

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. Lee 2011 NSPC 81

Date: November 10, 2011
Docket: 2119017 - 2119019
Registry: Halifax

Her Majesty the Queen

v.

Sherri Dawn Lee

SENTENCING DECISION

Judge: The Honourable Judge Anne S. Derrick

Heard: July 7, September 9, and November 7, 2011

Decision: November 10, 2011

Charges: Theft (x1) and Fraud (x2)

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

By The Court:

[1] On May 18, 2011, after an eight day trial, I convicted Ms. Lee of three charges:

Count 1 – that between January 1, 2008 and April 1, 2009 she 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 because it was stolen by Ms. Lee. The total amount stolen by Ms. Lee from money intended for deposit was \$66,939.58.

Count 2 – that between March 31, 2008 and April 1, 2009, Ms. Lee, by deceit, falsehood or other fraudulent means, unlawfully defrauded Embrace Spa of a sum of money under \$5000, contrary to section 380(1)(b) of the *Criminal Code*. I convicted Ms. Lee of this charge on the basis of finding that she had back-dated her Spa account and the Spa accounts of family members to reduce or zero the balances in those accounts. The total of the back-dating was \$1166.02.

Count 3 – that between January 1, 2008 and April 1, 2009 Ms. Lee, by deceit, falsehood or other fraudulent means, unlawfully defrauded Embrace Spa of a sum of money not exceeding \$5000, contrary to section 380(1)(b) of the *Criminal Code*. I convicted Ms. Lee of this charge on the basis of finding that she had misappropriated Blue Cross payments and applied them

to the “on-accounts” of herself and her family members. I found the total amount of misappropriated payments to be \$676.62.

[2] None of the money Ms. Lee stole or defrauded from Embrace Spa has been recovered. The loss totals \$68,782.22.

The Facts

[3] My trial decision is reported as *R. v. Lee*, [2011] N.S.J. No. 261. At the conclusion of my decision convicting Ms. Lee I said the following:

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.

[4] Ms. Lee was a highly-regarded employee of Embrace Spa. Hired to work at the “front-end” of the Spa, she was eventually promoted to the position of Assistant Manager. With this promotion came increased responsibilities that included preparing and making bank deposits. Ms. Lee’s almost exclusive handling of bank deposits for the Spa during the relevant period meant that she had easy access to money and was trusted to handle it honestly. In my reasons following

trial I noted that this gave her a great deal of latitude as she was uniquely positioned to take money undetected for months:

97...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.

[5] Ms. Lee's thieving was of a very deliberate and persistent nature. Of 23 deposits made to the Spa account from April 3, 2008 to March 27, 2009, 21 of them were missing money.

[6] Ms. Lee also became well versed in the computer system for the Spa and was assigned the task of allocating Blue Cross payments to clients' Spa accounts. Ms. Lee's knowledge about how to "back-date" accounts enabled her to make favourable adjustments to her own accounts and those of family members. The evidence at trial established that Ms. Lee was able to identify and exploit opportunities for misallocating money and back-dating accounts by methods that were not readily discernible and did not become evident until the forensic audit was completed.

[7] Ms. Lee's deceit went on under the noses of her employers, Bonnie and Peter Caldarozzi, and the Manager of the Spa, Michelle Price. Even when cash flow problems became evident, Ms. Lee continued to siphon off money. Evidence at trial satisfied me that Ms. Lee laid a false trail in late October 2008 by deliberately depositing to the Spa's bank account an HST cheque that should have gone to the Canada Revenue Agency. This created the impression of a robust and reassuring bank balance. Not that any suspicion was falling on Ms. Lee at the time,

- indeed the Caldarozzi's and Ms. Price did not even suspect theft as the reason for the cash flow problems - but the HST deposit threw up a smokescreen while Ms. Lee continued to steal. In my reasons convicting Ms. Lee I found that:

81...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. (*paragraph 81, Trial Decision*)

[8] Ms. Lee was a hard working member of the Spa team, trusted and valued by the Caldarozzi's. As Bonnie Caldarozzi put it in her trial testimony, "We loved Sherri."

[9] Ms. Lee's deceit was not discovered until she had left her employment at the Spa in May 2009. A forensic audit revealed what the Caldarozzi's had only just begun to suspect, that money had been stolen. The evidence pointed to Ms. Lee.

