CANADA P-2137286/2137288/2137292/2137294/2137298/2137300/2137302/2137304
PROVINCE OF NOVA SCOTIA
2010

IN THE PROVINCIAL COURT

Cite as: R. v. MacDonald, 2010 NSPC 33

HER MAJESTY THE QUEEN

- versus -

TIMOTHY WADE MACDONALD

SENTENCING DECISION OF THE COURT

HEARD BEFORE:	The Honourable Judge Del Atwood
PLACE HEARD:	Truro, Nova Scotia
DATE HEARD:	12 April 2010
CHARGES:	Seven counts contrary to para. 380(1)(a), one count contrary to para. 380(1)(b) of the Criminal Code of Canada
COUNSEL:	Karen Quigley, Crown Attorney Joel E. Pink Q.C., Defence Attorney

Introduction: Investors imperilled

[1] For the past decade and a half, low bank rates and a looming baby-boom demographic have resulted in many Canadians putting their hard-earned savings in the hands of an array of investment advisors, searching for rates of return that will help fund reasonably comfortable retirements. The financial crisis of the past twenty months has jeopardized a lot of that planning. Some financiers felt at liberty to take great, big gambles with other people's money, for which they were handsomely compensated. When the risks proved too great, and the financial system faced collapse, governments and central banks stepped in, protecting creditors, counter parties and corporate executives, but, in many cases, leaving small investors to flail about in the windstorm.

[2] Those losses–attributed to the natural ebb and flows of markets–were bad enough. There was more bad news to come, as it turned out that a number of individuals who had been entrusted with the safe-keeping of clients' portfolios had been helping themselves. Some have become household names: Bernard Madoff, who, indeed, made off with US$16 billion of his customers' capital, not including the economic losses, is the most colossal;[1] closer to home, Bertram Earl Jones bilked one hundred and fifty-eight customers–many of whom were close friends and family--of $50 million over a twenty-five year span of fraud and forgery;[2] rounding out this rogues' gallery is Vincent Lacroix, who siphoned off about $100 million to

[1] *U.S. v. Madoff* , 09 CR 213 (DC), transcript of sentencing decision at p. 43 (S.D. N.Y sentencing hearing held 29 June 2009).

[2] *R. v. Jones* 2010 QCCQ 851.

subsidize a princely lifestyle.[3]

[3] Measured against those high-value misappropriations, the frauds of Timothy Wade MacDonald seem minuscule: the amount is smaller, the number of victims, fewer, the lavish lifestyle, not in evidence. However, in imposing a sentence upon Mr. MacDonald, the court is concerned, not just with statistics or aggregates, but with the lives of real people. This was not a low-value-recurring–a.k.a. "salami"–fraud, involving the carving off of fractional cents from a multitude of transactions. No. Mr. MacDonald stole significant dollar amounts from each of his victimized clients. His actions have wounded the financial security of individuals who trusted him, and who planned their future livelihood based on his falsehoods and lies. In some cases, the losses are irreparable. MacDonald is before the court to account for his harmful actions.

The charges

[4] Mr. MacDonald elected to be tried in this Court and has pleaded guilty to seven counts of fraud exceeding five thousand dollars, as well as one count of fraud not exceeding five thousand dollars. The facts supporting these charges were read into the record by the Crown attorney when this sentencing hearing convened on 22 March 2010, amplified by the Crown's sentencing brief dated 19 March 2010. These facts were admitted by defence counsel on the record on 22 March 2010, subject to certain comments regarding restitution amounts, which will be addressed later in this decision.

[5] The Court is satisfied that the statement of facts supports the guilty pleas entered by Mr.

---

[3] *R. c. Lacroix* 2009 QCCS 4519.

MacDonald, and the Court records a formal conviction on each of the eight counts, specifically, counts 1, 3, 7, 9, 13, 15, 17 and 19 in the information of Constable Bruce Lake, sworn 11 January 2010.

