reason heaped on an accused in respect of a single criminal delict.

[17] The *Kienapple* rule precludes multiple convictions for different offences only where there is both a factual and legal nexus connecting the offences. The factual nexus is established where the charges arise out of the same transactions. The legal nexus exists if the offences constitute a single wrong or delict. (*Prince*)

(b) Application of the principles

(i) Theft and conveying gold from the Mint

[18] The charges are worded thus:

> 2. Leston Lawrence between November 27, 2014 and March 12, 2015 … without lawful justification or excuse, did convey out of the Royal Canadian Mint metal, gold, contrary to section 459 of the Criminal Code.
>
> 3. Leston Lawrence between November 27, 2014 and March 12, 2015 … did steal gold, the property of the Royal Canadian Mint, of a value exceeding five thousand dollars contrary to section 334 of the Criminal Code.

[19] The provisions of the *Criminal Code* in respect of the two offences are as follows:

> 459. Every one who, without lawful justification or excuse, the proof of which lies upon him, knowingly conveys out of any of Her Majesty's mints in Canada,
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> …
>
> (c) coin, bullion, metal or a mixture of metals,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.
>
> 322. (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,
>
> (a) to deprive, temporarily or absolutely, the owner of it … of his property … in it

[20] Crown counsel submits that convictions for both theft and taking gold from the Mint are appropriate, because, while they arise from the same transaction, they involve different delicts and have a different legal nexus. They are found in different parts of the *Criminal Code* – theft in Part IX, dealing with rights of property and conveying gold out of the Mint in Part XII, dealing with offences relating to currency. Furthermore, it is submitted, they have different maximum sentences – fourteen years for conveying gold from the Mint, and ten years for theft over $5,000.

[21] I am not convinced.

[22] It is clear to me that there is a factual nexus between the two offences. As Cory J. put it in *Prince* at para. 20, that question is resolved by an affirmative answer to the question of whether the same act of the accused grounds each of the charges. Clearly, in this case, the answer is yes. Both arise out of Mr. Lawrence removing gold from the Mint, which he did not own, without lawful excuse (or, as the definition of theft puts it in s. 322, "without colour of right").

[23] The issue, then, is whether there is an additional and distinguishing element which goes to guilt in one of these offences – whether there is a "legal nexus".

[24] The offence created by s. 459, as charged in the information before the court, is a particularization of the offence of theft. The Supreme Court of Canada held at paragraph 36 of *Prince* that convictions for two offences may be barred by the *Kienapple* principle where one is a particularization of the other – as the Court held in *R.*

v. Krug, [1985] 2 S.C.R. 255 in ruling that convictions could not be upheld for both using a firearm in the commission of an indictable offence and unlawfully pointing a firearm. To put it another way, a distinct legal nexus is not created simply because one offence is only a particular way in which the other offence could be committed.

[25] Doherty J.A. wrote on behalf of the Court of Appeal in *R.K.*:

> **35** I stress that Dickson C.J.C. referred to an "additional and distinguishing element". Not every difference in the elements of the offences will preclude the *Kienapple* rule. Indeed, if the elements of the offences are identical or if the elements of one offence are all included in the other offence, the pleas of autrefois convict or autrefois acquit will apply and there is no need to resort to the *Kienapple* rule.
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> **36** When will it be said that there are no "additional and distinguishing elements" between offences? As indicated in *Prince* at pp. 49-50, there can be "no precise answer" to this question. The sufficiency of the legal nexus between offences will depend on an interpretation of the statutory provisions that create the offences and the application of those statutory definitions to the circumstances of the case.
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> **37** In *Prince* at pp. 49-51, Dickson C.J.C. provided guidance as to the situations in which there will be a sufficient legal nexus to justify the application of the *Kienapple* rule. He described three categories of cases where the legal nexus between offences will be established. I need not repeat those categories here. In essence, each presents a situation in which the offences charged do not describe different criminal wrongs, but instead describe different ways of committing the same criminal wrong.
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> **38** Dickson C.J.C. in *Prince* at pp. 51-54 further elucidated the legal nexus inquiry by referring to three factors that will defeat any claim that different offences have a sufficient legal nexus to warrant the application of the *Kienapple* rule. These factors do bear repeating in these reasons. First, where the offences are designed to protect different societal interests, convictions for both offences will not offend the *Kienapple* rule. Second, where the offences allege personal violence against different victims, *Kienapple* will not foreclose convictions for offences relating to each victim. Third, where the offences proscribe different consequences, the *Kienapple* rule will not bar multiple convictions.
>
> **39** I think the three factors identified in Prince as severing any possible legal nexus between offences provide further support for the view that the crucial distinction for the purposes of the application of *Kienapple* rule is between different wrongs and the same wrong committed in different ways. If the offences target different societal interests, different victims, or prohibit different consequences, it cannot be said that the distinctions between the offences amount to nothing more than a different way of committing the same wrong.

