

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

Citation: R. v. Lee, 2011 NSPC 26

**Date:** May 18, 2011

**Docket:** 2119017 - 2119019

**Registry:** Halifax

Her Majesty the Queen

v.

Sherri Dawn Lee

**DECISION**

**Judge:** The Honourable Judge Anne S. Derrick

**Heard:** March 7, 8, 9, 10, 11, April 20, 21, and May 5, 2011

**Decision:** May 18, 2011

**Charges:** Theft (x1) and Fraud (x2)

**Counsel:** Mark Heerema - Crown Attorney  
Peter Katsihtis - Defence Counsel

**By the Court:**Introduction

[1] Ms. Lee is charged that between March 31, 2008 and April 1, 2009 she stole more than \$5000 from Embrace Spa (contrary to section 334(b) of the *Criminal Code*), where she was employed, and that during these dates she also defrauded Embrace Spa of a sum of money not exceeding \$5000 (contrary to section 380(1)(b)). By way of an amendment at trial, not opposed by Defence, Ms. Lee is also charged that between January 1, 2008 and April 1, 2009, she defrauded Embrace Spa of a sum of money not exceeding \$5000 (contrary to section 380(1)(b)). An earlier amendment to the Information provides that Ms. Lee may also be known as “George” which is her husband’s surname.

[2] On the issue of Ms. Lee’s name, I have decided in this decision to refer to her as Sherri Dawn Lee, not Sherri Dawn George, as Lee is the name she was charged under. At various times during the trial Ms. Lee was referred to as Ms. George by counsel and myself, but I will be referring to her throughout these reasons as Ms. Lee.

The Spa and its Operations

[3] The essential facts that resulted in charges being laid against Ms. Lee are relatively straight forward. Embrace Spa began operating in September 2005. It

offered a range of spa services such as therapeutic massage, hair styling and esthetics. Clients made appointments and were received at reception. This was the “front-end” of the Spa. Front-end staff was responsible for taking the clients to the lockers and lounge where they would get ready and wait for their technician to come and collect them. Client services were delivered in the “back-end” of the Spa.

[4] From its inception the Spa was managed by Michelle Price who had been involved in the design, planning and start up. Ms. Lee was also one of the original employees, working first of all on the “front-end” of the spa and eventually becoming the assistant manager. Ms. Price described their respective duties: her responsibilities were more “operations” and the “back-end” of the Spa whereas Ms. Lee was more “inventory, front-end, bank deposits.” Although Ms. Lee testified to working in the spa area “a lot” at the beginning, it is apparent to me from the evidence that she was primarily a “front-end” employee.

[5] The only office in the “front-end” of the Spa was right behind the reception area. It was a small office containing a filing cabinet, a computer and a printer. Ostensibly Ms. Price’s office, it housed client files and was used for various administrative purposes, including storing cash and cheques from clients and preparing bank deposits. Front-end staff was in and out of the office frequently, getting files and taking documents from the printer.

[6] Embrace Spa used a specialized computer software system for its accounts and transactions called “S.A.M.” - Spa Accounting Management. Staff was trained

on inputting transactions into the system which also managed appointments and other spa-related information. Clients were set up with “on-accounts” which maintained a record of their transactions with the Spa. Staff was also able to set up S.A.M. accounts to purchase services and products. Services and products were paid for in cash or by credit or debit card. Accepted credit cards were Visa, MasterCard and American Express (Amex). For clients with coverage, therapeutic massages were paid in whole or part by Blue Cross.

[7] In the case of Blue Cross coverage, clients signed a claim at the front-end of the spa which would be submitted for payment. Those clients whose coverage paid only a portion of the cost of the massage paid the uninsured portion with cash, credit or debit card. The Blue Cross insured balance was maintained on a client’s “on-account” in the S.A.M. system until payment was received from Blue Cross and the account was credited accordingly.

[8] Front-end staff had the responsibility to enter the Blue Cross payments on account when the Blue Cross cheque came in. These entries were done on the S.A.M. system. Front-end staff also closed out the cash at the end of each day. This involved adding up the day’s “take” and reconciling it with what was indicated by the S.A.M. system.

[9] For the first two years of the Spa’s operation, until sometime in 2008, the responsibility of depositing the Spa’s revenues into the Spa bank account at ScotiaBank was assumed by Bonnie Caldarozzi, who co-owned the Spa with her husband, Peter Caldarozzi. Ms. Caldarozzi was generally making bank deposits

every 3 – 4 days although sometimes it would be as long as a week between deposits. Cash was received “pretty much” every day at the Spa with the cash payments varying from a low of \$50 - \$75 to a high of \$400 - \$500 depending on how clients chose to pay. Ms. Lee agreed in her evidence it was a rare day at the Spa that cash was not taken in.

### The Cash-Flow Problem

[10] The Spa started out with 6 or 7 employees in total, including technicians. Open seven days a week initially, it did not take long to grow and began to expand rapidly. Additional “front end” and spa staff was hired. After a time however, the owners noticed a cash flow problem. These problems surfaced in 2008. No one was able to figure out the cause. The Spa’s business was growing so the faltering cash flow did not make sense. Ms. Caldarozzi and Ms. Price discussed the issue of remuneration and whether the practice of paying staff by commission was draining the Spa’s revenues. An hourly wage was brought in. The cash-flow problems did not resolve.

[11] In October 2008, Ms. Caldarozzi went away. Before leaving she wrote a cheque to pay the Spa’s HST for July, August and September. The cheque was for an amount between \$24,000 - \$26,000 and payment was due by the end of October. Ms. Price was instructed to do a bank deposit at the end of the month and to ensure that the HST cheque was sent out to the Canada Revenue Agency (“CRA”). When Ms. Caldarozzi returned she was very pleased to see a robust end-

of-October bank balance for the Spa. This was a great improvement over how things had been looking up to this point.

[12] The relief was short-lived. Three weeks later Ms. Caldarozzi received a notice from the CRA assessing Embrace Spa with a penalty for failing to pay the HST. She was shocked. As far as she had known, the HST cheque had been sent in according to her instructions. She went to the bank to view a copy of the cheque. It showed that the cheque had been stamped on October 31, 2008 for deposit into the Spa's bank account. This explained the healthy and reassuring bank balance noted by Ms. Caldarozzi for the end of October.

[13] Ms. Caldarozzi was subsequently advised by Ms. Lee that she had mistakenly deposited the HST cheque into the Spa account. I will discuss this error in more detail later in these reasons.

[14] The cash flow problems continued. The owners did not suspect anything untoward. They trusted the staff and had a very good relationship with the two managers. Ms. Caldarozzi described the relationships amongst herself, Ms. Price and Ms. Lee as "very trusting, easy [and] professional..." and referred to the three of them working "really well together."

[15] The Spa remained very busy. Ms. Lee loved working at the Spa but was finding the demands of her job, with a requirement that she be on call seven days a week even when not at work, very stressful. She also felt unappreciated and underpaid. She developed some serious health problems.

[16] On May 4, 2009, having given two weeks' notice, Ms. Lee resigned her employment at the Spa. From Ms. Price's perspective, there was nothing that triggered Ms. Lee's departure and she was sad to see Ms. Lee go.

[17] Ms. Lee testified that when she left the Spa she was very dissatisfied. Although friends with Ms. Price outside of work, she did not like the way she was being treated on the job. She confirmed in her evidence that she regarded Ms. Price as fundamentally lazy and felt she was doing her job. She had wanted a raise. Although she had spoken to Ms. Price and Mr. Caldarozzi about this, the result was only a small increment.

### The Forensic Audit

[18] In June 2009, the Caldarozzis, concerned about a possible misappropriation of funds, decided to retain Susan MacMillan, a forensic accountant, to conduct a forensic audit. They determined there was only so much of an audit they could afford. For this reason, Ms. MacMillan only looked into the period of March 18, 2008 - March 31, 2009. She discovered that a considerable amount of money paid by clients for services at the Spa had not made it into the Spa's bank account. The money had disappeared. Suspicion fell on Ms. Lee.

[19] The forensic audit uncovered some additional problems. Certain client accounts had not been credited with payments from their insurer, Blue Cross, whereas other accounts, those of Ms. Lee and her relatives, had received

comparable amounts of money. Also, a number of accounts, including those of Ms. Lee and her relatives, had been favourably adjusted through the use of a procedure known as “back-dating”. Back-dating was a procedure used to make corrections to the on-account files of individual clients and staff. I will discuss the Blue Cross payment process and “back-dating” in due course.

[20] After the forensic audit identified that money had gone missing, the Spa instituted changes to enhance the security of the daily revenues. A new lock box was acquired and is kept locked. The paperwork generated at the close of each day and the accompanying money and cheques are slipped into the lock box by staff through a drop slot. Ms. Price retains the lock box key. The locks at the Spa were changed and surveillance cameras installed over the cash. Reconciliations are done every month so any shortfall will be caught within 30 days. Only Ms. Price does the bank deposits.

### The Documentary Evidence

[21] The investigation into business transactions at the Spa produced 15,000 documents. Only a fraction of that material has been entered into evidence although the Defence was provided with disclosure of all the documents. The Defence did not object to any of the Exhibits entered by the Crown. These exhibits, which are copies of the original documents, are: Exhibit 1 – Agreed Statement of Facts with supporting documentation; Exhibit 2 – Blue Cross Provider Payment Summaries for Embrace Spa; Exhibit 4 – Daily Deposit Report for August 11, 2008 with supporting documents; Exhibit 5 – S.A.M. [Spa Accounting



Management] On Account Histories [for 20 specific individuals]; Exhibit 6 – Bank Deposit Slips and Related Documents from Embrace Spa from April 3, 2008 to March 27, 2009; Exhibit 7 – S.A.M. Documents [relating to Angela and Deanne Pittman, Katie and Jason Bell, and Karen and Kara Brison]; and Exhibit 9 – Grant Thornton Documents [including the C.V. of the Crown’s expert witness, Susan MacMillan]; Graphic Illustration of Daily Reconciliation Process; Graphic Illustration of Overall Reconciliation Process; Schedule 1 of Forensic Audit – Spreadsheet; Table of Bank Deposits outlining Cash Shortages; and Table of Observations made from review of Blue Cross Allocations.]