Findings of fact–circumstances of the offences

[6] Based on the reading-in of the facts on 22 March 2010, I am able to make a number of findings.

[7] At all relevant times, Mr. MacDonald ran a small financial-services business in the Town of Truro, Nova Scotia, carried on under the name "MB Capital Management Limited." This business appears to have been affiliated in some way with a larger corporate organization, known as "World Source Financial Limited." The nature of this affiliation was not made clear to the Court. Mr. MacDonald's clients included friends and business acquaintances. He solicited business from his clients by promising to make profitable investments. Mr. MacDonald was skilled at ingratiating himself to existing and prospective clients, and was adept at gaining and maintaining their confidence. The thirteen investors who were defrauded by Mr. MacDonald entrusted significant amounts of money to him. Unbeknownst to them, this trust was misplaced, as Mr. MacDonald was fully willing to use the deposits of others as his personal bank account.

Count 1–defrauding Andre Kelbrat

[8] Andre Kelbrat was introduced to Mr. MacDonald by his brother, Peter Kelbrat, who was also

an MB Capital client. At some point in time during the month of July 2009, Mr. Kelbrat wrote a $5000.00 cheque to "MB Capital Management" in order to set up a tax free savings account. Mr. MacDonald cashed the cheque, but did not set up the TFSA. Mr. Kelbrat has recovered none of the $5000.00. Fortunately, a second $5000.00 cheque he had given to Mr. MacDonald to set up a spousal TFSA was never cashed. The accused admitted to police that he had deposited Mr. Kelbrat's cheque into his business account and spent it on personal and other uses. Mr. Kelbrat's victim-impact statement is a piercing account of how Mr. MacDonald's deceit has left him mistrustful of financial institutions, and instilled in him a sense of betrayal and loss, both personal and financial. His entire family has felt the impact, including two children in college who no longer have the benefit of their father's savings.

Count 3–defrauding Doug and Frances Videto

[9] In 2006, Doug and Frances Videto, who had been clients of Mr. MacDonald's since 2003, handed over two lump sums to Mr. MacDonald for investment. One was placed with World Source Financial, and was protected. The second was in the form of a cheque for $40,000.00 to the order of Mr. MacDonald's business, MB Capital Management. Mr. MacDonald admitted to police that this money was never invested; he deposited the cheque to his business account and spent the money on personal and other needs.

[10] April 2008, Mr. And Mrs. Videto lent Mr. MacDonald the sum of $85,000.00, secured by an instrument signed by Mrs. Videto and Mr. MacDonald. A copy of that instrument is found at Tab 8 of the Crown's sentencing submission; although not exhibited formally with the court, the document conforms to the pertinent statement of facts read into the record by the Crown at the start of the sentencing hearing. The instrument appears to constitute a promissory note. In

order to lay their hands on the sum of money advanced to Mr. MacDonald, the Videtos were obligated to redeem what appear to have been locked-in or registered investments held on account with World Source Financial Limited, thereby incurring penalties of $5855.00. Mr. MacDonald kept up on his repayment schedule under the promissory note for a few months, allowing the Videtos to recoup $35,664.85. However, Mr. MacDonald fell into arrears in December 2008, and payments stopped entirely in July 2009. Mr. MacDonald solicited this loan from the Videtos on the pretext of buying into a World Source Financial franchise to allow him to expand his business. This was fictitious. Mr. MacDonald told police later that he put the Videtos' money into his business account and used it for personal and other expenses.

[11] In her victim-impact statement, Mrs. Videto describes treating Mr. MacDonald as family; she recounts the physical and emotional agony she has endured losing thirty-two years' worth of hard earned savings due entirely to Mr. MacDonald's dishonesty.

