

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Wilson, 2008 NSPC 68

Date: 2008 October 16

Docket: 1749136

Registry: Sydney

Between:

The Queen

v.

John Norman Wilson

Judge: The Honourable Judge A.P. Ross

Heard: Sydney, Nova Scotia

Decision: October 16, 2008

Charge: s. 380(1)(a) cc

Counsel: Ms. Diane McGrath for the Crown
Mr. Joel Pink for the Defence

By the Court:

[1] I'm going to turn to Mr. Wilson's matter now, this is a matter for sentence, of course, which was adjourned from yesterday. I will say at the outset that for possible future reference I am going to have the bulk of these remarks reduced to writing and circulated in the form a written decision. I'll do my best this morning to go through the various aspects of sentence, to deal with the arguments and issues raised by counsel. I have many pieces of paper here to guide me along the way. I'm going to deal with them under certain headings and I'll try to make it clear as we proceed just what aspects I'm touching on. I'm sorry to be late getting going, I know Mr. Wilson has been waiting a long time for this. He waited a number of years for the investigation to complete, waited over a year since the charge was laid, and has been waiting since yesterday for the sentence and I didn't mean to have him counting not only years but also minutes and seconds but I think we're finally at the point where I arrived at a settled conclusion as to what I believe is the fit and appropriate sentence. You'll have to excuse me for being some what lengthy in giving reasons for the outcome but this is not a typical or usual or simple case, there are strong and compelling considerations taking me in different directions and I think it's incumbent on me to try to put on record the reasons for the outcome.

[2] Mr. Wilson, of course, is charged with a fraud, he plead guilty to a single count which encompassed a number of transactions in the month of January and then early February of 2001. They involved deceiving the Bank of Nova Scotia of a sum of money through the acquisition of financing for motor vehicles. By using false and fraudulent documentation the sum here is a huge sum of money of over 1.8 million dollars. I'm not going to repeat the crown's recitation of the facts but it would appear that the Bank of Nova Scotia was Mr. Wilson's business's principle source of financing. Mr. Wilson ran a car dealership in Sydney. He had inventory financing from the Bank of Nova Scotia, such a business normally would. Under this form of financing he financed inventory as it came through and re-paid the advances when the stock was sold. In the month in question he fabricated purchase orders making it appear that he had acquired vehicles from Chrysler when actually he had not. He used those and demand promissory notes to obtain working capital from the bank which it advanced on the belief that it was secured in a sense by the vehicles in question. He did this for sixty-eight vehicles using vehicle identification numbers for cars in other dealerships or making them up entirely and I was also told that he also in a couple of cases faked sales of a couple of those vehicles, these fictitious vehicles, to make it appear that inventory was moving.

[3] There are ways in which John Wilson is larger than this crime and there are ways in which this crime is larger than John Wilson. We have in court this morning for sentencing a man who has plead guilty to defrauding the Bank of Nova Scotia of over 1.8 millions dollars. What makes this a particularly difficult case is the fact that the accused is not a bad or dangerous person, quite the opposite. The material supplied by defence includes letters of reference and some testimony about his character and reputation. It comes not only from his family members but from people who are highly respected members of the community and they include other businessmen, clergymen, educators, community workers, lawyers and elected officials. Each one urges the court to show some understanding, some leniency, together they point out his good deeds in the community, his efforts on behalf of charities, the personal bonds he has forged with others and the high regard he enjoys among those who know him. So indeed John Wilson, the person, is larger than this crime. He says himself that he feels his life was only lived ninety percent honest and honourable, I think is how he put it in his statement, that there is a missing slice. I have little doubt that Mr. Wilson is today as he sits here awaiting his punishment a better person than most of those who will never enter the door of a courtroom charged with an offence. But the function of a judge passing sentence is

not to pass judgement on an accused's life, rather it is to pass judgement on a particular behaviour, to find an appropriate sentence for a particular conduct. The sentence, whatever it is, will not define Mr. Wilson's entire life. Those sorts of judgements are well beyond the scope of this court. This is not to say that his personal circumstances are irrelevant. In the Pre-Sentence Report and elsewhere one learns that he assumed primary responsibility for the upbringing of his two daughters after his marriage dissolved. He is described as hard working, conscientious and community minded. However, a sentence must be fitting and appropriate to the conduct first and foremost regardless of the underlying character of the person who engages in it or the many other positive deeds he or she may have performed elsewhere in their lives. In a sense I am being asked to see beyond the events of January 2001 and indeed I should. The story of this crime can be placed in the story of the accused's life but it should not be lost in that broader picture. It is the features of the crime itself which this sentence must address. This is so because the conduct and this sentencing has a public aspect. Likely no area of the law has a more public face than criminal law. We deal here not simply with private obligations but with the rules and standards which are supposed to govern everyone regardless of status or upbringing. A sentence therefore does not necessarily or simply benefit the individual offender per se, rather it must be fitting in a larger