[10] In September 2009, Ms. Lee was interviewed by police. She ultimately made inculpatory statements. I described this in my trial decision:

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.

[11] Ms. Lee also told police investigators that she "didn't mean to do all that stuff." However, as I determined in convicting Ms. Lee, it is clear to me she very much meant to do what she did. She took advantage of the trust that had been

placed in her and exploited opportunities to even up what she regarded as the disparity between what she contributed to the Spa as a hard-working employee and what she received in return.

The Victims - Victim Impact Statements

[12] Victim Impact Statements were filed by Bonnie and Peter Caldarozzi, the owners of Embrace Spa, and Michelle Price, the Spa's Manager. The Caldarozzi's read their statements at Ms. Lee's sentencing hearing on November 7.

[13] The Caldarozzi's Victim Impact Statements referred to the pain and disbelief they have experienced over what they describe as Ms. Lee's betrayal. Mr. Caldarozzi said in his statement that after a warm and trusting relationship with Ms. Lee, "It feels strange to think of her as a thief but I have had to come to that realization." Ms. Caldarozzi spoke of Ms. Lee being "an extreme disappointment" and how "She has caused so much stress and upheaval it is hard to put down the words or read this out loud even after all these months." The Caldarozzi's "feared ruination" as they struggled to keep the Spa afloat, experienced strains in their working relationship with Ms. Price and the staff, and had the pain and stress of uncovering Ms. Lee's crimes and trying to get out of, what Ms. Caldarozzi describes as, "the financial mess". The thefts have "scuttled" their plans for expansion of the Spa and jeopardized their retirement – as Mr. Caldarozzi points out, he and his wife have no pension funds.

[14] The Caldarozzi's and Ms. Price were broad-sided by Ms. Lee's dishonesty and her violation of their trust. Ms. Price's Victim Impact Statement speaks of the effects on her health, and the extreme stress and anxiety she experienced as a result

of Ms. Lee's actions. She found it necessary to obtain counseling. Ms. Price has said in her impact statement that "...there are no words to truly show the distress, anxiety and tension [Ms. Lee's] actions have caused myself and my staff."

The Pre-sentence Report, Submissions by Defence Counsel, Support Letters and Ms. Lee's Statement at the Sentencing Hearing

[15] A pre-sentence report was filed although it is of limited assistance as the only information in it comes from Ms. Lee. The author of the pre-sentence report notes that Ms. Lee was "directed to have collateral sources contact [him], but no contact was made." What I have instead are fourteen letters submitted by Ms. Lee from family and friends that emphasize her good character. I will address those in due course.

[16] The pre-sentence report notes that Ms. Lee is 37 years old and has a Grade 10 education. She has a seventeen year old daughter whom she brought up on her own. The daughter's father has not played a role in helping to raise his daughter. Ms. Lee is now married to Robert George who has two young daughters with whom Ms. Lee has a positive relationship. She advises that Mr. George is supportive of her.

[17] Ms. Lee is presently employed as the manager of Town Shoes at Dartmouth Crossing. When the pre-sentence report was prepared at the end of June 2011, she had held this position for 14 months. It has now been 18 months. Prior to this, Ms. Lee worked at Mud Wraps Manicures in Bedford for eight months. This was after she left Embrace Spa. Her employment history before Embrace Spa included a chiropractic practice, Dairy Queen, Sobeys and various fast food outlets in the

area. There seems to be no question that she has always worked hard and endeavoured to be gainfully employed.

[18] The pre-sentence report confirms that Ms. Lee is a member of the Rock Church in Lower Sackville and is involved in volunteer and community functions with the church. This is also evident from her support letters. Ms. Lee has no criminal record.

[19] In the pre-sentence report interview, Ms. Lee maintained her innocence and denied being a “disgruntled employee” of Embrace Spa. The author of the pre-sentence report, an experienced probation officer, reported as follows: “[Ms. Lee] stated she maintained a positive relationship with the manager of the company [Embrace Spa] and believes she was “set up.”

[20] I will note that at trial Ms. Lee gave no evidence about how or why she would have been “set-up” or by whom. She simply said she did not know how money went missing, Blue Cross payments were misallocated, or how her Spa account and those of family members ended up being back-dated.