[22] The Crown also entered a booklet of photographs taken by police investigators at Embrace Spa (Exhibit 3) and the Defence entered a document entitled “On Account Detail Report Sat April 2, 1938 to Thu September 1, 2005” (Exhibit 8).

[23] The Crown’s approach to prosecuting the case by presenting the Court with only a sampling of all the documents available was at first opposed by the Defence. In particular the Crown wanted to admit into evidence a spreadsheet prepared by Ms. MacMillan from the Spa’s raw data without the need for thousands of source documents being tendered. To this end the Crown made an application for a “voluminous documents” exception to the hearsay rule. However at the start of the hearing, Defence counsel indicated that having reviewed the Crown’s brief and cases, Ms. Lee was no longer maintaining her objection to this evidence. Nonetheless, at counsel’s request, I did produce a decision on the issue of the

“voluminous documents” exception to the hearsay rule as it is a relatively rare phenomenon. (*see, R. v. Sherri Dawn Lee, 2011 NSPC 5*)

### The Allegations Against Ms. Lee

[24] The Crown is alleging that Ms. Lee used three techniques to steal from or defraud Embrace Spa. I will need to examine these allegations separately but I will explain them first:

- Ms. Lee took cash from deposits that were to have gone into the Spa’s bank account, for herself.
- Ms. Lee fraudulently applied Blue Cross payments intended for insured Spa clients to S.A.M. accounts for herself and family members, benefitting these accounts by paying their balances down or off.
- Through back-dating, Ms. Lee fraudulently altered S.A.M. accounts for herself and family members to pay them down or off.

[25] The issue in this prosecution is one of identity, the identity of the person or persons responsible for what the forensic audit uncovered. Ms. Lee does not dispute the findings of Ms. MacMillan’s audit: what she says, in effect, is that the Crown has failed to prove beyond a reasonable doubt any of the charges against her. Money went missing but she is not responsible. Blue Cross payments were misapplied and back-dating done to her “on account” and the on-accounts of her family members but she has no knowledge of how this happened.

### The Charges

[26] The charges against Ms. Lee are as follows:

**Count 1** – that between January 1, 2008 and April 1, 2009 she unlawfully stole a sum of money exceeding \$5000, the property of Embrace Spa, contrary to section 334(b) of the *Criminal Code*. This charge relates to the money received by the Spa that should have found its way into the Spa’s bank account by bank deposits but didn’t. The missing money totals \$66,939.58.

**Count 2** – that she, by deceit, falsehood or other fraudulent means, did unlawfully defraud Embrace Spa of a sum of money exceeding \$5000, contrary to section 380(1)(a) of the *Criminal Code*. This charge relates to the back-dating of transactions which the Crown alleges was done by Ms. Lee. As the dollar amount of the back-dating is under \$5000, the Crown has indicated it is seeking a conviction for the included offence of fraud under \$5000. This fraud is alleged to have occurred between March 31, 2008 and April 1, 2009.

**Count 3** – that between January 1, 2008 and April 1, 2009 she, by deceit, falsehood or other fraudulent means, did unlawfully defraud Embrace Spa of a sum of money not exceeding \$5000, contrary to section 380(1)(b) of the *Criminal Code*. This charge relates to the misapplication of Blue Cross payments to the “on-accounts” of either Ms. Lee or her family members.

### The Crown’s Similar Fact Application

[27] The Crown has applied to have the evidence relating to the back-dating and Blue Cross misapplication charges (counts 2 and 3) considered in determining whether Ms. Lee is guilty of theft (count 1). The Crown frames its similar fact application as follows: should I be satisfied that Ms. Lee defrauded Embrace Spa by “(a) improperly back-dating transactions and (b) misapplying Blue Cross payments, then such findings can be used as some evidence establishing that any cash-deficiencies in bank deposits prepared by Ms. Lee were intentional and not the product of an accident.” (Crown’s Brief dated March 22, 2011)

[28] The Crown indicates in its similar fact application brief that evidence relating to the back-dating and Blue Cross payments is not to be used to establish the identity of the person who prepared the bank deposits. In any event, the issue of identity has been resolved by Ms. Lee’s testimony that she was involved in the preparation of most of the bank deposits. Her evidence that Ms. Price participated in preparing bank deposits with her is something I will address when I deal with the theft charge which is what I will now discuss.

### **The Charge of Theft**

#### The Daily Deposit Reports and the Bank Deposits

[29] As I have noted, Embrace Spa took its revenues in at the front-end of the business. Clients would pay for services with cash, credit or debit. Occasionally a client would pay with a cheque. Insured clients would also have payments made

by Blue Cross credited to their accounts. The S.A.M. system kept track of what came in. Front-end staff was responsible for posting payments to clients' accounts with these accounts maintaining a running balance.

[30] At the end of each business day, the front-end staff closing up the Spa would tabulate the daily "take" using a form prepared at the Spa that provided for all the various forms of payments. Staff compiled a profile of the day's transactions by referring to the amount of cash in the till (allowing for a float which started out as \$400 and seems to have changed at some point to \$600), any cheques, and the credit and debit receipt slips. Also included in the tabulations were any reward cards that had been redeemed. Reward cards would be redeemed when a client had purchased a set number of services, entitling him or her to receive for no charge a service worth a certain amount.

[31] Exhibit 4 is an example, from August 11, 2008, of the Daily Deposit Report prepared by one of the two front-end staff who closed the Spa that day. The "deposit" referred to on the report form was the deposit that went into the lock box once the tabulation was done. The deposit of funds to the Spa's bank account did not happen every day: indeed as I will discuss, in the period under consideration, bank deposits were happening quite infrequently.

[32] Counting up the day's revenues and entering this on the Daily Deposit Report was not the end of the job. Front-end staff also had to review the S.A.M. print-out for the day and compare the daily "take" to what the computer had recorded. The two had to reconcile. In other words, what had gone into the till had

to match with what the computer indicated were the transactions for the day. Exhibit 4 shows for example that there was \$158.38 received in cash for August 11, 2008, \$353.94 in Visa payments, \$355.49 in Mastercard payments, \$58.37 in American Express, and \$681.54 in debit payments. With \$75.00 added in for a redeemed rewards card, the revenues for August 11, 2008 of \$1,817.53 matched the “Grand Total” recorded by the S.A.M. system.

[33] The revenues for each day, once scrutinized according to this system of reconciliation, were then placed, with the supporting documentation in a ziplock bag and stored in the lock box located in Michelle Price’s office behind the Spa’s front reception area.

[34] The lock box, when locked, was locked with a key that was kept in Ms. Price’s desk. Everyone working the front-end of the Spa knew where the key was stored. According to one Spa employee, Judy Dunlop, the lock box did not always get locked. Ms. Price, who usually left work at 4 p.m., acknowledged on cross-examination that anyone could have gone into her office in the evening when she was not there.

#### Reconciliation Responsibilities and Access by Other Staff to Cash

[35] A number of Spa employees, present and former, testified to having prepared the nightly reconciliations as front-end staff. Front-end staff during the relevant time included Robin Harlow, Jessica McNutt, Sarah Dorey, Wendy Grant, Taylor McKindsey, Sarah Mader and Judy Dunlop.

[36] Reconciliations by front-end staff did identify differences between the S.A.M. records and what had been taken in according to the till receipts. Robin Harlow testified that the correct amount of money for the daily “take” went into the lock box: if there was a discrepancy between the money in the till and what was shown by the S.A.M. system, money would be taken from the float, leaving the float short, to ensure that the cash going into the lock box matched the S.A.M. transaction record. According to Robin Harlow, the till was often short, usually about \$20 but “every once in a while” as much as \$60 - \$80.

[37] Ms. Price testified that she had known of instances when the float was short leading her to call Ms. Caldarozzi for instructions on what to do. Ms. Caldarozzi would sometimes tell Ms. Price to get money from the lock box to rectify the shortfall in the till and leave a note indicating that is what she had done. Ms. Price testified that from March 2008 to April 2009 this happened maybe ten times. The discrepancies each time were amounts between \$10 and \$50.

[38] The small discrepancies described by Ms. Harlow and Ms. Price would not account for the significant amount of money that went missing and forms the basis for the theft charge against Ms. Lee.

[39] The front-end staff witnesses all denied removing any money from the ziplock bags or the lock box and testified that they did not misrepresent the entries on the Daily Deposit Records or see any other staff do so.

### Preparing and Making the Bank Deposits

[40] When Bonnie Caldarozzi had been doing the bank deposits, her practice was to take the ziplock bags from the lock box and, one at a time, compare their contents to the applicable Daily Deposit Reports. Once one bag was done, she would set the cash aside and move on to the next one. The cash was organized into the correct denominations and the amounts itemized on the bank deposit slip. Cheques would also be itemized for deposit. The deposit was taken to the bank where the commercial teller would ensure the deposit complied with the entries on the deposit slip, stamping the Spa's copy with the date and retaining a copy for the bank.

[41] The time came when Ms. Caldarozzi concluded that she was occupying too much of the limited space in the office preparing the bank deposits and doing the accounts payable. It was a busy area and Ms. Caldarozzi felt she was in the way. It was decided that the bank deposits could be handled "in house" by either Ms. Price or Ms. Lee. Ms. Caldarozzi recalls showing Ms. Lee "exactly" how to do what she had been doing. Ms. Price's evidence was that she witnessed Ms. Caldarozzi providing Ms. Lee with this instruction. Ms. Price already knew how to do bank deposits from having done them at a Spa she had managed before.

[42] It was Ms. Lee's evidence that after Ms. Caldarozzi handed over responsibility for the deposits, she and Ms. Price started doing them together.



[43] Ms. Lee contradicted Ms. Caldarozzi's evidence about the bank deposit preparation training. Ms. Lee testified that Ms. Caldarozzi did not show her how to do the bank deposits, Ms. Price did. It was also Ms. Lee's evidence that she never reconciled the contents of the ziplock bags with the Reports because she did not have time. She also said she was never shown how to do those reconciliations. All she did was empty out the bags, organize the paper currency into denominations, count the coin, tally the cheques and total the deposit. Ms. Lee acknowledged knowing about the Daily Deposit Reports and confirmed that she had prepared them on numerous occasions when she worked a closing shift.