Count No. 7–defrauding Linda and Ricky Lynds

[12] Mr. MacDonald is Linda Lynds' brother in law. In April 2000, Ms. Lynds and her husband invested $36, 364.86 with Mr. MacDonald. Mr. MacDonald promised that they would earn a monthly dividend of around $300.00, and would be permitted to draw down their principal by ten percent per year. The investment was to have been some sort of locked-in or registered account; the Court was not provided with details on this point. The Lyndses made a number of principal withdrawals (in fact, because of Mr. MacDonald's mishandling of the Lynds' investment, even the dividends were really principal draw-downs); the Court was not provided with details on this point, which is problematic when a restitution order is being

sought. This underscores the importance of presenting the Court with a proper forensic audit in cases of financial-services fraud. In any event, at a certain point, the monthly dividend payments began arriving late, and Ms. Lynds noticed a number of irregularities. She and her husband decided to pull out their money in the summer of 2009, and were told by the accused that they would have the balance of their capital, less an early-withdrawal penalty, returned to them by 4 August 2009. The net amount was apparently said by Mr. MacDonald to be $19,200.00. It never arrived. Mr. MacDonald told police that the Lynds' money had never been invested, and was spent on personal or other uses. In her victim-impact statement, Ms. Lynds describes the financial, emotional, physical and familial toll Mr. MacDonald's deceit has wrought on her family. "It is hard for me and my family to believe that a family member the we accepted so graciously into our home could betray and lie, not to mention steal our life savings and not blink an eye".

Count No. 9–defrauding Darlene and James Isenor

[13] Mr. and Mrs. Isenor met with Mr. MacDonald in the spring and summer of 2009 to help plan Mr. Isenor's retirement. Mr. MacDonald solicited from the Isenors a total of $10,000 to set up TFSAs. The Isenors gave Mr. MacDonald two cheques for $5,000.00 each. At this point in time, Mr. MacDonald's business was, without doubt, in free fall, and he was only weeks away from the enterprise crashing and burning. When the Isenors tried calling Mr. MacDonald at the office in August 2009, they were undoubtedly shocked to discover that the telephone had been disconnected. The Isenors found out later from World Source Financial that their money had never been invested as promised. Mr. MacDonald admitted to the police as much. Mrs. Isenor's victim-impact statement describes the extreme anxiety she has felt and the impact on

her and her husband's financial security, all due to Mr. MacDonald's dishonesty.

Count No. 13–defrauding Guy Roy

[14] Mr. Roy is a businessman in Truro who was introduced to Mr. MacDonald in 2003 through a mutual acquaintance. Mr. Roy and Mr. MacDonald became close friends, dining together frequently, and attending sporting and other events in each other's company, often at Mr. MacDonald's expense. Mr. Roy had a significant amount of money invested with Mr. MacDonald. Much of it appears to have been invested properly; however, $34,300.00 remains unaccounted following the collapse of Mr. MacDonald's business. Mr. MacDonald admitted receiving this money from Mr. Roy and using it for personal and other expenses.

Count No. 15–defrauding Alison Videto and Greg Parker

[15] Ms. Videto and Mr. Parker were introduced to Mr. MacDonald through Ms. Videto's father, Doug. Ms. Videto and Mr. Parker arranged a number of financial matters through Mr. MacDonald. There are two pertinent transactions. In April 2009, Ms. Videto and Mr. Parker gave two cheques to Mr. MacDonald, to the order of MB Capital Management, totaling $2000.00 to set up TFSAs. Mr. MacDonald later admitted to police that the accounts were never set up, and he spent the money on personal and other expenses.