societal context. If it is not, public confidence in the criminal justice system is diminished and respect for the rule of law is eroded. To some while the defence submission and supporting material naturally and understandable positions the particular conduct from January of '01 in the context of Mr. Wilson's entire life I must also consider how a sentence fits into the broader public context and that is a context which extends well beyond Mr. Wilson himself and even beyond his family and those who know him.

[4] Mr. Wilson could scarcely have received the benefit of a more thorough submission than the one made by his counsel. I have listened and read and considered the material in the cases supplied. Counsel too has made a cogent submission on sentence. I agree that the factors enumerated in page seventeen to eighteen of defence counsel's brief are mitigating factors. Those include his plea of guilty, his expressions of remorse, that there was no personal benefit, that the activity extended over a one month period rather than a more extended period of time, his co-operation with the police and indications of stress and depression. Other courts have considered these aspects of an accused's behaviour in fashioning sentence and I should as well. And while I am in general agreement with the

potential relevance of these aspects I do, however, wish to make a brief comment on some of them.

[5] With respect to the plea of guilty Mr. Wilson was charged on February 27th of '07, about 6 years after the crime itself was committed. He plead guilty on the 8th of February 2008, about 1 year after the charge was laid. He did this before there were any hearings thus avoiding the necessity of a trial and the attendant expense.

However, it appears he “plead out” to use the vernacular in the face of a very strong case backed up by documentary evidence and forensic investigation. And he may have been acknowledging the inevitable outcome. This does not mean he is without remorse, that is a different matter. Mr. Wilson does appear to be genuinely remorseful and ashamed. His plea of guilty is certainly entitled to great weight, however, I simply make the comments noted above.

[6] No personal benefit. Under this heading, this mitigating factor, there is no evidence that he took large sums out of the company during the relevant period and used them for his own purposes. There is no evidence of extravagant personal spending. I will say, however, that the business was presumably sustaining Mr. Wilson in at least a moderately comfortable lifestyle and of course there is the

benefit of that, keeping the business ongoing. And there is too to some extent I think to be considered here matters of his pride and reputation which would be important to him. These are benefits in a sense in keeping the business afloat and his reputation and position in the community afloat with it. I'm going to make some remarks later under the heading of "motive" which have some bearing as well on the matter of personal benefit.

[7] With respect to the "short period of time" over which the offenses were committed. A little bit more than 1 month. This is I agree again a relevant factor but I think it is important to remember that this was not just a momentary impulse but it was a concerted pattern of behaviour. The money taken was more than many have been able to steal over a much longer period. One must remember that not once or twice, not 6 or 7 or a couple of dozen times but on sixty-eight occasions Mr. Wilson created false and fictitious documents in order to draw down funds from the Bank of Nova Scotia. By lying to the bank he was able to get his hands on 1.8 million dollars of money for his company and the amount taken is ultimately more important than the length of time it took for him to steal it.

[8] With respect to the comments concerning his mental state and depression. Despite the fact that the opinion of Dr. Munchie is uncontested and is expert opinion, despite the fact that it is entitled to and does receive weight at this sentencing I have some reticence to give it quite the significance attributed to it by the defence or even by Dr. Munchie himself. The theory of the defence is that Mr. Wilson's judgement was impaired by a significant episode of depression which preceded the events by a couple of months at least and persisted through January of '01. Dr. Munchie talked about what depression meant, clinical depression, and he describes some of its features and I've considered those in light of the conduct involved here to see whether this strong a connection can be drawn between the two. First of all what appeared to be indispensable features of depression according to the diagnostic and statistical manual are depressed mood and loss of pleasure. One would think that depressed mood and loss of pleasure would lead to lassitude to a person doing less, perhaps working less. It appears that Mr. Wilson continued to work long hours. Other adjectives used by Dr. Munchie to describe features of depression include a person being forgetful. Mr. Wilson did not forget to do anything here. Another adjective used was indecisive. Mr. Wilson was not indecisive, he took action to address what he saw was a crisis in the business. Other features include agitation, insomnia and irritability. This is not a case of loss of

temper or falling asleep at the wheel of a car. Other features include anxiety and guilt and in extreme cases suicidal thought. And I think those come closest to supporting the defence theory that I enunciated earlier. Dr. Munchie describes it in this way, he says at page 3 of his letter:

Mr. Wilson's main stressor has been his automobile dealership. Mr. Wilson's business started as a small jeep dealership in 1990 and about 5 years later he felt pressured into getting into the Chrysler dealership along with his partner. The pace was quite hectic and because of the increased pressure from work along with other personal issues his stress level increased. Because of increased anxiety and dysphoria due to the ongoing psycho social stressors (i.e. loss of marriage, difficulty dealing with stressors from his 2 adult daughters, financial stress and the ill health of his mother) his capability to make rational decisions was greatly affected.

I would note, and this is not to diminish in any sense what the responsibility that Mr. Wilson undertook with respect to his children but from the PSR it would appear that he separated from his first wife, Donna, in 1997 by that time I'm advised in the report his daughter, Heather, had already left home. His daughter, Sarah Jane, resided with her mother for 3 years and then moved in with Mr. Wilson for about 4 years. I was told there that Mr. Wilson and Loretta Baker lived together for about 2 years from 2000 to 2002 which would be the relevant time period for the offence, that they had trouble blending their families and there was, of course, the stress of the business and the unfolding investigation. Nevertheless Dr. Munchie includes and there was likely some stress even though these 2 children were apparently to a

large extent self-supporting by the time this crime was committed, some stress resulting in their financial well being. I note he did employ them and there's certainly nothing wrong with a small business person employing family members. Dr. Munchie's conclusion is his capability to make rational decisions was greatly affected. Yet in a sense what Mr. Wilson did in January of '01 was rational it was wrong and illegal and it turned out to be self-defeating but it was a planned and deliberate scheme to inject working capital into the company, he believed it might keep things afloat and he thought he might get away with it. Dr. Munchie said that he counsels people suffering from depression not to make major decisions. But what we have here is not comparable to someone in a state of depression or depression quitting their job or leaving home or leaving their spouse, those things like suicide in extreme cases are clearly harmful to the individual. What Mr. Wilson did he thought would work to his benefit and indeed to the benefit of others. Over and above the ability to calculate his financial interests I do not take from the medical report of Dr. Munchie any suggestion that being depressed deprives a person of the ability to distinguish right from wrong. And that is what is at the crux of this matter this morning.

[9] With respect to motive and here I do return to the matter of personal benefit or lack of personal benefit. As I said there is no indication Mr. Wilson used the money for anything other than the business. He was not leading a lavish lifestyle. The trustees appointed to the business did not see any evidence that he syphoned off money. However, the distinction between Mr. Wilson and his company is to some extent an artificial one. He was inextricably tied up with his business , he had a direct beneficial interest in the company, he presumably went into business to make a success of it, to secure his and his family's long term financial well being. In December and January of '01 he saw that the business was in trouble and to keep it going presumably hoping things would turn around he embarked on a series of fraudulent transactions by which he deceived the Bank of Nova Scotia of giving the business 1.8 million dollars. Certainly it is possible that he did not want to see his employees laid off and he felt a sense of responsibility to them. Many people have said this and I don't disbelieve it. However, despite this these actions cannot be seen as simply selfless acts. In doing this one asks what sacrifice he was making? He and others, of course, were directly benefiting from the fraud and I have little doubt that the preservation of his business, personal pride and long term financial success were all motivating factors. Here I suppose one might ask how delaying the

inevitable because his business was in such trouble or how risking or going to jail was doing anyone a kindness.