[44] According to Ms. Lee, not only did she not reconcile what the Spa had taken in with the Daily Deposit Reports, she generally did not go to the bank by herself to make the deposit. Ms. Lee testified that about seventy percent of the time she and Ms. Price would take the deposit to the bank together. Ms. Lee said they would use it as an opportunity to get out of the Spa, combining the visit to the bank with a lunch break. In Ms. Lee's words, they did this "a lot." One of the full-time Spa employees, Sarah Dorey, did not see Ms. Price prepare Bank deposits but she remembers Ms. Price and Ms. Lee leaving the Spa together, saying they were going to do a bank deposit.

[45] It was Ms. Lee's evidence that making regular bank deposits presented a problem. She talked about this in her direct evidence: the Spa was very busy and according to Ms. Lee either she or Ms. Price had to be there. If Ms. Price wasn't at the Spa, Ms. Lee couldn't leave because it was an operational requirement for one of the managers to be on site in case something happened on the Spa side of the

operation. When it was pointed out to Ms. Lee on cross-examination that this evidence did not square with what she had said about regularly going to do bank deposits with Ms. Price, Ms. Lee's immediate response was to say that Sarah Dorey, a full-time employee who knew the Spa's business very well, could readily step in when she and Ms. Price went to the bank.

[46] If Ms. Lee was unable to take the deposit to the bank, she would draw a line through it, sign her initials and sometimes make a notation such as "no time". The money and cheques would be put back into the lock box in a ziplock bag with the accompanying documentation. This is what Ms. Price testified to having observed Ms. Lee do when she was unable to complete a deposit.

Observations by Bonnie Caldarozzi and Michelle Price of Ms. Lee Doing Up Bank Deposits

[47] Ms. Caldarozzi and Ms. Price both testified to seeing Ms. Lee reconciling the ziplock bags with the Daily Deposit Reports. Ms. Caldarozzi testified that while she did not often see Ms. Lee preparing bank deposits, there were three to five times when she observed her doing so in the period of January 2008 to April 2009. She saw Ms. Lee with the paperwork and cash spread out on the office desk, going about her business preparing the deposit, looking at the various sections of the documents and adding up the totals.

[48] Ms. Lee was specifically asked about this evidence on cross-examination. She said Ms. Caldarozzi had to have been mistaken. She was not reviewing, as Ms.

Caldarozzi claimed to have observed, the cash section of the Daily Deposit Reports as she prepared the bank deposit slips.

[49] Ms. Price testified that she also saw Ms. Lee preparing Bank deposits: removing the ziplock bags, reviewing the relevant documents, checking the cash and organizing it and the receipts in piles on the desk.

[50] Ms. Caldarozzi testified that she understood it was Ms. Lee who was taking the deposits to the bank. It was her evidence that Ms. Lee never spoke to her about any problems with the bank deposits nor did she report any discrepancies between the cash stored in the lock box and the daily receipt records. Ms. Price testified that when Ms. Lee prepared a bank deposit she would bring any issues to Ms. Price's attention. According to Ms. Price, Ms. Lee never raised any concerns relating to the bank deposits or about there being shortages between the cash in the ziplock bags and the accompanying paperwork. This could be consistent with Ms. Lee's evidence that she never compared what she was depositing with what the Spa had taken in according to the Daily Deposit Reports.

#### Observations by Other Staff

[51] The front-end staff dealt much more with Ms. Lee than they did with the Spa manager, Michelle Price. Ms. Price was more involved with the technicians in the "back-end" of the Spa. Ms. Lee was the "go to" person for front-end staff. As an example, Jessica McNutt, who worked full-time at the Spa, described Ms. Lee as the front-end staff's "go-to girl" testifying that she was always on call. She always

called Ms. Lee if there was a problem staff needed help with; Ms. Lee “always” picked up the phone.

[52] Ms. Lee was consistently described by the front-end staff witnesses as hard-working and very busy. They often observed her preparing the contents of the lock box for a bank deposit, one of her many responsibilities. This was done by Ms. Lee in Ms. Price’s office. Front-end staff was in and out of that office, getting client files for technicians, returning files, collecting documents from the printer or speaking to Ms. Price.

[53] Robin Harlow was one of the front-end staff who witnessed Ms. Lee with the ziplock bags pulling out the cash and Daily Deposit Record forms. Sarah Dorey also testified to seeing this: “I did see Sherri counting the deposit. Sherri would be making sure the paper and money coordinated. I’d see this usually weekly, on Fridays.”

[54] Ms. Dorey testified that she knew Ms. Lee was making sure that everything “matched.” She believed this was one of Ms. Lee’s responsibilities. She recalls observing Ms. Lee do “a bag at a time”, making sure the money was there and that “everything was filled out by the girls and nothing had been left blank”, referring to the daily reconciliations done by front-end staff closing the Spa at the end of the day. She acknowledged that she was not staring at Ms. Lee as she did this but did witness Ms. Lee checking to make sure the front-desk staff had filled the Daily Deposit Reports out correctly. Ms. Dorey confirmed however that she was not looking at the “paperwork” that Ms. Lee had in front of her. While Ms. Lee was

preparing the deposit, Ms. Dorey was in the office just long enough to get some files, she was not hanging over Ms. Lee watching what she was doing. She was unequivocal in her testimony that she knew the “paperwork” was the Daily Deposit Reports that were kept in the ziplock bags. What she didn’t see were the actual numbers on the Reports; she wasn’t paying attention to any of the entries. She simply saw what Ms. Lee was doing, not the specific figures on the documents she had in front of her.

[55] Taylor McKindsey worked part-time at the front-end of the Spa and saw Ms. Lee at the office desk with the money from the lock box and the paperwork spread out in front of her. Sometimes there would be several ziplock bags on the desk at the same time with the cash organized in piles according to denomination. Ms. McKindsey testified she saw Ms. Lee preparing the deposit probably more than five times although she is not sure how many times in total she witnessed this. She recalls seeing Ms. Lee closing out the till at the end of the day “countless times.” This was not a Spa task Ms. McKindsey ever participated in.

[56] Sarah Mader was another employee who knew Ms. Lee’s responsibilities included bank deposits. She also saw Ms. Lee in the office separating and counting the cash for the deposit, witnessing this probably 10 – 20 times. Ms. Mader did not see anyone else preparing the deposit. She observed that Ms. Lee generally went to the bank with the deposit by herself although on the rare occasion, Ms. Price would go with her.

[57] In the period covered by the forensic audit, March 18, 2008 to March 31, 2009, there were a total of only 23 deposits made to the Spa's bank account. In this period Embrace Spa's S.A.M. system recorded the Spa's cash revenues as having been \$96,481.96. In other words, from March 18, 2008 to March 31, 2009, the Spa took in \$96,481.96 in cash. Ms. MacMillan's review of the bank deposit slips, which she reflected in a spreadsheet, confirmed that only \$29,542.38 of this reached the bank. The short-fall was \$66,939.58. This was the money that was unaccounted for, the money that had not made it into the Spa's account occasioning the cash-flow problem.

[58] Each of the 23 deposit slips for completed deposits reviewed for the forensic audit had a bank deposit receipt that corresponded to the amount of the deposit, confirming that the total for the deposit shown on the deposit slip had been credited to the Spa account.

[59] Copies of the bank deposit slips for the 23 deposits are contained in Exhibit 6. Exhibit 6 also includes deposit slips that did not make it to the bank but were marked over to indicate the deposit had not been made, in some instances with a notation that there had been no time to do so. This happened on April 24, 2008; August 7, 2008; November 10, 2008; December 5, 2008; December 24, 2008; and February 20, 2009. Ms. Lee confirmed in her evidence that the crossed-out deposit slips all carried her line-strike, initials and in some cases, notation - "No Time."

[60] The executed deposit slips – the ones for the deposits that made it to the bank during the period relevant to this trial – were, with the exception of one dated October 14, 2008, signed “Sherri Lee”. Ms. Price reviewed them during her evidence and testified that her familiarity with Ms. Lee’s signature made her confident that the slips indicating Ms. Lee’s name had in fact been signed by her. Ms. Lee confirmed this was the case, with the exception of the deposit slip dated March 2, 2009. Although signed “Sherri Lee”, this signature did not look to Ms. Lee like hers. Ms. Lee did agree that she signed her name differently at different times. She indicated the amounts filled in on the deposit slip did look as though they had been done by her.

[61] The following is the information contained in the deposit slips tendered as evidence in Exhibit 6:

<u>Date on Slip/Date of Deposit</u>	<u>Total Amt. of Cash</u>	<u>Signature on Slip</u>
Apr. 3, 2008/Apr. 3, 2008	\$ 710.00	Sherri Lee
Apr. 28, 2008/Apr. 28, 2008	\$1200.00	Sherri Lee
May , 2008/May 5, 2008	\$ 720.00	Sherri Lee
May 26, 2008/May 26, 2008	\$2940.00	Sherri Lee
June 17, 2008/June 17, 2008	\$1240.00	Sherri Lee
July 15, 2008/July 15, 2008	\$1318.90	Sherri Lee
Aug. 16, 2008/Aug. 16, 2008	no cash	Sherri Lee
Sept. 15, 2008/Sept. 15, 2008	\$1900.00	Sherri Lee
Oct. 14, 2008/Oct. 14, 2008	\$ 970.00	No signature

Oct. 28, 2008/Oct. 28, 2008	\$1000.00	Sherri Lee
Nov.14, 2008/Nov. 14, 2008	\$ 720.00	Sherri Lee
Dec. 8, 2008/Dec. 9, 2008	\$1000.00	Sherri Lee
Dec. 19, 2008/Dec. 19, 2008	\$2990.00	S. Lee
Dec. 29, 2008/Dec. 29, 2008	\$6745.14	Sherri Lee
Jan. 22, 2009/Jan. 23, 2009	\$1730.00	Sherri Lee
Jan. 23, 2009/Jan. 23, 2009	\$ 825.00	Sherri Lee
Jan. 27, 2009/Jan. 27, 2009	no cash	Sherri Lee
Feb. 6, 2009/Feb. 6, 2009	\$ 600.00	Sherri Lee
Mar. 2, 2009/Mar. 2, 2009	\$1080.00	Sherri Lee
Mar. 9, 2009/Mar. 9, 2009	\$ 400.00	Sherri Lee
Mar. 20, 2009/Mar. 20, 2009	\$ 800.00	Sherri Lee
Mar. 27, 2009/Mar. 27, 2009	no cash	Sherri Lee

[62] Ms. MacMillan reviewed each of the 23 deposits and discovered that 21 of them should have contained more cash for deposit than they did. The range of shortfall between what should have been available for deposit as cash (based on what the Spa actually received in cash payments from clients since the last deposit) and what was actually deposited fell between 19 percent and 100 percent. Three deposits were 100 percent short on the cash side: August 16, 2008, January 27, 2009 and March 27, 2009. On these dates, there should have been \$7,000.94, \$657.98 and \$1,702.67 respectively in cash for deposit. On each date, no cash was deposited at all.