Count No. 17–defrauding Holly Harrington

[16] In 1999, Mrs. Harrington lost her husband and her 4-year-old child. As she was trying to resume a normal life with her surviving son, she met with Mr. MacDonald in order to invest significant proceeds from the sale of her house. Mrs. Harrington placed $55,720.00 with Mr. MacDonald. I find as a fact, and, indeed, am satisfied well beyond the extent required by s. 724 of the *Criminal Code*, that Mr. MacDonald promised to pay Mrs. Harrington a monthly

dividend of $450.00; I am satisfied as well that Mr. MacDonald promised Mrs. Harrington that her principal would not be touched and would be kept safe. I base this on the facts read into the record by the Crown, uncontested by Mr. MacDonald, and on sentencing exhibit no. 1, tendered by the Crown at the commencement of the sentencing hearing on 22 March 2010. This exhibit included copies of two statements of account, purportedly issued by "MacDonald Bezanson Capital Management Inc." to Mrs. Harrington, one apparently from 1999 and another from 2000. Mrs. Harrington acknowledged receiving what she believed to be her monthly dividends over a ten year period, totaling $46,800.00. However, after Mr. MacDonald walked away from his business, Mrs. Harrington discovered that her capital–the nest egg that she was assured would help look after her and her son–was gone. Mr. MacDonald admitted placing Mrs. Harrington's money in his business account and spending it on personal and other uses. The Crown included in its sentencing brief a copy of a statement given by Mrs. Harrington to Truro police referring to another $30,000.00 investment; however, this was not covered in the Crown's sentencing submissions, either as to forming part of the offence described in count 19, or as to the issue of restitution.

[17] In her victim-impact statement, Mrs. Harrington describes having her financial future taken away from her, now having to live from paycheque to paycheque. "I had trusted Tim to invest my money but instead he took the opportunity to take full advantage of a grieving situation at the time to benefit his own needs."

Count No. 19–defrauding Margo and Brian Rogers

[18] Mrs. Rogers has known Mr. MacDonald since the two of them were children. In 2001, Mr. and Mrs. Rogers were persuaded by Mr. MacDonald to borrow $63,000.00 to invest with

World Source Financial. Mr. and Mrs. Rogers acknowledged receiving what they believed to be their monthly dividends over an eight year period, totaling about $38,000.00. Mr. MacDonald told Mr. and Mrs. Rogers that he would have their investment statements from World Source sent to his office and kept there. The Rogerses were content with this. Mr. and Mrs. Rogers made occasional draws on their principal; the amounts involved were not disclosed to the Court, and this, again, is an issue that could likely have been cleared up by a forensic audit. As it is, it is not possible for the court to ascertain the dollar amount of the draw downs, and this presents an obstacle to ascertaining a restitution amount. Additionally, the sentencing brief submitted by the Crown included a copy of a letter from Mrs. Rogers to the Truro police. This letter was not exhibited into evidence; it refers to an additional investment of $40,000.00; however, this was not covered in the Crown's sentencing submissions, either as to forming part of the offence described in count 19, or as to the issue of restitution.

[19] In her victim-impact statement, Mrs. Rogers describes Mr. MacDonald as the brother she never had. Her statement poignantly describes her sense of betrayal and loss of trust, and portrays Mr. MacDonald as the classic con artist, appropriately confident, reassuring and familial, but also contrite and mournful when required.

Circumstances of the offender

[20] The Court has had the benefit of a pre-sentence report prepared 15 March 2010. Mr. MacDonald is a first-time offender. More accurately, the matters before the Court are his first charges. His is not the case of the impulse thief, who steals once and is either caught right away, or sufficiently conscience driven that he never does it again. Mr. MacDonald's frauds

were concurrent, and continued over an extended period of time. He accounts for his actions by stating that he was under a lot of pressure to keep his business going and to continue to provide for his family. The author of the pre-sentence report describes Mr. MacDonald as not expressing any remorse for his victims. I note the submissions of defence counsel, and Mr. MacDonald's own s. 726 sentencing address, expressing remorse. I am not satisfied that Mr. MacDonald is remorseful for what he has done to his victims. I believe that he is remorseful for the sorry predicament in which he now finds himself. As noted earlier, Mr. MacDonald can be appropriately confident, sincere, familial, assuring and contrite. He used these skills to con his clients. His track record leaves the Court unconvinced of his sincerity.