[10] With respect to the extent of the loss this received some attention yesterday. It is clear that the actual amount taken was in excess of 1 million eight hundred and fifty-four thousand dollars. In fact the figure is known to the penny. Less clear is the actual pecuniary loss to the Bank of Nova Scotia given the personal and business bankruptcy and or receivership which ensued shortly after the event. It seems the business was failing, debts were piling up and payroll and rent were continuing obligations which had to be met. The 1.8 million was stolen from the bank, the business went into receivership or bankruptcy and Mr. Wilson went into personal bankruptcy in quick succession. I do not know on the basis of submissions what the Bank of Nova Scotia may have realized from those proceedings nor even what Wilson Chrysler or Mr. Wilson personally may have owed the bank, it may have been more than 1.8 million dollars. One would think that monies loaned to the business prior to January of '07 were largely covered by actual vehicles or other assets. However, the 1.8 million fraudulently obtained in January of '01 was completely unsecured or underwritten by any actual asset. It was piled on top of existing indebtedness. Given the imminent failure of the business and the presence

of existing debt it is difficult to see how the bank could have recouped this amount subsequently. It appears to me based on what has been presented that the actual loss to the bank must be in the same order of magnitude as the 1.8 million fraudulently drawn down in January of '01.

[11] With respect to the position of trust. Under that heading I agree with the defence submission that Mr. Wilson was not in a position of trust as that is commonly understood. The documentation and security required by lenders seems to belie the contention that banks repose trust in the usual sense in their commercial customers. Reputation, good business practice all no doubt are relevant to lending out money but this is accompanied by a healthy dose of skepticism and security and documentation and I do not think that abuse of any position of trust is an aggravating factor in this particular sentencing.

[12] Under the heading of what other punishments or consequences Mr. Wilson may have suffered. This I think is a relevant consideration. There are sometimes extra penal consequences that are a direct result of the behaviour that I think may legitimately be taken into consideration. Here those appear to be, apart from his own personal sense of shame and humiliation and loss of reputation which I will

speaking to again, they do appear to be the stress of a fairly long investigation, I have the indications from his sister and Miss. Baker and others that this put stress on Mr. Wilson.

[13] Under the heading of any particular consequences of a jail sentence to this particular offender. Here I note that a jail sentence and by this and elsewhere when I say jail I mean a conventional jail sentence in an institutional setting. Here sending Mr. Wilson to jail would not as it did in some other cases that were cited and considered by other courts it would not deprive Mr. Wilson's children of a caregiver or even of financial support. There is some evidence that a jail sentence would precipitate another bout of depression and that that in turn, although it seems to me somewhat speculative nevertheless somewhat real as well, that that in turn might increase the risk of further heart trouble. So this is a particular individual consequence of a jail sentence that I think can be considered and ought to be. With respect to the RV business, and I forget its name but the business that Mr. MacNeil spoke to when he testified, that business will lose an employee. Here though I note that under accelerated release, if a jail sentence were to be imposed here considering that as a possible option, that under the protocols of accelerated release Mr. Wilson could be back to work at the RV business or elsewhere for that

matter after 6 months. While I fully understand the value of Mr. Wilson to the RV business and I would commend the owner for being able to see beyond Mr. Wilson's conduct in January of '01, at the same time I don't think it would be appropriate to consider the negative impact of a jail sentence on Mr. Wilson to the RV business. I think that would be going too far astray from what is relevant and pertinent to this sentencing proceeding. Many have urged that the court show leniency under this heading. I would begin by saying that anyone, I think any right thinking person would as a human being naturally wish to extent leniency to Mr. Wilson given what has been presented about his life, character and reputation. It is worth noting that s. 718.2(d) and (e) do in effect say that the courts should exercise restraint in sentencing, that sanctions should not be unduly punitive or harsh. The Pre-Sentence Report and the letters of reference point out the tragic dimensions of this case. Mr. Wilson is beloved by his daughters and partner, he is respected by his colleagues, he is ashamed and remorseful and his actions here are out of character. It is entirely understandable therefore that I've been asked to consider a conditional sentence.

[14] The conditional sentence turning to that issue, that topic, is available where the court imposes a sentence of less than 2 years. First obviously the court must

conclude that a sentence of less than 2 years is fit and appropriate. Secondly a conditional sentence is suitable where it would not endanger the safety of the community. I have read some comment in other cases that seem to equate the safety of the community with the financial loss suffered at the time of the crime. I don't understand that kind of reasoning. I would simply say that based on how I understand that provision of the Criminal Code Mr. Wilson does not pose a danger to the community today in any sense. The third requirement before a conditional sentence can be imposed is this - it is available provided that it is consistent with the fundamental principles and purposes of sentence. I am left with the first and third of these i.e. the length of sentence being under 2 years and not doing harm to the fundamental purposes and principles of sentence. Those two are what require careful and difficult consideration in this case. That is whether less than 2 years is suitable and whether a sentence served in the community even under house arrest is consistent with certain fundamental purposes of sentence. Both of these call on the court to consider the extent to which deterrence and denunciation factor into an appropriate sentence for a crime of this sort. Deterrence and denunciation, and when I say deterrence I here mean and will always mean general deterrence, these are not the only objectives of sentence but they are two important objectives and I need to assess their importance to the outcome here. Section 718 of the Criminal