[26] In my view, the offence of conveying gold from the Mint without lawful excuse is simply a particularization of the offence of theft – taking another's property without colour of right. It does not target a different societal interest – it simply increases the penalty for theft where the property stolen was gold and the owner was one of Her Majesty's mints. There is a sufficient legal nexus between the two offences. Convictions cannot stand for both.

[27] Crown counsel submitted that if I concluded that one of these two offences should be stayed, the conveying gold out of the Mint charge should remain. A conditional stay will be entered in respect of the theft charge.

(ii) Breach of public trust and conveying gold from the Mint

[28] There is a distinct legal nexus between these two offences. The offence of conveying gold from the Mint can be committed by anyone. Breach of public trust requires that the Crown prove four things, each of which shows that the offence targets different societal interests than the offence of conveying gold from the Mint: that the defendant was an official acting in connection with the duties of his office; that he breached the standard of responsibility and conduct demanded of him by the nature of the office; that the defendant's conduct was a marked and serious departure from the standards expected of an individual in the defendant's position; and that the defendant acted with the intention to use his public office for a purpose other than the public good – for example, for a dishonest or corrupt purpose. (*R. v. Boulanger*, [2006] 2 S.C.R. 49 at para. 58)

[29] I conclude that convictions may be entered for both these offences. Hill J. came to the same conclusion with respect to breach of public trust and theft, after a much more thorough review of the authorities, in *R. v. Cook*, [2010] O.J. No. 3518. I agree with him.

(iii) Possession of property obtained by crime and conveying gold from the Mint

[30] Convictions for both theft (or, as in this case, conveying gold from the Mint and possession of property obtained by crime can be maintained only where the circumstances of both offences support a finding that they were distinct – where, for example, the thief was convicted, incarcerated, and then released, at which point he resumed possession of the stolen property. (*R. v. Coté,* (1975) 18 C.C.C. (2d) 231 (S.C.C.)

[31] In this case, however, those circumstances are not present. The conviction for conveying gold out of the Mint shares the same factual and legal nexus as that for possession of property obtained by crime. There will be a conditional stay on the possession count.

(iv) Money laundering and conveying gold from the Mint

[32] There is no question but that convictions can be maintained for the s. 462.31(1)(a) offence and the other offences. There is neither a factual nor a legal nexus. The offence requires not only that the gold have been stolen (or conveyed from the Mint) but that it then have been used or dealt with with intent to convert it. Those elements were met when the defendant sold the pucks to Ottawa Gold Buyers and spent the money and transferred the proceeds out of the country to buy the boat, build the house, and give a joint title to the recipient of the wire transfer.

(v) Conclusion on the *Kienapple* issue

[33] Conditional stays will be entered on count 1 (possession of property obtained by crime) and count 3 (theft).

Part 4: Term of custody

[34] The Crown seeks a three year term of incarceration for Mr. Lawrence. Mr. Barnes, on behalf of the defendant, submits that an eighteen month term of incarceration would be appropriate.

[35] The fundamental purposes of sentencing, as established by s. 718, are to denounce unlawful conduct, deter the offender and others from committing offences, separate offenders from society where necessary, assist in rehabilitating offenders, provide reparations for harm done to victims or the community, and promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community.

[36] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Section 718.2 provides some specific examples of aggravating circumstances. Included among these are circumstances where the offender abused a position of trust.

[37] The same section sets out the basic principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. No two cases are alike. Each offender is unique, and each crime is unique. Nevertheless, I am required to pay heed to decisions in similar cases, particularly where those cases are from the Court of Appeal, in order to ensure that the sentence I impose is consistent with this principle.

[38] In *R. v. Dobis* (2002), 163 C.C.C. (3d) 259, the Ontario Court of Appeal held that a penitentiary sentence, probably in the range of three to five years, was required where the offender, an accounting manager for a family-owned business, stole $286,000 and $1.9 million in two separate schemes continuing for more than three years. The court reviewed a number of earlier decisions in similar cases. It noted the significant amount of planning, skill and deception required to execute the theft and fraud over such a long period of time.