[63] Ms. MacMillan testified that the ultimate purpose of the spreadsheet she prepared as part of the forensic audit was to determine if what had been recorded by Embrace Spa's system had actually made it to the bank. Clearly, in the case of the cash, it did not. It was Ms. MacMillan's opinion that the cash shortfalls for the deposits were not clerical errors. She noted that the amounts are significant and in her opinion, evidence of an actual misappropriation of cash. She referred to the fact of 21 of 23 Bank deposits missing cash as the result of an intentional act, "not an accident."

[64] Ms. MacMillan was asked about the conditions that would facilitate such shortages occurring. She noted that access to the cash would be necessary and indicated that a number of staff knew where the key to the lock box was kept. However, it was Ms. MacMillan's evidence that a front-end clerk who slipped money out of the lock box would run the risk of the missing cash being noticed at the time the bank deposit was prepared. She testified that the person preparing the bank deposit would not have this exposure.

[65] There were no significant discrepancies in the credit and debit transactions between what went into the bank via these methods of payment and the amounts indicated by the Spa's records as having been paid using these options. Compared to the cash discrepancy, the cheque discrepancy over the March 18, 2008 – March 31, 2009 period was small, only \$2,655.38, which the Crown is not alleging Ms. Lee is responsible for.

[66] Ms. Lee did not challenge Ms. MacMillan's findings. She flatly denies being responsible for the missing money and testified that she did not take it to reward herself for being underpaid and having so many responsibilities at the Spa. She points to the fact that she did not have exclusive access, that a number of Spa employees could have accessed the lock box and taken money.

#### The October 14, 2008 Deposit

[67] Of the 23 deposits that were prepared and submitted to the bank, one of them was filled out by Michelle Price. She testified that it is her writing on the deposit slip for October 14, 2008. She does not recall anything about preparing the deposit or discussions with Ms. Lee about it. A visual examination of this slip reveals a notable difference between its entries and the other ones that all indicate Ms. Lee's signature: the numeral "7" in the Spa's bank account number and the deposit entries have a stroke through them. The 7's on the deposit slips signed with Ms. Lee's signature do not. This is further confirmation that Ms. Lee did not prepare this deposit slip.

[68] The October 14, 2008 deposit went to the bank. It is one of the deposits identified by the forensic audit as being short of cash. Ms. MacMillan's audit found that \$5,704.37 in cash should have been in this deposit. On October 14 only \$970.00 in cash was deposited, a shortfall of \$4,734.37. In her cross-examination, Ms. Price indicated her understanding that the forensic audit had discovered \$4,734.37 was missing from the October 14 deposit. She testified that she had not taken this money and did not know what had happened to it.

### The October 2008 HST Cheque

[69] I have already described how in October 2008, an HST cheque that was to have been paid to the Canada Revenue Agency found its way into the Spa's bank account creating the impression the account was flush with money. The deposit of that sizeable cheque occurred on October 31, 2008 as confirmed by the bank's deposit stamp which Ms. Caldarozzi saw on the copy of the cheque when she went to the bank to find out what had happened. Ms. Caldarozzi testified that Ms. Lee explained the deposit of the HST cheque into the Spa account as an error that happened because she had all the paperwork for the deposit spread out and must have mixed the HST cheque up with the regular deposit.

[70] Ms. Lee gave the same explanation in her testimony. She testified that the cheque was dropped off at the Spa. It was her evidence that she is pretty sure "they" were in the process of doing a deposit at the time. The HST cheque mistakenly got in with the other cheques for deposit. Ms. Lee testified it was her mistake that this happened. She stamped the cheque and took it to the bank. In her words: "It just got in with all the other cheques."

### Ms. Lee's Denial of Theft and the Analysis of the Evidence

[71] Ms. Lee is presumed innocent of all charges against her until the Crown proves her guilt beyond a reasonable doubt. As this is a circumstantial case, Ms. Lee cannot be convicted unless I am satisfied beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the proven facts. (*R. v. Cooper*, [1977] S.C.J. No. 81, page 12) Ms. Lee testified in her own defence, and I must assess her evidence in this regard in the context of the principles in *R. v. W(D)*, [1991] S.C.J. No 26: if I believe her testimony then I must acquit her; even if I do not believe her testimony, I must acquit her if it leaves me with a reasonable doubt; and even if I am not left with a doubt by Ms. Lee's evidence, I must consider whether I have a reasonable doubt based on all the evidence.

[72] Ms. Lee emphatically denies that she took any money from the bank deposits. I do not believe her. I do not believe her and I am satisfied beyond a reasonable doubt that no one other than Ms. Lee stole \$66,939.58 from the Spa during the relevant time period. While it is a fact that other employees, including Ms. Price, had access to the lock box, I do not believe they were helping themselves to the cash kept there. If, as Ms. Lee has testified, she and Ms. Price were doing the deposits together on a regular basis, theft by other employees would have been noticed. Theft by anyone not involved in doing the deposits would have been too risky. Employees testified that they understood the contents of the ziplock bags were to be reconciled with the Daily Deposit Records: this is evidence that they believed the money to be taken for deposit was checked against the records for what had been received by the Spa as revenue since the last deposit. I do not believe that Spa staff would have run the risk of taking money under these

circumstances nor do I believe that such a risk would have been taken over the extended period of time during which money was stolen.

[73] The fact that Ms. Lee had the best access and least risk does not dispense with the Crown's burden of proof. It is essential that I explain my reasons for not believing Ms. Lee's denial of guilt and the evidence that satisfies me beyond a reasonable doubt that she was the thief.

[74] I do not believe Ms. Lee's claim that she was not instructed about reconciling the Daily Deposit Reports and the cash in the ziplock bags. In this regard I accept without hesitation the evidence of Ms. Caldarozzi and Ms. Price that this was the training Ms. Lee received when the responsibility of bank deposits was assigned to her and Ms. Price. Ms. Lee's inconsistent evidence on this point dealt a blow to her credibility: she said she did not do the reconciliations because she did not have time. She then said she did not do them because she was not trained to do so. Furthermore, when Ms. Lee was asked in her police interview about checking the cash against the Daily Deposit Reports, she confirmed that she did so, a response she acknowledged in cross-examination having made.

[75] The evidence I accept, the testimony of Ms. Caldarozzi and Ms. Price, is that Ms. Lee was shown how to reconcile the contents of the lock box with the Daily Deposit Reports. I also accept that Ms. Lee was observed to do the deposits in accordance with these instructions. Sarah Dorey, someone whom Ms. Lee testified knew the Spa business "inside out", observed Ms. Lee doing the bank deposits in accordance with the reconciliation method. I accept that evidence. I also accept the

evidence of Robin Harlow who testified that she saw Ms. Lee “counting the deposit” and “making sure the paper and money coordinated.” These witnesses had good, clear and consistent recollections and I found their evidence to be credible and reliable.

[76] Ms. Lee would have had a keen appreciation for the purpose of the Daily Deposit Reports which were filed in the ziplock bags with the daily “take” of the Spa. As the evidence has established, Ms. Lee was very familiar with these Reports having filled them out herself on many occasions when she worked the “front end” and closed out the Spa at the end of the day. Ms. McKindsey testified that she had witnessed Ms. Lee closing out the till at the end of the day “countless times.”

[77] I disbelieve Ms. Lee’s denial of the theft on the basis of other evidence as well. I do not believe Ms. Lee’s testimony that she and Ms. Price went together to do the bank deposit as much as “seventy percent” of the time. Her testimony about the trips to the bank to make deposits was another example of Ms. Lee’s inconsistent evidence: initially she had described the Spa as being so busy and her managerial services so much in demand that she could not leave to make bank deposits. If Ms. Price was not there, she had to be. That may be true. By all accounts the Spa was very busy, becoming busier as the months went by. That may explain why Ms. Lee did not get to the bank and had to cancel the deposit slips she had prepared. However she subsequently contradicted herself, testifying that she and Ms. Price would leave the Spa together to go to the bank, turning it into a little excursion and a chance to get some lunch. That is inconsistent with the “busy Spa” depiction and I do not believe it. The evidence I accept is that Ms. Price did not

often go to the bank with Ms. Lee: Ms. Price testified that she “sometimes” went with Ms. Lee to the bank. Sarah Mader testified that it was “rare” for Ms. Price to accompany Ms. Lee to the bank. I find that Ms. Lee has grossly exaggerated the number of times she and Ms. Price may have gone to the bank together; the evidence satisfies me it was no more than an occasional event.

[78] Ms. Lee’s claims that she did not do any reconciliations in making up the bank deposits and that most of the time Ms. Price accompanied her to the bank with the deposits could, if accepted, make it easier to believe her evidence that she has no idea how money went missing from the lock box. Ms. Lee’s evidence on these points, which I do not accept, is “smoke and mirrors” evidence: it creates a scenario where she could not have known there was money missing because she was not checking the records and where Ms. Price was sufficiently in the deposit loop that she would have known if there was a shortfall. I find on the evidence the actual scenario to have been this: Ms. Lee was a trusted employee that no one would have suspected was taking money. She took full advantage of the confidence placed in her by the Caldarozzi’s and Ms. Price.