Code says that the fundamental purpose of sentence is to contribute to respect for the law, maintenance of a just, peaceful and safe society by imposing sanctions that have one or more of the following objectives. They are deterrence and denunciation, the two that I've mentioned, also separation of an offender from society where necessary, rehabilitation of an offender, providing reparation for harm done to victims and lastly promoting a sense of responsibility in offenders and an acknowledgment of harm done to the victims and the community. Every sentence need not address all 6 objectives. In some cases rehabilitation will be primary, almost exclusive consideration, in others it will be deterrence and so forth. I am being asked to consider a conditional sentence of 2 years less a day on house arrest and I therefore must consider what objectives that particular form of sentence would advance. With respect to the objective of rehabilitation in large measure Mr. Wilson is already rehabilitated. He went back to work eventually, he got over his depression, he restored his relationships with family and associates, I can supposed he never entirely lost the support and the admiration of those who knew him. Allowing him to maintain his current employment would certainly keep him from regressing and would make less likely an occurrence of depression or of heart problems. A conditional sentence would keep him a contributing member of society but it is well to remember and I must that jail would not forever foreclose

the possibility of his re-entering the work force once released. Many people have paid the price of a jail sentence and then moved on.

[15] With respect to sub-section (e) - reparation to the victim, it was suggested that I might order some financial restitution but the reality appears to be that Mr. Wilson is utterly incapable of repaying more than a minute fraction of the amount he took. It is difficult to see how in the 2 years in the community continuing in his present job he can do very much to compensate the victim for its loss. It was suggest and I might order an nominal even symbolic amount to be repaid which arguably would also advance the objective of acknowledging the harm done. And I note that doing lengthy community service, as suggested as part of the conditional sentence, would no doubt advance that objective to some degree as well. However, I would also note that the Supreme Court of Canada in the decision R. v. Proulx said at paragraph 41:

A conditional sentence maybe as onerous as or perhaps more onerous than a jail term particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community all the while living in the community under tight controls.

Here the Supreme Court seemed to give considerable emphasis to the efficacy of a conditional sentence and the onerousness of a conditional sentence where the

offender is making reparations. And as I've indicated here given the magnitude of the theft reparation during a 2 year period in his type of circumstances could hardly be more than nominal.

With respect to sub-section (c) of 718 which speaks to offenders being segregated from society I think that speaks to people who are such a risk that they must be put behind bars as a matter of public safety and I don't think that really applies here at all.

In a general sense the community perceives a conditional sentence even on house arrest as less onerous than a jail sentence of roughly similar duration. The Supreme Court of Canada reflects this view again in the Proulx decision as paragraph 44. It said:

A conditional sentence even with strict conditions will usually be more lenient than a jail terms of equivalent duration. The facts that incarceration is a threatened punishment for those who breach their conditions provides further support for this conclusion. In order for incarceration to serve as a punishment for a breach of a conditional sentence logically it must be more onerous than a conditional sentence.

I take from that comment that incarceration has greater deterrent value than a conditional sentence of imprisonment.

[16] Moving to the type of crime we're involved with here the case law makes it abundantly clear that deterrence and denunciation are of foremost important in sentencing for thefts of this magnitude. And if that is so, a sentence for a theft of 1.8 millions dollars which gives insufficient weight to deterrence and denunciation would not be fit and appropriate according to law. Here I would also refer to the Black decision at paragraph 29 and also paragraph 48:

Some have criticised deterrence particular where crimes of passion or sudden impulse are concerned or where crime is committed by people who are immature or antisocial or even pathological. I daresay however that there are certain crimes and certain groups of people for which and for whom deterrence does operate where it is effective in preventing crime. One of these I think is the area of so called "white collar crime", the fields of finance and business. Here some people will have the opportunity to commit large scale fraud yet such people it seems to me are also likely to consider and fear the prospect of jail if caught and charged for their crimes. As has been said in other courts 'commercial fraud is often committed by people of other wise good character with no prior record, with good reputation in the community'. And so I have a concern shared by many other courts that such people may not be sufficiently deterred by a sentence which requires them to stay at home much of the time but allows them to keep their job, to have visitors, to maintain their lives relatively intact.