[21] Nevertheless, he has no prior record. His current partner and his mother speak well of him. He has tried to hold a job since he walked away from his business and his clients. He claims not to blame his ex-wife for his predicament, but in the pre-sentence report attributed her small income to some of his financial troubles.

[22] While Mr. MacDonald certainly pleaded guilty at the first opportunity, and apparently rendered a full confession to the police, among others, I am of the view that I must weigh this mitigating factor carefully. In this case, the jig was well and truly up, and the array of aggrieved clients confronting Mr. MacDonald represented an overwhelming and compelling case of financial-services fraud.

Applicable Provisions of the Criminal Code

[23] The *Criminal Code of Canada* addresses sentencing as follows:

> Fraud
>
> 380. (1) Every one who, by deceit, falsehood or other fraudulent

means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(I) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

. . . .

380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:

(a) the value of the fraud committed exceeded one million dollars;

(b) the offence adversely affected, or had the potential to adversely affect, the stability of the Canadian economy or financial system or any financial market in Canada or investor confidence in such a financial market;

(c) the offence involved a large number of victims; and

(d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community.

Non-mitigating factors

(2) The court shall not consider as mitigating circumstances the offender’s employment, employment skills or status or reputation in

> the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence.

[24] I am not satisfied that s. 380.1 of the Code is applicable to this sentencing hearing; certainly, paras. 380.1(1)(a) and (b) have not been made out factually. As to para. (c), this case does not involve the levels encountered by the sentencing courts in *Lacroix*,[4] with a tally of 9200 victims, or even *Jones*,[5] with a total of fifty-eight victims. Furthermore, while I am satisfied on the evidence that Mr. MacDonald enjoyed a good reputation with his clients, I was not presented with evidence to satisfy me that he was held in high regard in the community in general. While a single victim of breach-of-trust fraud is one too many, given the principle of strict construction of penal statutes as re-emphasized in *R. v. Paré*[6], the Crown has not presented sufficient evidence to satisfy me that s. 380.1 is applicable to this case. However, there are other provisions of general application.

> Purpose and Principles of Sentencing
>
> Purpose
>
> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;

---

[4]Note 3, *supra*.

[5]Note 2, *supra.*

[6][1987] 2 S.C.R. 618, at paras. 24-26.

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

R.S., 1985, c. C-46, s. 718; R.S., 1985, c. 27 (1st Supp.), s. 155; 1995, c. 22, s. 6.

. . . .

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

R.S., 1985, c. 27 (1st Supp.), s. 156; 1995, c. 22, s. 6.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(I) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

. . . .

Degrees of punishment

718.3 (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

Discretion respecting punishment

(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

Imprisonment in default where term not specified

(3) Where an accused is convicted of an offence punishable with both

fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

Cumulative punishments

(4) The court or youth justice court that sentences an accused may direct that the terms of imprisonment that are imposed by the court or the youth justice court or that result from the operation of subsection 734(4) or 743.5(1) or (2) shall be served consecutively, when

(a) the accused is sentenced while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;

(b) the accused is found guilty or convicted of an offence punishable with both a fine and imprisonment and both are imposed;

(c) the accused is found guilty or convicted of more than one offence, and

(I) more than one fine is imposed,

(ii) terms of imprisonment for the respective offences are imposed, or

(iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence; or

(d) subsection 743.5(1) or (2) applies.

. . . .

Submissions on facts

723. (1) Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.

Submission of evidence

(2) The court shall hear any relevant evidence presented by the

prosecutor or the offender.

Production of evidence

(3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

Compel appearance

(4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.

Hearsay evidence

(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

(a) has personal knowledge of the matter;

(b) is reasonably available; and

(c) is a compellable witness.

R.S., 1985, c. C-46, s. 723; 1995, c. 22, s. 6.

Information accepted

724. (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

Jury

(2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at

the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

(b) the party wishing to rely on a relevant fact, including a fact contained in a pre-sentence report, has the burden of proving it;

(c) either party may cross-examine any witness called by the other party;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.
. . . .