[21] In his sentencing brief, Mr. Katsihtis provided some background information about Ms. Lee that amplified information from the pre-sentence report. Ms. Lee had a difficult adolescence after her parents separated. Her father left the family and soon afterwards Ms. Lee moved out. She went to live with a boyfriend’s family and quit school. She was subjected to physical and verbal abuse by the boyfriend. After ending this relationship, she later experienced an unplanned pregnancy. Ms. Lee’s daughter is now 17. Ms. Lee became addicted to drugs and alcohol, as Mr. Katsihtis indicates, “to escape the guilt, anguish and disappointment

in her life.” Ms. Lee attributes her success in overcoming her substance abuse issues to her involvement with the Rock Church.

[22] In Ms. Lee’s statement in court at the sentencing hearing on November 7, she spoke about the difficulties she has faced in her life, with a limited education, and how she has struggled to overcome the challenges of the past. Her submission was articulate and riven with emotion.

[23] In addition to the pre-sentence report and what Mr. Katsihtis included in his written submissions about Ms. Lee, I have also carefully read the fourteen support letters attesting to her character. The letter writers are friends, and close family of Ms. Lee.

[24] Ms. Lee’s family and friends hold her in very high esteem. Their letters of support are glowing testimonials. Ms. Lee is characterized as an outstanding mother, wife, daughter, daughter-in-law, sister, sister-in-law, and friend. She is praised as a “tremendous asset” to her church community and as a volunteer on church ministries, including one that involved a trip to India. A number of letter writers referred to Ms. Lee’s commitment to her church and she is described as “appreciated by her church family.” I note that the pastor of her church spoke of learning about the charges against Ms. Lee, saying he was “taken by surprise because that knowledge was contrary to all that I’ve ever known to be true about her.”

[25] Ms. Lee is characterized by her family and friends as “genuine, caring and honest”, “friendly and considerate”, “devoted to her family”, “kind-hearted and trustworthy”, “straight forward and upfront” and “strong, dedicated and

determined.” She is known to be a reliable and loving source of support and comfort to family and friends. Her loyalty and devotion to family is emphasized. The letters also comment on Ms. Lee’s struggles against adversity and her mistakes. Her husband, Robert George, and his mother, credit Ms. Lee for her intervention to help Mr. George turn his previously troubled life around. Mr. George indicates that Ms. Lee’s love and support have enabled him to confront and overcome his own substance abuse.

[26] Ms. Lee’s friends and family note Ms. Lee’s unconditional love for her daughter and observe how her daughter has grown up to be a fine young person. Reference is made in several of the letters to this being a critical stage in Ms. Lee’s daughter’s life and how closely bonded she is to her mother. The opinion is offered that incarceration would have a devastating impact on her and Ms. Lee’s young step-daughters, with whom she has developed a loving connection.

Ms. Lee’s Health

[27] Also submitted for this sentencing was a letter dated June 27, 2011 from Dr. Naida Leckey, Ms. Lee’s family doctor since 1995. Dr. Leckey refers to Ms. Lee having some chronic health problems, notably Gastresophageal Reflux and Oesophageal Spasm. These conditions are treatable with anti-reflux measures but not curable. Dr. Leckey details the symptoms Ms. Lee experiences, including severe abdominal pain, and observes that the conditions are “undoubtedly exacerbated by severe stress.” Dr. Leckey goes on to note that Ms. Lee “has also had other medical issues over the years” and follows this statement by a short discussion about Occipital Neuralgia which in Ms. Lee causes recurrent pain and can be exacerbated by stress. Dr. Leckey concludes by stating that if Ms. Lee

experiences a recurrence of these conditions, “she will undoubtedly require medical attention.”

[28] Another health issue emerged in a prominent role in this case. In Ms. Lee’s trial testimony, the pre-sentence report, Mr. Katsihtis’ submissions, and several of the support letters, it was indicated that Ms. Lee was diagnosed with and received treatment for stomach and ovarian cancer. The fact that Dr. Leckey’s letter makes no mention of this lay at the heart of the delays in this sentencing. I will address this issue shortly.

Crown and Defence Positions on Sentence

[29] The Crown submits that only incarceration will serve the principles that must be given primacy in this sentencing, denunciation and deterrence, and seeks a sentence of eight to twelve months. The Defence is arguing for a conditional sentence in this range.