Denunciation is spoken to in s. 718(a) of the Criminal Code. While I don't think it is as quite as important as deterrence about which I will say some more later and also consider it in the context of a possible conditional sentence versus conventional jail sentence. Denunciation under 718(a) is a live principle here. Sentences have an extemporary aspect. They serve in part to fix the seriousness of the crime in the

mind of the public. They serve as public pronouncement of just how wrong certain behaviours are. Law makers intend that a court should in passing sentence give voice to the thinking of reasonable and upright people to reflect to some degree how they would view the conduct in question. The public look to criminal sentences for authoritative pronouncements on what is right and what is wrong. Certainly they have many other sources for their values but the justice system is an important source. By doing so a sentence may properly brand certain conduct as reprehensible and in so doing reinforce the morally correct behaviour of the vast majority of citizens. I'm asked here to consider and one can hardly help but to consider that this a theft from an institution as opposed to an individual. However, that distinction does not exist in law as a legal distinction per se. And I think it is arguable that it does not exist as a moral distinction either. Banks are big, Wal Mart is big, governments are big, pension plans are big is it therefore any less serious to steal from one of these? The Bank of Nova Scotia, it's capitalization, the money it lends out to businesses like Mr. Wilson derives from the savings and investments of thousands of people. That a bank earns profits does not make it open season for thieves. Defence has not said, and I don't mean to be misunderstood here, it has not contended that this is a victimless crime. But I must be concerned again about the meaning that might be taken from a particular sentence here. This certainly is not a

victimless crime, it is just harder to put a face on the victims. The individual thief who steals from a bank or a pension plan or the government derives all the gain, the loss is spread out among many. Governments, banks, big business could all be accused of excess from time to time, of waste and extravagance but there is a flaw in thinking that excuses an individual in stealing from that and that it some how diminishes the seriousness of the crime.

[17] Turning again to deterrence this has been spoken of in many of the cases cited by counsel. I don't want to belabour this proceeding much longer and I won't but I do feel obliged to cite from some of the cases that were provided. In *R. v. Spensieri* which is a 2007 decision of the Ontario Court of Justice at paragraph 38.

The court says:

There is no question that general deterrence and denunciation are the primary sentencing principles engaged in this sentencing. One need only look at the case law presented at this hearing to see the very strong statements by our court of appeal to that effect.

Spensieri was a serious fraud. A large amount was stipulated but it was characterized as a so called "risk of loss" case rather than one involving actual loss.

And I have not lost sight of the fact that despite that very strong statement of principle in Spensieri a conditional sentence of imprisonment was imposed.

Spensieri is one of 4 cases that were provided to me where more than 1 million

dollars was involved in the theft but which nevertheless resulted in a conditional sentence of imprisonment. And consequently I have looked at all the case but paid particular attention to these. In Spensieri as I've indicated the crime was characterized as a "risk of loss" case. The accused there was a charter accountant, it was said he did not play a central role in the financial affairs of the company rather that was performed by the CFO MacIntyre. There there were false quarterly statements prepared, a phony paper trail created, overly aggressive sales forecasts fabricated and false statements of sales done in order to attract investment capital. Eventually the business went under, it lost it's stock value, secured creditors were out 6.6 million dollars, it was purchased by Southbridge, one of the victim's for 5.5 million and it left a short fall of 1.1 million dollars and the Bata Com Company itself was wound up and went bankrupt. The shares of the company went worthless. In that case again Mr. Spensieri at paragraph 57 the court says that:

Ontario Court of Appeal decisions including Dobois make general deterrence the principle objective animating the refusal to impose conditional sentences in many such white collar crimes. Large scale well planned frauds by people should be visited with jail sentences.

Nevertheless the court considered that not every fraud involving a breach of trust even would require jail and that a conditional sentence on restricted punitive terms

could be appropriate. And indeed as I note a conditional sentence was imposed in that case.