[79] Ms. Lee’s evidence that she and Ms. Price often worked on the deposits together also casts Ms. Price in the role of having her fingers on the bank deposit pulse. The documentary and witness evidence indicates otherwise: Ms. Lee prepared most of the deposits. Ms. Price filled out only one of the 23 deposit slips. She and the Caldarozzi’s trusted Ms. Lee to do the bank deposits carefully and honestly. That trust gave Ms. Lee a great deal of latitude.

[80] Ms. Lee's credibility is also severely damaged by the facts surrounding the HST cheque deposit in October 2008. The problem with Ms. Lee's explanation for what happened is that it does not accord with the documentary evidence of the deposits. Ms. MacMillan's forensic audit documents in Exhibit 9, Tab D indicate that a Spa bank deposit was made on October 28 but none on October 31, the date the HST cheque was deposited. The next bank deposit after October 28 was November 14. On October 31, 2008 there was no Spa deposit. Indeed there was not even a voided deposit. On October 31 there were no other cheques being prepared for deposit or being deposited for the Spa that the HST cheque could have got mixed up with. Someone had to have taken the HST cheque to the bank for deposit all by itself.

[81] Ms. Lee has acknowledged that she made the deposit of the HST cheque on October 31. This is what she told Ms. Caldarozzi and what she testified to. As no regular Spa deposit was being made, she had to have undertaken a special trip to the bank to deposit the cheque into the Spa account. The effect of this deposit was that for a few weeks Ms. Caldarozzi thought the cash flow problem had been rectified. I find that the deposit of the HST cheque was not a mistake as Ms. Lee claimed to Ms. Caldarozzi and in her testimony. The only reasonable inference is that this was a deliberate strategy to make the Spa's bank account look more robust, and neutralize, at least temporarily, the concerns being voiced about cash flow. This was Ms. Lee covering her tracks; there was already \$42,659.84 missing from the deposits made up to this point.



[82] There is also the fact of Ms. Lee's knowledge that the Spa conducted a cash business. She knew it was commonplace for the Spa to receive cash in payment for services. Yet she did a deposit on August 16, 2008 that included no cash even though the most recent deposit before this had been thirty-two days earlier. A no-cash deposit after thirty-two days, and yet Ms. Lee raised no concerns with Ms. Price or the Caldarozzi's. In her evidence Ms. Lee offered the possibility that perhaps someone had made a deposit in the meantime. No one had. And it would have been obvious to Ms. Lee from the deposit book that no deposit had been done since August 16.

[83] In addition to the reasons I have recited for disbelieving Ms. Lee's testimony, there is also the evidence about her interview with police on September 15, 2009. She told the police investigator that she knew she had hurt the Caldarozzi's. She answered a query about whether she would be interested in writing them a letter of apology by saying that they wouldn't even look at it if she did. She was crying by the time she told police she felt "horrible" and she discussed how her husband was going to be "very disappointed" in her.

[84] When cross-examined about her anticipation that her husband was going to be "very disappointed" in her, Ms. Lee said at first that this was because her husband didn't know she had allocated money from his Blue Cross claim to her on-account. (This is fact happened on May 9, 2008 in the amount of \$50.85. It is not believable that Ms. Lee's reference to her husband's disappointment related to a transaction that had occurred nearly eighteen months earlier and involved such a small amount.) She then testified that what she meant was that her husband didn't

know about the allegations. But what Ms. Lee had told police earlier indicates Mr. George did know about the allegations: talking to the investigator, she said Mr. George was shocked because she wasn't the only person who had access to the money at the Spa. She testified that she had "revealed" to her husband on the way to the police station what she had been told by the investigator about why she was being interviewed. She wrapped up her explanation by testifying that her reference to police about her husband being disappointed related to the allegations and what she had told him when they were on the way to her interview.

[85] In her police interview Ms. Lee told the investigator that she didn't think she had even "admitted it" to herself and that her husband "had no idea." This could not have been a reference to her husband having no idea about the charges Ms. Lee would be facing because she had already told him about the allegations. When asked to explain this in court, Ms. Lee said that her husband had no idea "of the details of the case, neither did I."

[86] Ms. Lee's explanations under cross-examination for what she said to the police investigator amounted to a whole lot of weaving and dodging. Her efforts in court to explain away her statements to police were wholly unconvincing.

[87] Ms. Lee's police interview was not only dissembling, it was also inculpatory. She incriminated herself when police explored the potential for recovery of the Spa's losses. Asked by the police investigator if there was any way "we can recoup this?", Ms. Lee said "I don't have any" and in response to being asked if there was "some way we can pay it back?", she answered, "yeah, I can."

[88] It was Ms. Lee's testimony that she told police she was willing to pay money to the Spa even though she didn't take any because the investigator told her that her name "was on everything." I took Ms. Lee to be saying that her responses were those of someone who was innocent but trapped by evidence that wrongly implicated her.

[89] I do not believe Ms. Lee's explanations for her responses to police. She has acknowledged and recalled her exchanges with the investigator during the interview. It is obvious that she was confessing: she was acknowledging that she had been found out, that her husband would be disappointed with her for taking the money, that she was responsible for the money that was missing and would pay it back. I accept that in these particular exchanges, Ms. Lee was telling the truth. I do not accept her awkward, implausible testimony about what she now says she meant.

[90] Ms. Lee acknowledged that she told police she "didn't mean to do all that stuff." When asked in cross-examination to explain what she meant by those words, she could offer nothing and said "I don't have an answer." Describing the interview process as stressful and requiring her to answer "all kinds of questions", she said "I recall the statement but to know exactly what I meant...I can't say for sure."

[91] I find the explanation for what Ms. Lee meant to be quite simple. She was admitting to having taken money from Embrace Spa. The answers she gave police,

taken altogether, constitute an admission of a significant theft. Her statements to police cannot be taken as referring to anything of a lesser nature than the theft.

[92] I find that Ms. Lee is the person responsible for the theft of the money that was taken in by Embrace Spa but never made it to the Spa's bank account. This money was stolen and I am satisfied beyond a reasonable doubt that Ms. Lee stole it. I do not accept that anyone else was stealing from the Spa at the same time: no one else, except Ms. Price, would have been in any position to do so. Had Ms. Price been stealing money, an honest Ms. Lee would have discovered it during her preparation of the bank deposits. Ms. Price has denied any wrong-doing and I believe her.

[93] I do know that Ms. Price prepared one of the twenty-three deposits identified by the forensic audit. This deposit, prepared on October 14, 2008, is one of the pieces of evidence where, in the submissions of the Defence, reasonable doubt can be found. It will be obvious that I have rejected that proposition. (In the Defence submissions, the other main source of reasonable doubt is Ms. Lee's testimony which I have dealt with.) Even though that October 14 deposit was missing a significant amount of money, it does not raise any doubt in my mind about Ms. Lee's involvement in stealing from the Spa, including the cash that did not materialize in this deposit. What follows are my reasons for arriving at this conclusion.

[94] The evidence establishes that Ms. Price filled out the October 14, 2008 bank deposit slip. Only \$970.00 was deposited when \$4,734.37 should have been. Of

course I have had to consider whether this raises a doubt about Ms. Lee's involvement in stealing from the Spa. I have had to assess whether an inference should be drawn that Ms. Price may have pocketed the \$4,734.37. However that is not the inference I draw from all the evidence I have heard. I accept Ms. Price's statement that she never improperly took money from the lock box. I do not believe she stole from her employers. The inference I draw is that the money was already missing when Ms. Price went to prepare the deposit. The last deposit had been done a month earlier. Therefore, on an occasion or occasions between September 15 and Ms. Price's preparation of the October 14 deposit, \$4,734.37 was slipped out of the ziplock bags being stored in the lock box. As I have explained, I am satisfied that Ms. Lee was stealing money at this time. I do not believe Ms. Price was. By the time of the October 14, 2008 deposit, according to the evidence, that is, the forensic audit (Exhibit 9, Tab D), the bank deposits had already been short on each of the eight previous occasions a deposit had been done (by Ms. Lee), for a total of \$36,270.20 that had not gone into the Spa account when it should have. There were then twelve subsequent deposits prepared by Ms. Lee and made after the October 14 deposit, which were short. The total amount of missing cash from those subsequent deposits was \$25,935.01. The October 14 deposit was sandwiched between the missing \$36,270.20 and the missing \$25,935.01. There is no reasonable inference to be drawn other than the theft from the October 14 deposit was Ms. Lee's doing.

[95] As the Crown pointed out in his submissions, the evidence provides very little information about the October 14 deposit. I do not know the conditions under which it was prepared as Ms. Price has no recollection of doing it. I infer from the

facts that Ms. Price did not do a careful reconciliation of all the Daily Deposit Reports when she made up this deposit. Had she done the reconciliations, she would have seen that the cash for deposit was far short of the total cash amounts indicated on those Reports. I do not know why Ms. Price would not have been more careful on this occasion or what, if any role Ms. Lee may have played in how this deposit got prepared, but I am satisfied that the money was stolen and that it was stolen by the same person who had been stealing money in the preceding months and would continue to steal in the months to come, Ms. Lee.

[96] There is no question that Ms. Lee was not the only person working at the Spa who had access to the lock box and its contents. As I have noted however, she was the person who prepared all but one of the bank deposits that factor into the theft allegation. I also note that it is not mandatory for the Crown to prove exclusive opportunity to commit the offence where other inculpatory evidence is present. (*R. v. Monteleone*, [1982] O.J. No. 3466, (Ont. C.A.)) As recently stated by the Nova Scotia Court of Appeal, where there are other inculpatory circumstances established by the evidence against the accused, “There is no requirement for the Crown to establish exclusive opportunity before a [trier of fact] could be satisfied beyond a reasonable doubt that the guilt of the accused was the only rational conclusion to draw from the evidence.” (*R. v. Hawkins*, [2011] N.S.J. No. 32 (N.S.C.A.))