[39] MacPherson J.A., writing for the Court, stated:

> **42** However, in the end I am persuaded that the serious nature and consequences of the offences committed by the respondent required the imposition of a penitentiary sentence. There 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, which is how I would characterize the offences in this case.
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> **43** In *McEachern*, supra, Howland C.J.O. stated that "the most important principle in sentencing a person who holds a position of trust is that of general deterrence" (p. 191).
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> **44** In *Bertram and Wood*, supra, Brooke J.A. said, at p. 319:
>
> > The sentences in such cases are not really concerned with rehabilitation. Instead, they are concerned with general deterrence and with warning

> such persons that substantial penitentiary sentences will follow this type of crime, to say nothing of the serious disgrace to them and everyone connected with them and their probable financial ruin.

45 Similarly, in *Gray*, supra, Carthy J.A. stated, at pp. 398-99:

> [T]here are few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from the sentences given to others.

46 Finally, and quite recently, in *Holden*, supra, Doherty J.A. identified "general deterrence as the paramount consideration" (para. 2) in large scale fraud cases.

47 I agree with all of these statements. Accordingly, general deterrence needed to be central to the trial judge's sentence in this case. In my view, the nature and consequences of the theft and fraud committed by the respondent, which were fully and well-described by the trial judge in his reasons, required a penitentiary sentence, probably in the range suggested by the Crown at trial, namely, three to five years.

[40] Later the same year, in *R. v. Bogart* (2002) 167 C.C.C. (3d) 390, a differently constituted panel of the Court of Appeal set aside a conditional sentence of two years less a day and three years' probation and substituted a jail sentence of 18 months on a physician who had fraudulently billed OHIP for nearly $1 million over seven years. In the course of his reasons, Laskin J.A. referred to the *Dobis* decision and noted that the review of the cases carried out in that decision

> shows that ordinarily these frauds merit a penitentiary sentence in the range of three to five years. Even where mitigating circumstances have reduced the sentence to the reformatory range, a jail term, not a sentence served in the community, has usually been imposed.

[41] The Court imposed a sentence of 18 months, rather than one in the range of 3 to 5 years, because the offender had already served 13 ½ months of the conditional sentence and because there were very unusual and significant mitigating factors relating to the offender: he served a sector of the population – those who are HIV positive or have AIDS - that few doctors treated at that time; his patients, with whom he had a great deal of empathy, depended on him and did not want him to be incarcerated; he pleaded guilty; he expressed great remorse and accepted responsibility for what he had done; he had made regular monthly restitution payments and had repaid 25 percent of the amount of the restitution order; and he had no previous criminal record.

[42] Justice Hill of the Superior Court, in his decision in *R. v. Williams*, [2007] O.J. No. 1604, conducted an extensive review of the jurisprudence in significant fraud cases. He listed, at paragraph 30 of his reasons, the following list of aggravating factors in what he characterized as "white collar" breach of trust cases:

> (a) the nature and extent of the loss (while recognizing that the amount of the theft or fraud is one factor only);
>
> (b) the dishonest attainment of public monies, which is a serious crime with its own effects even though the institution, on its face, seems able to bear the loss;

(c) the degree of sophistication of the dishonesty and the degree of planning, skill and deception;

(d) whether the sole motivation is greed;

(e) whether there is a lengthy period of dishonesty;

(f) the number of dishonest transactions undertaken in the commission of the offence;

(g) whether there exists little hope of restitution;

(h) whether the offender was caught as opposed to voluntary termination of the criminality;

(i) whether there was a risk that others would fall under suspicion;

(j) the impact on victims of the fraud including members of the public, the employer and fellow employees; and

(k) the quality and degree of trust reposed in the offender.

[43] Justice Hill sentenced the 60 year old offender, the former Superintendent of Program for a school board, to a sentence of 18 months incarceration for one count of fraud involving a loss of $194,000. There were a number of aggravating factors, including a significant breach of trust, a high degree of planning, premeditation and sophistication, dishonest conduct extending over years, a motivation of simple greed, and post-offence conduct intended to conceal the fraud. Mitigating factors included a lack of a criminal record, loss of employment, stigma and shame, a prior high public reputation, and clinical depression suffered by the offender.