Offender may speak to sentence

726. Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.

R.S., 1985, c. C-46, s. 726; R.S., 1985, c. 27 (1st Supp.), s. 159, c. 1 (4th Supp.), s. 18(F); 1995, c. 22, s. 6.

Relevant information

726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.
. . . .

737. (1) Subject to subsection (5), an offender who is convicted or

discharged under section 730 of an offence under this Act or the Controlled Drugs and Substances Act shall pay a victim surcharge, in addition to any other punishment imposed on the offender.

Amount of surcharge

(2) Subject to subsection (3), the amount of the victim surcharge in respect of an offence is

(a) 15 per cent of any fine that is imposed on the offender for the offence; or

(b) if no fine is imposed on the offender for the offence,

(I) $50 in the case of an offence punishable by summary conviction, and

(ii) $100 in the case of an offence punishable by indictment.

Restitution to victims of offences

738. (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:

(a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable . . . .

Previous sentencing decisions

[25] I have reviewed the sentencing authorities submitted to the Court by counsel. I find the following to be the most pertinent:

- *R. v. Matheson* (2001), 194 N.S.R. (2d) 124 (SC): 2-years-less-a-day conditional sentence for a lawyer who stole $117,152 from clients over a period of 10 years; no

prior record; favourable pre-sentence report; ADHD diagnosis; mental condition affected offender's conduct; guilty plea;

- *R. v. Phronimadis* 2005 CarswellOnt 9190 (SCJ): 23 month global jail sentence for large-scale fraud against government; no priors; timely guilty plea and co-operation with authorities; guilty plea;
- *R. v. Maguire* 2005 CarswellOnt 1696 (SCJ): two-years-less-a-day jail sentence followed by probation for credit union manager; the dollar value of the loss is not clear from the record, but was substantial; the offender stopped only when she was caught; guilty plea;
- *R. v. Black* (2003), 214 N.S.R. (2d) 201 (SC): two-year term of imprisonment imposed on each of three counts of fraud, to be served concurrently; offender a businessman who received a $1 million transfer–essentially, a loan–on condition that the monies be applied to meet specific obligations; offender used over $600k of this loan to pay down other obligations; offender's business went bankrupt; the lenders recovered nothing; not-guilty plea, and convicted following trial; offender found not to be in a position of trust;
- *R. v. Coulson* 2008 ABPC 144: guilty plea to ten frauds totaling in excess of $600K; offender sold motor vehicles on consignment, and failed to remit proceeds of sale to owners; very dire medical condition; due mainly to offender's terminal illness, a conditional sentence of two years less a day was imposed;
- *R. v. Wilson* (2008), 278 N.S.R. (2d) 7 (PC): auto dealer defrauded his bank of over $1.8 million by misrepresenting inventory; fraud occurred within a period of one month; guilty plea; court did not find that the offender occupied a position of trust; penitentiary sentence of 26 months imposed
- *R. v. Cremer* 2007 ABQB 544: Workers' Compensation Board manager defrauded his employer of $1.254 million by diverting to himself payments for fictitious claims; health problems and serious controlled-substances dependency; due mainly to the offender's health, conditional sentence of two years less a day imposed, with restitution in the full amount;

[26] In addition, I have considered the Nova Scotia Supreme Court Appeal Division case of *R. v. Hennigar*.[7] Hennigar was a well regarded investment advisor who defrauded seven clients of approximately $143,000. In dismissing the offender's appeal from a three-year penitentiary term imposed following trial, Pace J.A., for a unanimous three-member panel, stated as follows:

[7](1983), 58 N.S.R. (2d) 110 (A.D.).