[97] In this case, there is the other inculpatory evidence I have reviewed, in addition to Ms. Lee’s access to the lock box, and the constellation of factors that uniquely positioned her to be able to take money undetected for months. She was

entrusted with the responsibility for doing the bank deposits which gave her authorized access to the cash in the lock box on an ongoing basis. It was expected that she would do up the deposits and take them to the bank. In her capacity as the employee with these responsibilities, she could make it appear as though she was reconciling the cash with the Daily Deposit Reports. She was better situated than anyone else to steal money and avoid detection.

[98] I will also note that front end staff testified as witnesses and denied taking money. I accept that evidence as truthful. The evidence overwhelmingly points to Ms. Lee as the lone thief.

[99] To this point I have been discussing the evidence relating to the bank deposits. Even without Ms. Lee's admissions to police I would have been satisfied beyond a reasonable doubt that she stole from Embrace Spa although the statements from her police interview further confirm this conclusion. What the excerpts from Ms. Lee's police interview do not specify is whether Ms. Lee was also admitting to the misapplication of Blue Cross payments and the back-dating of "on-accounts". I intend to now discuss the evidence relating to these charges but before I do, I will address the Crown's similar fact evidence application.

#### Similar Fact Evidence Application

[100] As I indicated earlier in these reasons, the Crown is seeking to have evidence from the Blue Cross transactions and the back-dating of on-accounts admitted to support its case that Ms. Lee intentionally took money from the bank

deposits, dispelling any suggestion that the cash-deficiencies were the result of an accident. This is how the Crown's application is articulated in its brief:

The Crown is asking that if your Honour is satisfied that: (1) Ms. Lee defrauded/stole from Embrace Spa through back-dating and misapplying Blue Cross payments and (2) that Ms. Lee prepared the bank deposits (or greater majority of them), then the evidence relating to the back-dating and misapplication of Blue Cross payments should be used as some evidence to establish that any cash-deficiencies in bank deposits prepared by Ms. Lee were intentional and not the product of an accident.

[101] The Crown made a persuasive argument in its brief on the admissibility of count-to-count evidence in this case. However I have concluded that it is unnecessary to decide the issue. From the evidence relating to the bank deposits alone, I am satisfied beyond a reasonable doubt for the reasons I have given that Ms. Lee intentionally took cash that should have been deposited to the Spa's account. I will now examine the evidence concerning the Blue Cross allocations and the back-dating of on-accounts as it relates to the fraud charges.

### **The Blue Cross Payments**

[102] Ms. Lee is charged with having fraudulently applied Blue Cross payments intended for insured Spa clients to S.A.M. accounts for herself and her family members, benefiting those accounts by paying their balances down or off. During



the time relevant to the charges against Ms. Lee, various members of her family used services offered by the Spa: Bobby George, her husband; Tanisha Lee, her daughter; Aiden Lee, her nephew; Kendra Dodge, her sister; and Kelly Smyth, her sister-in-law.

[103] I have already indicated that Blue Cross would send payment to the Spa in cheque form to cover services, either wholly or in part, for insured clients. In the period relevant to Count 2, described above, Embrace Spa received cheques from Blue Cross on nine occasions: April 16, April 30, July 8, July 23, August 6, September 17, and December 23, 2008 and February 18 and March 4, 2009. Exhibit 2 contains copies of the documents relating to these payments.

[104] The documents in Exhibit 2 are the “Provider Payment Summary” forms that accompanied the Blue Cross cheques. These summaries contain information about when the service was rendered at the Spa to the insured client, what service was rendered (e.g. massage), the eligible amount and the percentage covered.

[105] Ms. Price testified that the allocation of Blue Cross payments was delegated to Ms. Lee as part of her job responsibilities. Other “front end” staff did assist with entering the amount of the Blue Cross payment on the insured client’s S.A.M. on-account, with the result that the client’s balance would be paid down or off. To keep track of these allocations, Spa staff would variously circle the amounts being entered from the “Provider Payment Summary” or highlight them or check them off. Ms. Lee confirmed that it was her practice to check the amounts off when she was posting the Blue Cross payments to clients’ accounts. Payments made to Spa

on-accounts by allocation from Blue Cross cheques were identified in the S.A.M. on-account records by the word “CHECK.”

[106] The Blue Cross allocations in the period of March 31, 2008 and April 1, 2009 did not all end up where they were supposed to. This was determined by the forensic audit. Anomalies in the Blue Cross allocations are documented in Exhibit 9, Tab F. According to this document, a total of \$880.02 in Blue Cross payments went to Sherri Lee’s on-account. This does not represent payments to which Ms. Lee was entitled through her own Blue Cross coverage.

[107] Notations on the Blue Cross “Provider Payment Summary” documents in Exhibit 2, Tab A, indicate that on April 24, 2008 Ms. Lee made Blue Cross payment allocations to insured clients’ on-accounts. Ms. Lee confirmed in her testimony that the signature, date and check marks are hers: on April 24, 2008 she made most of the allocations for the Provider Payment Summaries dated April 16, 2008. One such allocation was in relation to a Blue Cross payment for Spa client, Lori White. The \$67.80 that Blue Cross paid for Lori White’s Spa service was not allocated to her. On the date the allocations to client on-accounts were done, April 24, Ms. Lee’s on-account was credited with a cheque in the amount of \$67.80. (Exhibit 5, Tab A – On Account History of Lori White and Tab O – On Account History for Sherri Lee.)

[108] A large Blue Cross cheque came to the Spa dated April 30, 2008. (Exhibit 2, Tab B) The individual amounts making it up were allocated to client accounts by Ms. Lee on May 9, 2008. Of payments intended for clients, John Calder (\$84.75)

and Lori White (\$67.80), John Calder received \$79.10 and Lori White received \$67.60. (Exhibit 5, Tabs A (Lori White) and B (John Calder) on-account histories) The Calder on-account received \$5.65 less than the Blue Cross cheque amount designated for him and the White on-account received .20 less. On the same date the allocations were done, May 9, 2008, \$5.65 and .20 went to Ms. Lee's on-account. Also on May 9, 2008, a payment for Ms. Lee's husband, Bobby George, was allocated in part to Ms. Lee's account: of \$67.80 designated for Mr. George, \$50.85 went to Ms. Lee's on-account. And Mr. George's on-account for May 9, 2008 shows an entry of \$16.95 which happens to be the difference between \$67.80 and \$50.85. (Exhibit 5, Tab C – On Account History for Bobby George, and Tab O – On Account History for Sherri Lee.) To summarize the Bobby George example, of \$67.80 from Blue Cross for Bobby George's insured massage, only \$16.95 was allocated to his Spa account. On the same day, an amount - \$50.85 - that happens to represent the difference between \$67.80 and \$16.95 went to Ms. Lee's on-account.

[109] Another Blue Cross cheque dated July 9, 2008 (Exhibit 2, Tab C) was posted to client accounts on July 16. Check marks and strike-through lines indicate that the allocations were made. There is no signature or dating of the documents, just the check marks and line-strikes. Anil Snook, a Spa client, was entitled to receive \$84.75. Her on-account was allocated \$22.60. (Exhibit 5 – Tab D – On Account History for Anil Snook) This means that \$62.15 was missing from the allocation for her Blue Cross coverage. An entry of that amount was made to Ms. Lee's account on the day Blue Cross allocations were done. (Exhibit 5, Tab O – On Account History for Sherri Lee.)

[110] The next Blue Cross cheque that arrived at the Spa was dated July 23, 2008 (Exhibit 2, Tab D). According to the S.A.M. system, the allocations to client accounts were done on July 28. The check marks, initials and line-strikes on the pages of the “Provider Payment Summary” from Blue Cross indicate that the first three pages were posted by Ms. Lee. The entries on these pages include one for Stephanie Meagher, a Spa client. Blue Cross paid Embrace Spa \$67.80 for services rendered to Ms. Meagher. None of this was allocated to Ms. Meagher’s on-account. However, on July 28, amounts totaling \$67.70 were credited to the on-accounts of Sherri Lee (\$43.62 and \$2.48), Tanisha Lee (\$10.17) and Aiden Lee (\$11.53). These payments zeroed Tanisha’s and Aiden’s on-account balances. (Exhibit 5, Tab O – On Account History for Sherri Lee; Tab P – On Account History for Tanisha Lee; Tab Q – On Account History for Aiden Lee)

[111] According to the date and initials recorded on the documents for a Blue Cross cheque dated August 6, 2008 (Exhibit 2, Tab E), Ms. Lee did the allocations to client on-accounts on August 14, 2008. Blue Cross had forwarded payments of \$84.75 for each of Kara and Karen Brison. One payment of \$84.75 was credited to Kara Brison’s account when the Blue Cross allocations were made on August 14. According to the S.A.M. records, on August 15, 2008, Ms. Lee’s on-account received a payment in the amount of \$84.75.

[112] The activity in the on-accounts for Kara Brison and Sherri Lee on August 14 and 15, 2008 warrants a close look. Kara Brison had come to the Spa on July 29, 2008 with her mother for them each to have a massage. (Exhibit 7, Tab C) Both

Brisons had Blue Cross coverage. The massages were billed to Kara Brison's Spa account. (Exhibit 5, Tab F – On Account History for Kara Brison) In the August 6, 2008 Blue Cross cheque were payments for each woman in the amount of \$84.75.