[44] There are a number of aggravating factors in Mr. Lawrence's case. They include

(a) the amount of the theft – a loss to the Mint of over $200,000;

(b) the theft was of public property;

(c) the offences required a certain amount of planning (albeit, as defence counsel points out, not overly sophisticated planning);

(d) the thefts required that the pucks be taken out one by one in numerous trips;

(e) the offences took place over some time (although months, not years as was often the case in the jurisprudence relied on by the Crown);

(f) the offences were an egregious breach of trust (although this is not an aggravating feature of the breach of public trust offence, that being the essence of the offence (*R. v. AhmedI, 2017 ONCA 76 at paras. 101-109)*);

(g) there has been no explanation for the motivation other than simple greed;

(h) but for the suspicion of the bank teller asked to wire money from an Ottawa Gold Buyers' cheque issued to pay for gold by a Mint employee, there is no indication that Mr. Lawrence would have voluntarily terminated his activities;

(i) while restitution has been promised, the efforts to accomplish it have been less than energetic; there has been no restitution made to date.

[45] Mr. Lawrence did not plead guilty. He demanded a trial, as is his right. This is not an aggravating factor. Had he pled guilty, however, this would have been a mitigating factors.

[46] There are a number of mitigating factors:

(a) Mr. Lawrence has no prior criminal record;

(b) while he was certainly in a position of trust which he breached, he was not a senior managerial official exercising significant discretion over the operation of the institution, as is typically the case in the serious frauds dealt with in the jurisprudence establishing the range of sentences (so this is a "blue-collar theft", not a "white-collar theft");

(c) the result of these charges was that Mr. Lawrence lost his job; while this is a normal and predictable result of stealing from one's employer, it is a significant consequence for him;

(d) this case has attracted significant public attention, and Mr. Lawrence has had his name and photograph displayed on the internet and in media around the world; this has undoubtedly given him a greater stigma and affected his reputation more than a conviction normally would have, and will make it more difficult for him to get employment in the future; and

(e) while the value of the stolen gold was significant, it was at the lower end of the serious fraud cases reviewed by the Court of Appeal in *Dobis*.

[47] Considering all of the circumstances, and taking into account the totality of the sentences, I conclude that an appropriate term of incarceration for Mr. Lawrence is two years six months (30 months) for each of the three offences of which he has been convicted, to be served concurrently.

[48] A penitentiary sentence is required to express the denunciation required for a significant breach of trust of this sort. That message is sent with a 30 month sentence. Similarly, a 30 month sentence will serve as an adequate general deterrence, in the circumstances of this case.

Part 5: Ancillary orders

(a) Order for return of pucks and dip spoons to Mint

[49] There will be an order for the return to the Royal Canadian Mint of the six gold pucks held by the RCMP – the four found in the safety deposit box, the puck seized from Ottawa Gold Buyers, and the puck seized from the Mint by the RCMP for comparison purposes.

[50] There will also be an order for the return of the dip spoon seized from the Mint which was entered as an exhibit at trial, and for the dip spoon seized from the Mint which was not entered as an exhibit at trial.

(b) Restitution Order

[51] The Mint has filed a Statement on Restitution in which it indicates that the value of the 17 gold pucks stolen from the Mint and not recovered is $191,040.96, based on the value of gold on the London market, accepted as the standard, on January 19, 2017. Mr. Lawrence received $130,206.19 for the pucks he sold. The Mint seeks an order of restitution in the higher amount.

[52] Sub-section 738(1) of the *Criminal Code* requires that I consider making an order requiring Mr. Lawrence to make restitution to the Mint in "an amount not exceeding the replacement value of the property as of the date the order is imposed". The replacement value, in this case, is the market value of the gold. Requiring restitution in the replacement value rather than the amount for which the stolen property was sold makes good sense. The loss to the victim is what it costs to replace the item. In most cases, a thief will have to sell stolen property for less than it would fetch on the open market. That does not diminish the loss to the victim.

[53] There will be a restitution order under s. 738 in favour of the Royal Canadian Mint in the amount of $191,040.96.

(c) Fine in lieu of forfeiture

[54] The Crown has applied for a fine in lieu of forfeiture under s. 462.37. That section provides that if a sentencing judge is satisfied that property is proceeds of crime and the offence was committed in relation to that property, the judge shall order that the property be forfeited to the Crown.

[55] Sub-section 462.37(3) provides that the court may order an offender to pay a fine "in an amount equal to the value of the property" if the property cannot be made subject to the forfeiture order because, among other things, it cannot be located, has been transferred to a third party, is located outside Canada, or has been commingled with other property that cannot be divided without difficulty.