[30] The Crown is also seeking a restitution order in favour of Embrace Spa. Mr. Katsihtis has made submissions that Ms. Lee’s financial circumstances do not make a restitution order feasible for her. He also notes that a period of actual incarceration would adversely affect Ms. Lee’s ability to pay restitution. I will address the issue of restitution later in these reasons.

[31] The acknowledgement by the Defence that a custodial sentence, albeit one to be served in the community, is appropriate in this case is a recognition that cases involving breaching the trust of an employer attract sentences that emphasize

denunciation and deterrence. It is an acknowledgement that Ms. Lee's offences are too serious to be dealt with by way of suspended sentence and probation. The issue in this case is therefore not whether Ms. Lee should receive a custodial sentence of 8 – 12 months but how should that sentence be served – in an actual jail or in the community under a conditional sentence order.

[32] Deciding the issue of whether Ms. Lee should be sentenced to a jail term or permitted to serve a custodial sentence in the community has required me to carefully review all of the information about Ms. Lee that I have received, which the Defence submits should lead me to conclude that a conditional sentence is the fit and proper sentence, and it demands that I apply the relevant legal principles in a rigorous and informed way.

The Purpose and Principles of Sentencing

[33] The purpose of sentencing is set out in section 718 of the *Criminal Code*:

718. Purpose -- 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;
- (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.

[34] It is a fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code; R. v. Naugle, [2011] N.S.J. No. 165 (N.S.C.A.)*) The “severity of sanction for a crime should reflect the...seriousness of the criminal conduct.” (*R. v. Arcand, 2010 ABCA 363, paragraph 48*) The goal of sentencing is to achieve a just sanction, making proportionality “the overarching principle since a disproportionate sanction can never be a just sanction.” (*Arcand, paragraph 52*) *Arcand* recognizes that a sentence that does not adequately address the serious nature of the offence fails the proportionality standard. (*Arcand, paragraph 54*)

Assessing the Seriousness of Ms. Lee’s Offences

[35] The most serious offence committed by Ms. Lee is of course the theft of \$66,939.58 from the Spa’s bank deposits. Although the frauds were of a much lesser amount, they too were perpetrated over an extended period of time. None of Ms. Lee’s offences were spontaneous, single transactions: she had “many, many times...to reflect on what she was doing, and to cease...This was not a crime where there was one rash terribly wrong decision to take someone’s property, at which point the conduct ceased...” (*R. v. Vallee, 2004 CarswellAlta 1024 (Alta. P.C., paragraph 18: upheld on appeal, [2004] A.J. No. 832(Alta.C.A.)*)

[36] Ms. Lee stealthily slipped her employers’ money into her own pockets over an extended period of time. She exploited her privileged knowledge of the Spa’s systems and their weaknesses and took pains to conceal what she was doing. It was a deliberate, calculated strategy to take what Ms. Lee felt she was entitled to. Ms. Lee was able to siphon off such a substantial sum from the Spa over a protracted

period because she was trusted. No one had any inkling that she was dishonest. Denunciation and deterrence, usually expressed as a sentence of incarceration, have been the principles that have undergirded sentences for exploitations of trust of this nature. (*R. v. MacEachern*, [1978] O.J. No. 987, paragraphs 8 and 9 (Ont.C.A.); *R. v. Tucker*, [1988] N.S.J. No. 33, page 18 (N.S.S.C., App. Div.) (Q.L. version); *R. v. Hill*, [1997] N.S.J. No. 97, paragraphs 13 – 15 (N.S.S.C.); *R. v. Toews*, [2007] A.J. No. 944, paragraphs 36 and 37 (Alta. P.C.); *R. v. McKinnon*, [2005] A.J. No. 12, paragraphs 60 – 63, (Alta. C.A.); *R. v. Reid*, [2004] Y.J. No. 3, paragraph 13 (Y.T. C.A.); *R. v. Steeves*, [2005] N.B. J. No. 351, paragraph 10 (N.B.C.A.); *R. v. Cremer*, [2007] A.J. No. 989, paragraph 26 (Alta. Q.B.); *R. v. Miller*, [2010] A.J. No. 174, paragraph 62 (Alta. P.C.))