[113] On August 14 when Ms. Lee did the Blue Cross allocations, Karen Brison's on-account showed nothing owing for her July 29 massage because it had been billed to her daughter's account. Despite Kara Brison's on-account carrying the cost for both massages, she was allocated only \$84.75 from the Blue Cross cheque. The next day according to the S.A.M. system, the same amount exactly that Blue Cross had sent the Spa for Karen Brison appeared in Sherri Lee's on-account, bringing its balance down accordingly. (Exhibit 5, Tab O – On Account History for Sherri Lee)

[114] Ms. Lee did the allocations for a Blue Cross cheque dated September 17, 2008 on September 24, 2008 according to the S.A.M. system. The "Provider Payment Summary" documents (Exhibit 2, Tab F) show Ms. Lee's initials, line-strikes and check marks but no date. The Blue Cross cheque included a payment for Trevor Conrad of \$67.80. That amount was not posted to his on-account. Ms. Lee's on-account shows an entry of \$67.80 on September 24. (Exhibit 5, Tabs H and O – On Account History for Trevor Conrad and On Account History for Sherri Lee)

[115] Another entry to Ms. Lee's on-account was made on January 2, 2009 in the amount of \$67.80. (Exhibit 5, Tab O – On Account History for Sherri Lee) Blue Cross allocations from a cheque dated December 23, 2008 were done on this date

although no identifying initials appear on the “Provider Payment Summary” documents, just the date the postings were done – January 2, 2009. (Exhibit 2, Tab G) A Spa client, Kelly MacLeod, was entitled to receive a Blue Cross payment in the amount of \$67.80 from the Blue Cross cheque that was posted to client on-accounts on January 2. That payment was never credited to her account. (Exhibit 5, Tab I – On Account History for Kelly MacLeod)

[116] Ms. Lee’s initials, dating and line-strikes appear on “Provider Payment Summaries” from Blue Cross dated February 18, 2009 (Exhibit 3, Tab H). The date indicated is February 26, 2009. An allocated amount of \$90.40 for a Katie Spencer appears on one of Ms. Lee’s signed pages. On the same date as the allocations were done, February 26, 2009, Ms. Lee’s on-account shows an entry of \$90.40. (Exhibit 5, Tabs J and O – On Account History for Katie Bell [aka known as Katie Spencer] and On Account History for Sherri Lee)

[117] As in the case of Karen Brison earlier, the S.A.M. system did not show an amount owing for Katie Spencer. In fact, the S.A.M. records did not have a client file for a Katie Spencer. The evidence has established that Katie Spencer had been Katie Bell before she was married. She remained Katie Bell in the S.A.M. system. There was no allocation on February 26, 2009 of \$90.40 into Katie Bell’s on-account.

[118] A Blue Cross cheque dated March 4, 2009 arrived at the Spa with the usual documentation, the “Provider Payment Summary” pages (Exhibit 2, Tab I) listing the clients receiving benefit payments. According to the S.A.M. system, postings

for this cheque were made on March 16, 2009. Ms. Lee posted some of these payments to client on-accounts, her initials, line-strikes and check marks appearing on the documents but without an indication of date. Sarah Mader also worked on allocations for this cheque. Spa clients Deanne Pittman, Bethany Draper and Kim Johnstone-McInnis received Blue Cross payments in the amounts of \$72.00, \$124.30 and \$72.00 respectively. Allocations were made as follows according to the on-accounts: for Deanne Pittman, nothing; for Bethany Draper, \$38.80, and for Kim Johnstone, \$45.53. On the same date, March 16, 2009, Ms. Lee's on-account received \$72.00, \$85.50, and \$26.47. Simple math shows that Ms. Lee's on-account was credited the exact amount of money that did not get allocated to the Spa clients entitled to it - \$183.97. (Exhibit 5, Tabs K, M and N – On Account Histories for Deann Pittman, Bethany Draper and Kim Johnstone-McInnis, and O – On Account History for Sherri Lee)

[119] Ms. Lee's initials, line-strikes and/or check marks appear on the "Provider Payment Summary" pages where the Pittman, Draper and Johnstone Blue Cross payments are indicated.

[120] The Deanne Pittman Blue Cross allocation bears a resemblance to the earlier cases of Karen Brison and Katie Bell Spencer. The Deanne Pittman payment in the March 4, 2009 Blue Cross cheque indicated she had received a Spa service on February 26, 2009. S.A.M. records show she did not. Deanne Pittman's last massage was on December 2, 2008. (Exhibit 7, Tab A) However the S.A.M. system shows that an Angela Pittman was at the Spa for a massage on February 26, 2009. Her on-account still shows an outstanding balance of \$72. (Exhibit 5, Tab L

– On Account History for Angela Pittman) At the time the Blue Cross cheque arrived with a payment ostensibly for Deanne Pittman, Ms. Pittman’s on-account showed that her December 2, 2008 massage had been paid for and she had a zero balance. (Exhibit 5, Tab K – On Account History for Deanne Pittman) It was Angela Pittman who still owed money.

[121] As I just noted, the Blue Cross cheque of March 4, 2009 contained a \$72.00 payment for Deanne Pittman. It was Angela Pittman who owed \$72.00 for a massage on the applicable date, February 26, 2009. According to the “Payment Provider Summary”, Ms. Lee allocated the \$72.00 payment on March 16, 2009. It was on that date that Ms. Lee’s own on-account was credited with \$72.00, a payment described by the words “CHECK.”

[122] During the time when Ms. Lee was doing Blue Cross allocations to client accounts, her own on-account was being enriched by the amounts I have described above. It was a very active account. Ms. Lee testified that she had “a good handle on her account.” It is unreasonable to think she would have failed to notice that amounts were appearing in it that reduced the balance she owed. None of the amounts I have been reviewing represent benefits that Ms. Lee was entitled to from Blue Cross. The amounts that were credited to Ms. Lee’s on-account were not amounts that appear on the Blue Cross “Provider Payment Summary” documents as amounts to be paid to Ms. Lee.

[123] The misallocation of Blue Cross payments does not appear in the on-accounts of other Spa staff. They are only found in the on-accounts of Ms. Lee and



members of her family. Ms. Lee testified she does not know how these misallocations occurred. This is in spite of the fact that in a number of cases Ms. Lee's initials plainly confirm that she was the person doing the postings to the accounts when identical amounts to those intended for insured clients went into her's or her family's on-accounts.

[124] I do not believe Ms. Lee's testimony that she does not know how these payments made their way into her on-account. Given the role Ms. Lee played in Blue Cross allocations, her claim that she had no hand in the crediting of her account with sums of money that precisely match what did not go into the accounts of entitled clients has no credibility. I find there is no evidence to support any conclusion other than Ms. Lee was allocating Blue Cross payments intended for Spa clients to the benefit of herself and her family. Spa employees testified that they did not misallocate Blue Cross payments when they worked on these cheques. I accept that evidence.

[125] Furthermore, why would Spa staff have misallocated payments to the benefit of Ms. Lee and her family? Ms. Lee confirmed in her evidence no one ever told her they were doing this and she never asked anyone to do it. It defies all reason and logic to suppose that someone else was allocating insured clients' payments to Ms. Lee's account and the account of her daughter and nephew. And had that been happening, the obvious benefit being enjoyed by Ms. Lee's on-account would have been obvious to her. The mysterious appearance of unexpected money in an honest employee's account would have prompted a concern being raised. Ms. Lee never

indicated to either Ms. Price or the Caldarozzi's that there was something odd happening with her on-account.

[126] Ms. Lee posted the allocations from the Blue Cross cheques that included payments for Karen Brison, Katie Spencer and Deanne Pittman. She was very well versed in the Spa's S.A.M. system. She would have been able to recognize and exploit opportunities that made it easy to re-direct these payments to her account: Karen Brison showed nothing owing for a massage, Katie Spencer didn't exist in S.A.M., and Deanne Pittman had no outstanding balance for a massage. No one was any the wiser about the misallocations until Ms. Lee left the Spa and the forensic audit was done.

[127] The forensic audit identified a total of \$880.02 as the amount of money that Ms. Lee's and her family's on-accounts received during the relevant period that in fact should have been allocated to insured clients' accounts. (Exhibit 9, Tab F) The Crown advised during submissions that this should be discounted by a couple of misallocations that do not appear in the Blue Cross documentation provided at trial. I have also discounted the \$50.85 that went into Ms. Lee's on-account on the same day (May 9, 2008) that Mr. George's on-account was credited only \$16.95 when Blue Cross had sent payment for him in the amount of \$67.80. There is nothing to satisfy me that Mr. George did not authorize Ms. Lee using that money to her benefit. As they were in a relationship at the time, that is possible.

[128] It is not possible that anyone else consented to Ms. Lee using money designated for them by Blue Cross to her benefit. Exhibit 1, the Agreed Statement

of Facts, categorically confirms this with respect to Lori White, John Calder, Anil Snook, Karen Brison, Trevor Conrad and Kelly MacLeod. In any event, Ms. Lee does not suggest she had anyone's consent to make these allocations to herself and her family. She has testified to having no idea how these misallocations occurred. As I have said, I don't believe her.

[129] These misallocations are Ms. Lee's handiwork. Such systematic crediting of the Lee on-accounts cannot have been accidental. Ms. Lee's involvement in the allocations is indicated by the initialing and other markings on the documents, with the exception of the postings done on January 2, 2009 (date only indicated) where Ms. Lee's on-account was credited for the exact amount that should have gone to Kelly MacLeod whose account received nothing. I am left with no doubt that Ms. Lee made all these fraudulent allocations to benefit her own account at the Spa or the accounts of family members, including the allocation of the payment that should have gone to Kelly MacLeod on January 2, 2009.

[130] The amount of the fraudulent Blue Cross allocations made by Ms. Lee, with the discounting I have done from the total calculated by the forensic audit, is \$676.62.

#### Back-dating

[131] The S.A.M. system seems to have offered much of what the Spa needed to manage the financial transactions in its operations. However one function that could not be performed on the system was editing an on-account. Once an entry

was made it was there to stay. On the S.A.M. system the only way to change an on-account was by a process called “back-dating.” Back-dating enabled an amount to be entered onto an on-account as a credit. A credit would reduce the amount owing to the Spa making back-dating a useful device for dealing with cases of overcharging.

[132] Ms. Price had to confront the problem of not being able to alter an on-account when precisely this situation occurred: a staff member was overcharged for a service. Ms. Price, looking for a way to correct the entry, contacted the software company that supplied the S.A.M. programme. This happened sometime in 2008. The software company explained back-dating. Back-dating required opening various screens, including the client account, and using a date earlier than the Spa’s start-up date to create a new entry. Crediting an on-account by way of a new entry would reduce or zero an erroneous balance. The use of the earlier date made back-dates easy to spot in the account’s history. No particular date was proposed at the time. No special password was required to access the S.A.M. system for the purpose of back-dating.