> 26 The appellant's counsel also argued that the sentences ought to have been concurrent and that Judge O Hearn erred in making each consecutive to the other.
>
> 27 I reject this argument as each of the offences not only involved different people as well as different times, places, and circumstances, but also each offence involved an uniqueness in its execution.
>
> 28 I turn now to the prison sentences imposed by the trial judge. The appellant at the time of sentencing was thirty-six years of age, married, and resided with his wife and nine year-old son at Ardoise, Hants County, Nova Scotia. He graduated from Dalhousie University in 1967 with a Bachelor of Commerce degree. Since that time he has been employed with a number of firms and in 1979 he formed his own consulting companies. The pre-sentence report indicates that Mr. Hennigar is a confident, self-assured businessman who is well able to express himself and has had no previous difficulties with the law. He stated during the sentencing hearing that it was his desire to repay the victims, and I think there can be little doubt of his strong remorse for what has occurred.
>
> 29 The trial judge in sentencing the accused took into account the principle of totality of sentence and all other factors and concluded on the evidence that sentences expressing general deterrence were necessary for the protection of the public. I agree with the learned trial judge and only wish to add that in crimes of a sophisticated nature carried out by intelligent people in planned and subtle ways against elderly and trusting people the sentence must be such not only to deter the offender, but also deter those who might follow his example.
>
> 30 Although the sentences imposed may appear somewhat lenient if one were to take each in isolation, in view of all the circumstances I cannot say that the trial judge committed any error.

[27] I expect that an economist would conclude that purchasing power parity would raise the amount of the fraud *Hennigar* –expressed in 2010 dollars– to a level approximating that in the present case. However, that is not for this Court to say. What I do observe is that *Hennigar* presents a striking similarity to Mr. MacDonald's case. Much as in *Hennigar*, Mr. MacDonald used his clients' money, not to fund a lavish or extravagant lifestyle, but to maintain the cash

flow of his business to allow it to appear to be a going concern. Undoubtedly, Mr. MacDonald benefitted from this, as it allowed him to support his family and his recreational activities as described in the pre-sentence report; presumably, it also let him pay his staff, buy office supplies, maintain his office space; it also let him maintain the fiction of being a successful investment adviser. The implications of this for Mr. MacDonald's clients were described succinctly by Margo Rogers in her victim-impact statement:

> [O]f this . . . $20,000 of it was fed back to me monthly and I was led to believe it was interest and I still had my initial investment . . . safely tucked away for the future.
>
> . . . . Not only did I lose the money I gave him to invest, but I lost the interest this money would have earned had it been placed where I had trusted it to be going. Of the money that was "fed" back to me monthly, because I was told by my friend that this was interest on our investment, I spent it rather than saving it. What a feeling to find out that I was investing in my friends lifestyle, not in my future.

Determination of sentence

[28] I take into account the following factors:

- the number of persons defrauded by Mr. MacDonald, and the significant amounts involved;
- the duration of some of his fraudulent activity;
- the fact that he continued to solicit investments from clients, even when he knew that his business had failed and had no intention of investing clients' monies as promised;
- the impact that these losses have had on Mr. MacDonald's victims;
- the use of misleading statements of account as evidenced in sentencing exhibit no. 1;
- the need to denounce and deter unlawful breaches of trust by persons who control large amounts of other peoples' money;

- the high degree of responsibility–indeed, the sole responsibility–Mr. MacDonald bears for his deceitful conduct.

[29] I recognize the following mitigating factors:

- Mr. MacDonald's guilty plea;
- his confession to police and other authorities;
- his lack of prior record;
- his guardedly favourable pre-sentence report;
- his expression of remorse.