[56] I am satisfied that s. 462.37(3) applies. The pucks were sold, producing cash which was proceeds of crime. That cash was transferred to a third party or parties (some of whom are outside Canada), for the boat purchase in Florida, the building purchase in Jamaica, the wire transfer to the joint interest of Mr. Lawrence and another person in Grenada, and in payment for credit card bills and other items in Canada. A portion was withdrawn in cash and cannot be located. This has all been established by the evidence of Ms. Hayward, the forensic accountant.

[57] When a fine has been ordered under s. 462.37(3), the court is required to impose a term of incarceration if the fine is not paid which is mandated by a sliding scale set out in s. 462.37(4). Where the amount of the fine is between $100,000 and $250,000, the term of imprisonment must be between 2 and 3 years.

[58] This is in addition to any sentence of incarceration imposed for the offence. The *Criminal Code* does not deal with the issue of time to pay or whether, at the end of any time to pay, the offender must be incarcerated for the term set out in the order even if he or she is unable to pay for good reason. The Supreme Court of Canada, however, has held that the court imposing the fine may specify a time to pay. The Court has also held that an offender may not be sent to prison at the expiry of that time if the fine has not been paid unless, after a hearing, a court is satisfied that the offender has, without reasonable excuse, refused to pay the fine. If the offender has been unable to pay because of poverty, the court cannot conclude that he has refused to pay the fine without reasonable excuse. (*R. v. Lavigne*, [2006] SCC 10)

[59] Although s. 462.37(3) states that the court "may" impose a fine in lieu of forfeiture if the conditions have been established, the court has only limited discretion. In particular, a judge may not decline to impose a fine simply because the offender is no longer in possession of the property or simply because the property is located outside Canada. Nor may the sentencing judge decline to order a fine because the offender has no ability to pay it. (*Lavigne, R. v. Angelis*, 2016 ONCA 675)

[60] This is because these provisions are not intended to punish an offender, but to deprive the offender of the proceeds of their crime and to deter them from committing crimes in the future. Forfeiture of the proceeds of crime is not always practicable. Where that is the case, Parliament has provided that the court may impose a fine instead of forfeiture of the proceeds in order to ensure that the proceeds of crime do not indirectly benefit those who committed it.

[61] The restitution order takes precedence over the fine in lieu of forfeiture, and the fine in lieu of forfeiture is reduced by any amount paid pursuant to the restitution order.

[62] I am satisfied that an order ought to issue requiring that Mr. Lawrence pay a fine in lieu of forfeiture in the amount of $190,000, the value (as set out in the Statement on Restitution) of the gold stolen and not recovered. He will have three years after the expiration of any term of imprisonment to pay the fine. If he does not pay the fine, he will serve a further term of imprisonment of 2 years 6 months (30 months), which he shall serve consecutively to any other term of imprisonment he is then serving.

(d) DNA order

[63] The Crown has applied for an order under s. 487.051 requiring the taking of samples from Mr. Lawrence that may be analyzed for his DNA for registration on the DNA database. Mr. Lawrence's offences are "secondary designated offences" and, as a result, I have a discretion whether to make this order. I am required to consider whether the offender has a criminal record, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person.

[64] The Court of Appeal has held that “in the vast majority of cases” it would be in the best interests of the administration of justice to make such an order. In determining whether to make the order, I am directed to consider that the legislation offers significant protections against misuse of the DNA profile information, thus minimizing an improper intrusion into the offender’s privacy. Having been convicted of a designated offence, the offender already has a reduced expectation of privacy. In the ordinary case of an adult offender the procedures for taking the sample have no, or at worst, a minimal impact on the security of the person. Thus, in the case of an ordinary adult offender there are important state interests served by the DNA data bank and few reasons based on the privacy and security of the person for refusing to make the order. (*R. v. P.R.F.* (2001), 161 C.C.C. (3d) 275)

[65] I note that the Court of Appeal has recently upheld the imposition of a DNA order in a case in which the offender, a bank employee, provided customers’ personal financial information to fraudsters, causing a $500,000 loss to the bank. (*R. v. Wilson,* 2016 ONCA 888)

[66] In all of the circumstances, I conclude that it is appropriate to issue an order requiring the analysis and registration of Mr. Lawrence’s DNA.

(e) Victim fine surcharge

[67] There will be a victim fine surcharge, under s. 737, in the amount of $200 per count of which the offender was convicted. Mr. Lawrence was convicted on 3 counts, 2 others having been stayed. The victim fine surcharge will be in the total amount of $600. Mr. Lawrence will have 6 months to pay that surcharge.

Released: February 2, 2017

Signed: Justice P. K. Doody