In Bortolussi a 1997 decision, not quite as current as Spensieri, relevant all the same. In that case we had a failure by the accused to deduct or not to remit income tax, Canada Pension Plan and UI deductions to the Receiver General of Canada and also failure to remit GST collected from customers of the business. Again there was no indication of personal gain. There remained outstanding one million two hundred and forty-three thousand dollars with no prospect of recovery of that amount or any significant portion of it because of the accused's inability to pay. Consequently restitution was not a realistic prospect in that case and that appears to be so with Mr. Wilson too. The court said at paragraph 27 that Mr. Bortolussi would lose his right to practice as a CA, personal bankruptcy was in the offering. Again it notes the absence of personal gain apart from continued employment. In that case there was a conditional sentence imposed of fifteen months but it is also worth noting that it was a joint position of both the crown and the defence that there should be a sentence of less than 2 years. It is characterized as a joint submission, it is not clear to me whether it was a joint submission that it should be a conditional sentence but nevertheless that is a distinguishing feature from the one I had before me today.

The case R. v Campbell was another fraud in excess of a million dollars. There the accused misappropriated 1.4 millions dollars of client money. The accused was a lawyer and acted as an investment adviser to many of his clients. Some of the victims were elderly. The accused there was sixty-five years of age with no prior record. He filed letters of support from family members, former clients, there was a diagnosis from a consulting psychiatrist that he was suffering episodes of hypomanic nature - a mental illness resulting in poor judgement being used. There was an early plea of guilty, expressions of remorse, saving court time etc.. And in the end there was a conditional sentence of 2 years less a day to be served in the community. Mr. Campbell also appears to have had a heart ailment and in that regard and the others I've mentioned that case bears many features similar to the one before me today.

In R. v. Coleman in the Ontario Court of Justice in 2003 we have significant loss stated as 1.5 million dollars. However in Coleman the court said and concluded that a restitution order was realistic. At paragraph 6 it says:

I think he has a prospect that does go a long way to making a restitution order more than just wishful thinking.

In imposing not only that accused but also a co-accused to a conditional sentence of 2 years less a day in the community the Judge said that where restitutions are made that are real , have the potential to be real, they can be considered in the totality of

sentence and I have factored that in. Consequently in addition to the conditional sentence they were ordered to pay restitution each of the 2 accused of seven hundred and fifty thousand dollars. And that no doubt would be part on the onerousness of the conditional sentence in that case and something that Justice Lamer no doubt had in mind when he spoke to it as being a component of the conditional sentence in Proulx.

[18] Now these foregoing cases are situations involving amounts over a million dollars which have attracted a conditional sentence. There are other cases where a conditional sentence is imposed involving much smaller amounts. Obviously though there are cases besides these 4, many others, involving larger amounts and indeed many others involving relatively smaller amounts which have resulted in a jail sentence of some duration of either less than 2 years in a Provincial jail or a sentence of more than 2 years in a Federal penitentiary. Among the cited cases the decision of the Nova Scotia Court of Appeal in Black is of particular importance here. As defence has pointed out, Mr. Black did not plead guilty, he did not acknowledge at trial or at sentence that his activities constituted any wrong doing, rather he tended to shift the blame to others. Mr. Black was a business man who in February of 1989 during a so called "Sheet Harbour Project" requested and

obtained fraudulently 1 millions dollars for his company from the entity MAC. Mr. Black's company NSC was eventually adjudged bankrupt, the funds which had been advanced were not repaid and the financial assistance provided by ACOA and others neither was repaid. Mr. Black was found guilty of defrauding the bank and ACOA after misrepresenting in a statutory declaration that the 1 million dollar transfer was an equity injection into NSC. Mr. Black was sixty-one years old with grown children, he was married, he was the primary caregiver for his ailing mother, Mr. Black had a university education. After these events Mr. Black and NSC engaged in protracted litigation with other parties evidently in an attempt to recover losses. At paragraph eleven of the Judgement it is said:

The evidence did not reveal the manner in which the company used the funds and it was not demonstrated that the accused personally distinct from other business interests with which he was associated obtain funds or benefited from the fraudulent activity.

Evidence at trial showed that the RCMP did not establish that Mr. Black personally received the money as a result of the fraud. People expressed the view he did not obtain personal gain from the NSC related financial dealings. Mr. Black strenuously maintained that he had no personal benefit. It's also noted in the decision that Mr. Black had no prior record, he had a positive Pre-Sentence Report which included favourable remarks from creditors who suffered as a result of

NSC's affairs. There was oral evidence introduced at the sentencing hearing showing that Mr. Black retained the respect of his family and friends and at least some of his creditors. And other than in relation to Mr. Black's dealings with NSC which gave rise to the charges his reputation as far as the court was advised was without blemish. That appears at paragraph 14.