[30] Most importantly, I take into account the fundamental purpose and principles of sentencing set out in ss. 718 and 718.1 of the *Code*. In considering all of these factors, I determine that a fit and proper total sentence for Mr. MacDonald is a federal penitentiary term. This is conceded by Mr. MacDonald's learned defence counsel at pp. 18 and 28 of the defence sentencing brief. Accordingly, I sentence Mr. MacDonald as follows:

- Count no. 1, defrauding Mr. Kelbrat: one month of incarceration;
- Count no. 3, defrauding Doug and Frances Videto: nine-months' incarceration consecutive to count no. 1;
- Count no. 7, defrauding Linda and Ricky Lynds: one month of incarceration, consecutive to counts 1 and 3;
- Count no. 9, defrauding Darlene and James Isenor: one month of incarceration, consecutive to counts 1, 3, and 7;
- Count no. 13, defrauding Guy Roy: a five-month term of incarceration, consecutive to counts

1, 3, 7, and 9;

- Count no. 15, defrauding Alison Videto and Greg Parker: a one-month term of incarceration, consecutive to counts 1, 3, 7, 9, and 13;
- Count no. 17, defrauding Holly Harrington: a six-month term of incarceration, consecutive to counts 1, 3, 7, 9, 13 and 15;
- Count no. 19, defrauding Margo and Brian Rogers: a 6-month term of incarceration, consecutive to counts 1, 3, 7, 9, 13, 15 and 17.

[29] This results in a total federal penitentiary term of 30 months. Based on my preliminary determination that the appropriate range of sentence exceeds two years, I am precluded from considering whether a conditional sentence would be appropriate.[8]

Restitution

[30] I have reviewed the authorities submitted to me as to the issue of restitution. I direct myself in accordance with the decision of the Supreme Court of Canada in *R. v. Fitzgibbon*[9] that, while the ability to satisfy a restitution order is a pertinent factor, it is not an overriding one, particularly in cases involving breach of trust. Here, the dollar amounts of most of the frauds are readily ascertainable, and it is appropriate that this Court provide Mr. MacDonald's victims with a speedy and inexpensive means of attempting to recover their losses from the person responsible. Accordingly, the Court makes the following restitution orders pursuant to para.. 738(1)(a) of the *Criminal Code*:

---

[8]See *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 58.

[9](1990), 55 C.C.C. (3d) 449 at 454-456

- in favour of Andre Kelbrat, the sum of $5000.00 (five thousand dollars);
- in favour of Doug and Frances Videto, the sum of $40,000.00 (forty thousand dollars) for the amount placed with Mr. MacDonald for investment;
- in favour of Doug and Frances Videto, an additional sum of $49, 335.15 (forty-nine thousand, three hundred and thirty-five dollars and fifteen cents), for the unpaid loan. I am of the view that the early-redemption penalty which the Videto's incurred to obtain the proceeds to advance the loan is not a recoverable restitution item, as I am not satisfied that this loss is "a result of the commission of the offence" within the context of para.. 738(1)(a);
- in favour of Darlene and James Isenor, the sum of $10,000.00 (ten thousand dollars);
- in favour of Mr. Guy Roy, the sum of $34,300.00 (thirty-four thousand, three hundred dollars);
- in favour of Alison Videto and Greg Parker, the sum of $2,000.00 (two thousand dollars);
- in favour of Holly Harrington, the sum of ($55,720.00) fifty-five thousand, seven hundred and twenty dollars;

[31] In relation to Linda and Ricky Lynds, as well as Margo and Brian Rogers, the court has not been presented with sufficient evidence to allow the court to readily ascertain the amount of the losses because of the capital draw-downs taken by these unfortunate victims of Mr. MacDonald's frauds. While their losses are substantial, the Court simply cannot approach its exercise of discretion by guessing at the amount. They retain their civil remedies against Mr. MacDonald.

Other sentencing issues

[31] Given the penitentiary sentence imposed here, the Court waives the imposition of victim-fine surcharges.

[32] The para. 380(1)(a) counts are secondary-designated offences under s. 487.04 of the *Code*; however, as a DNA-collection order was not sought by the Crown, there will be no order.

[33] The Court is very grateful to Crown and defence counsel for the very thorough submissions presented in this case.

[34] Orders accordingly.

Dated at Truro, Nova Scotia, this 12th day of April, 2010.

_____

P.C.J.