[133] It was Ms. Price’s evidence that the software technician explaining the back-dating procedure did so on speaker phone in Ms. Price’s office. Ms. Lee was present. Ms. Price recalled using the technique about five times in the period relevant to this case. She did not know if Ms. Lee ever used it as it was never discussed. Ms. Price testified that Ms. Lee never approached her about back-dating any accounts. To Ms. Price’s knowledge, only she and Ms. Lee knew about back-dating. This was Bonnie Caldarozzi’s understanding as well.

[134] As it turns out, Judy Dunlop testified to back-dating an account or being present when an account was back-dated under “very special circumstances.” It was Ms. Dunlop’s evidence that she “definitely” remembers Ms. Caldarozzi being there when this was done. However, with the exception of Ms. Dunlop’s experience, the evidence confirms that back-dating was not a procedure that other Spa staff knew about. Robin Harlow, Sarah Dorey, Taylor McKindsey, and Sarah Mader all testified they had not known about back-dating at the time.

[135] Although Ms. Lee gave a different explanation in her testimony for how she came to know about back-dating, she acknowledged that she had learned about it and knew how to do it. She said she was not aware that anyone else was doing back-dates at the time.

[136] The evidence establishes that more back-dating went on than anyone seems to have known about or recalled. Exhibit 8 shows a little more than three pages of back-dating in the on-accounts, including when Ms. Lee was still employed there. On-accounts of Spa clients, staff, and some relatives were back-dated. There is no evidence to support Ms. Lee being responsible for all the back-dating revealed by Exhibit 8.

[137] Back-dates were done on Ms. Lee’s own account and the accounts of various relatives: her sister, Kendra Dodge, her sister-in-law, Kelly Smyth, her daughter, Tanisha Lee, and her nephew, Aiden Lee. It is not possible to know when the back-dating was done as the S.A.M. system does not record this information. What the

back-dating of these on-accounts did was to credit them various amounts shown as “CASH.”

[138] Ms. Lee’s on-account shows five back-dated credit entries that totaled \$301.83. (Exhibit 8 and Exhibit 5, Tab O) Kelly Smyth’s on-account was back-dated to reflect payments totaling \$544.07. (Exhibit 8 and Exhibit 5, Tab S) Tanisha Lee’s on-account was credited a payment of \$33.86 through back-dating. (Exhibit 8 and Exhibit 5, Tab P) And Aiden Lee’s on-account was back-dated for a credit of \$10.26. (Exhibit 8 and Exhibit 5, Tab Q) One of the back-dates on Ms. Lee’s account and the accounts of Tanisha Lee and Aiden Lee all show the same date was used: April 2, 1938. The Crown invites me to draw the inference from this fact that these entries were all made at the same time. That is a reasonable inference to make.

[139] It is the Crown’s submission that the back-dating of Ms. Lee’s on-account and those of Kelly Smyth, Tanisha Lee and Aiden Lee was the fraudulent action of Ms. Lee. Another account in the S.A.M. system, Janelle Sutherland’s, was also back-dated, in the Crown’s submission, as part of Ms. Lee’s fraudulent scheme.

[140] The back-dating for the on-accounts of Ms. Lee, Tanisha Lee and Aiden Lee is a mystery as there is no evidence the accounts were subject to erroneous entries that had to be fixed. Ms. Lee testified that she cannot recall why her account was back-dated and is not sure where the back-dated payment for her daughter’s account came from. She testified that she does not know why Aiden Lee’s account would be back-dated although she later offered an explanation about paying for his

haircuts with debit. However neither Aiden's nor Ms. Lee's on-accounts show a debit payment in the amount of \$10.26, the amount of the back-dated payment for Aiden's haircut.

[141] Ms. Lee testified she could shed light on the back-dating of Kelly Smyth's on-account. She said it was because Ms. Smyth's insurance company had agreed to pay \$500 for massage therapy. For some reason, says Ms. Lee, the Blue Cross payments did not get applied to Ms. Smyth's account so Ms. Lee credited the amount by back-dating. She does not know what happened to the \$500 cheque that she testified came in to pay for Ms. Smyth's services.

[142] Ms. Price was asked about the Sherri Lee/Tanisha Lee/Aiden Lee on-accounts back-dating and the back-dating of the Kelly Smyth account. She testified that she knew nothing about these entries and had not been approached about any of this by Ms. Lee or the Caldarozzi's.

[143] Back-dating also occurred in Janelle Sutherland's account. There is evidence to indicate a connection to Ms. Lee. Ms. Sutherland worked at Embrace Spa and had an on-account. At the relevant time she was Jeanette Rogerson, changing her name when she got married on September 13, 2008. As part of her wedding preparations, Ms. Sutherland decided to get some Spa services for herself and her two bridesmaids. She remembers these events clearly, given their association with her wedding.

[144] Ms. Sutherland approached Ms. Price and asked for permission to put the cost for her Spa services on her account. She had never put services on her account before and she knew Ms. Price made the decisions about such matters. Ms. Price okayed this, and Ms. Sutherland and her bridesmaids obtained the services. Ms. Sutherland recalls paying \$50 on her account on September 13, 2008, the day of her wedding. She handed the money to Ms. Lee at the reception desk of the Spa. Ms. Sutherland made a second payment on her account when she returned from her honeymoon on approximately October 1, 2008. The cash she used on this occasion had come from cash she received as wedding gifts. She recalls giving this cash to Ms. Lee as well, an amount she remembered being around \$250. This second payment would have settled her account.

[145] Ms. Sutherland knew nothing about back-dating at the time, either generally or specifically in relation to her account. No one raised with her any concerns about her account. When at trial Ms. Sutherland reviewed her on-account history (Exhibit 5, Tab T) which shows payments of \$50 by "CHECK" and \$226 by "CASH" entered on her account on May 9, 1971 and October 1, 1990 respectively, she commented that these dates had "absolutely no significance" for her. Other than those entries, there is no record in Ms. Sutherland's on-account of her payments.

[146] Those anomalous dates indicate that Ms. Sutherland's account was back-dated to allow the entry of credits totaling \$276.



[147] Ms. Price was also asked about Ms. Sutherland's account when she testified. She recalled approving the installment payment plan for the Spa services. She was unaware that the account had been back-dated and testified that neither the Caldarozzi's nor Ms. Lee had spoken to her about back-dating the account.

[148] Ms. Sutherland's recall of handing Ms. Lee her two payments was unshaken by cross-examination. She testified that she "remembered specifically having the conversation with Sherri." She described Ms. Lee checking her account on the computer. She saw Ms. Lee put the money in the till. Ms. Sutherland was a rock-solid witness: very credible, clear in her recollections, forthright, and endowed with excellent recall. I accept her evidence in its entirety.

[149] Ms. Lee testified that she has no recall of Ms. Sutherland's payments. She remembers the Sutherland wedding party but she does not remember if Ms. Sutherland handed her any money: in her words, "I don't remember any transactions of money with Janelle at all." She denied taking money from Ms. Sutherland and then back-dating her account. Ms. Lee did agree that payments to Ms. Sutherland's account would have been reflected in her on-account and acknowledged there was no practice at Embrace Spa of not ringing cash payments through right away.

[150] While it is possible Ms. Lee does not now recall the transactions with Ms. Sutherland, I have concluded there is only one credible explanation for what happened to Ms. Sutherland's payments. It was known at the Spa that Ms. Sutherland had received Spa services. Payment for those services would be

expected to appear in her on-account history. And it does, only not with dates of September 13 and October 1, 2008. Payment appears as back-dated credits. Back-dating permitted entries to be made that were nothing more than paper entries. Any real cash did not have to be entered into the system where back-dating was used in this fashion. This made it possible for the real cash to disappear. I find that it has been established beyond a reasonable doubt that the cash Ms. Sutherland paid for her Spa services disappeared into Ms. Lee's pocket and that Ms. Lee made it appear as though it had gone on Ms. Sutherland's account by using the technique of back-dating.

[151] Ms. Lee denied back-dating Ms. Sutherland's account but I do not believe her. I also do not believe her explanations for the back-dating of Kelly Smyth's account nor do I believe her explanation for the back-dating of Aiden Lee's account. I am satisfied beyond a reasonable doubt that Ms. Lee deliberately and fraudulently back-dated these accounts and that she also fraudulently back-dated her own account and that of her daughter, Tanisha, in order to obtain a benefit to which she was not entitled. There is no evidence whatsoever that anyone else was manipulating these accounts other than Ms. Lee, and no imaginable reason for anyone to do so, and I reject any suggestion that may have occurred. Added to which, the evidence indicates, at most, that only Ms. Lee, Ms. Price and, according to Judy Dunlop, maybe Ms. Caldarozzi, knew how to back-date. I find no plausible or credible basis to believe that Ms. Price or Ms. Caldarozzi would have back-dated the on-accounts of Ms. Lee or her family.

[152] Embrace Spa, a fledgling business, operated on the basis of trust and good will. At the time relevant to the charges against Ms. Lee, it had not implemented in its day-to-day financial affairs the checks and safeguards that would have reduced or eliminated its vulnerability to theft and fraud. I find that Ms. Lee, well acquainted with the operational side of the business, saw opportunities to enrich herself, and exploited them. While there is no requirement for the Crown to prove motive, Ms. Lee had a motive. As she indicated in her testimony and to the police, she felt under-valued at the Spa; she worked very hard and, from her perspective, was not adequately compensated. She believed she deserved a raise and even though she spoke with Ms. Price and Mr. Caldarozzi about getting one, the increase that followed from this overture was disappointing. The evidence indicates to me that Ms. Lee saw a way to take matters into her own hands and get from the Spa the money she felt she was owed. She was able to do this by taking advantage of the trust she enjoyed and the knowledge she had about the Spa's operations.

[153] As my reasons indicate, the Crown has established beyond a reasonable doubt that Ms. Lee is guilty of theft and fraud. I am fully satisfied that Ms. Lee's guilt is the only reasonable inference to be drawn from the evidence I have accepted. I enter convictions accordingly on Counts 1 and 3 as charged and on Count 2, a conviction on the included offence of fraud under \$5000.