In some distinction from Mr. Wilson, Mr. Black did not acknowledge that he acted fraudulently. This is pointed out at paragraph 15 of the decision where it is said that his submissions at trial with respect to the handling of the transfer suggested his actions were justified in light of the business practices of other parties pursued against his interests and those of his company. It was noted in paragraph 18 again like the case before me here that the relevant events took place during a short period of time and they all involved misrepresentations concerning the character of the 1 million dollar transfer where Mr. Black caused incorrect information to be provided to 3 parties each of which relied on the information to their detriment in turn occurring a loss of 1 million dollars.

[19] In the decision in Black Justice Murphy of our Supreme Court does quite a thorough canvass of the case law and he touches on many of the cases that were referred to by counsel, I think likely all the cases referred to by counsel, and some

that I have mentioned myself. He talks about the Moulton decision in the Saskatchewan Court of Appeal and here I'm looking at paragraph 31. The Ontario Court of Appeal in Dobois. The Saskatchewan Court of Appeal in Dickhoff and Bernston. He talks about cases in Nova Scotia, the Matheson case for instance and Moulton where conditional sentences were imposed and he acknowledges that there were entries of guilty pleas in the Matheson and Moulton decisions which were found to be mitigating circumstances. Some attention is paid to the decision in R. v. Hill and in paragraph 43 R. v. Kuriya. Again Mr. Kuriya is someone who in his conduct in his personal life bears many similar features to Mr. Wilson. Apparently Mr. Kuriya enjoyed a stellar reputation in his community in New Brunswick, there were no prior convictions but nevertheless in that case a request for a conditional sentence was rejected. And Justice Murphy after considering that decision and the others concluded likewise. He says at paragraph 48:

After considering the complete submissions from both parties and the authorities, I am persuaded, as was the New Brunswick Court in Kuriya, that general deterrence is a very important principle in large-scale fraud cases. Denunciation of fraud in circumstances such as those before this court would not be satisfied by a sentence of less than two years. If I do not order incarceration for two years, given the misrepresentations respect for the law would be diminished. There is a need in this case to denounce Mr. Black's conduct and provide general deterrence.

Justice Murphy focussed primarily on the length of sentence as being important to fitness and appropriateness of sentence. Earlier in my comments I also mentioned and must consider I think the nature of the sentence, whether an institutional setting or based in the community as being appropriate to deterrence and denunciation as well. While it is true that Black is distinguishable from Mr. Wilson in the sense that Mr. Black did not admit or acknowledge his wrong doing as Mr. Wilson has and also in Black there was no evidence of depression. The Black case is also distinguishable from the present case in the amount of money involved. It is tempting to think that once one gets up in seven figures it seems not to matter much anymore. But the fact is that Mr. Wilson's fraud exceeding that of Mr. Black to the tune of eight hundred thousand dollars. Very few, indeed I think only 2 of the many perhaps even dozens of cases referred to me involved a larger sum than the 1.8 million dollars involved here.

[20] I should place this crime in the context of this offenders life but I must also place the sentence in the context of the society which the justice system is here to serve. Likely Mr. Wilson can discern from the preceding comments the outcome to which my reasoning leads. I do not think that for a theft of this magnitude given the mitigating circumstances which exist, even given the mitigating circumstances

which exist, that a conditional sentence of imprisonment even one containing punitive features like house arrest would give proper weight to the need for general deterrence for such crimes. I am concerned that rather than sentence a necessary and effective measure of general deterrence it would send the wrong message.

Most crimes are committed under stress of one kind or another. If nobody ever felt any pressure or stress it would indeed be a peaceful and law abiding society, one requiring little by way of laws or law enforcement. It is precisely when we are stressed and tempted to do something harmful to others that we are required to exert self-control and to show moral strength. It is with considerable regret that I arrive at the conclusion that a federal penitentiary sentence is needed here but it is a conclusion that I am drawn to by my responsibility to uphold the principles of sentence as I perceive them.

[21] Mr. Wilson, stand up please. Mr. Wilson I am going to sentence you to a prison sentence of twenty-six months in a federal penitentiary. I expect that you will be entitled to and earn early release. I do this with a sad heart but as I said out of what I perceived to be a sense of responsibility and the need to uphold the principle of deterrence in such cases. You are therefore in custody to begin serving that sentence.

A.P. ROSS, J.P.C.