[37] The courts have emphasized the need, in breach of trust thefts, to drive the message home that weighing the odds in favour of stealing from a trusting employer is a losing proposition. (*R. v. McKinnon*, [2005] A.J. No. 12, paragraph 61, (Alta. C.A.); *R. v. Reid*, [2004] Y.J. No. 3, paragraph 13 (Y.T. C.A.); *R. v. Geary*, [2006] M.J. No. 504, paragraph 23 (Man. Q.B.); *R. v. Williams*, [2007] O.J. No. 1604, paragraph 24 (Ont. S.C. Just.); *R. v. Stewart*, [2002] B.C.J. No. 2456, paragraph 7 (B.C.P.C.))

[38] The role of restraint in sentencing, as reflected in section 718.2(d) of the *Criminal Code* which mandates an offender is not to be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, still requires “...a consideration of the other principles of sentencing set out in sections 718 to 718.2.” (*R. v. Proulx*, [2000] S.C.J. No. 6, paragraph 96)

Aggravating and Mitigating Factors

[39] Section 718.2 (a) of the *Criminal Code* provides that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender” and the abuse of a position of trust in relation to a victim is specifically identified as aggravating. (*section 718.2 (a)(iii)*) In the Crown’s submission, Ms. Lee’s breach of the Caldarozzi’s trust is the principle aggravating factor in this case: she not only stole from her trusting employers, she took advantage of her unique duties and the opportunities they presented to effect her dishonest objectives. The Crown also notes additional factors that aggravate Ms. Lee’s crime: the fact that Ms. Lee stole from a small, vulnerable business that was just getting on its feet; the impact on the Caldarozzi’s personal financial security; the damage her deceit has done to the trusting environment that used to characterize Embrace Spa; the amount of money stolen; the duration of Ms. Lee’s dishonest activities and their calculated and opportunistic nature; and the planning and premeditation she applied to achieve her objectives.

[40] There are limited mitigating factors in Ms. Lee’s case and the most prominent one does not carry as much influence as is typically the case in the sentencing of first-time offenders. Ms. Lee has no criminal record, a fact that is usually strongly mitigating. In this case, its mitigation of her offences is blunted by the fact that, as Mr. Heerema has noted in his brief, “her good reputation would be a necessary pre-condition to holding a position of trust at Embrace Spa.” The role of the good reputation in breach of trust crimes has been described by the Northwest Territorial Court in *R. v. Bowden*:

...White collar crimes are usually committed by people with no criminal records and in fact a good background. It is those very qualities that allow them to be granted trust by their employers. We can lock our doors against intruders and criminals but we are defenceless from attacks from within,

and by virtue of their good records, white collar criminals such as the accused are able to attack and cause significant damage from within. (*R. v. Bowden*, [2011] N.W.T.J. No. 28, paragraph 7)

[41] Arguably, Ms. Lee's good reputation is, in the context of the offences she has been convicted of, statutorily barred from consideration as a mitigating factor. Section 380.1(2) of the *Criminal Code* provides: "The court shall not consider as mitigating circumstances the offender's...reputation in the community if those circumstances were relevant to, contributed to, or were used in the commission of the offence." I have no evidence on the issue of whether Ms. Lee having no criminal record was relevant to her being hired by Embrace Spa. Whether Ms. Lee comes within section 380.1(2) or not, I do not consider her lack of record to be more than minimally mitigating in any event. This was a substantial theft perpetrated when she was in a position of trust. She stole deliberately over many months. She could have stopped but she did not. Any mitigating value that rests in a clean record should be treated as having been dissipated by the protracted nature of this calculated crime.

[42] Other mitigating factors such as a guilty plea, an acceptance of responsibility, mental illness, a gambling addiction, substance abuse/addiction, dire family circumstances, or partial or full repayment of the stolen money, are not present in this case.

[43] In her September 2009 interview with police Ms. Lee did make what I found to be a confession, which included her saying she knew she had hurt the Caldarozzi's and that she felt "horrible." This was not followed by any actions that showed remorse or an acceptance of responsibility. No doubt Ms. Lee felt horrible

about getting caught. There are no signs she had any intention of owning up to what she had done prior to being confronted in the police interview. She denies any responsibility to this day, indicating in the pre-sentence report that she was “set up” which suggests that Ms. Lee is claiming she was framed. There is not a shred of evidence that she was. She should not be accorded any mitigation for what she said in her police interview when she has otherwise been resolute about denying responsibility. Leniency is not justified where an offender resolutely denies responsibility even though such a denial does not constitute an aggravating factor. (*R. v. Upton*, [2008] N.S.J. No. 527 (N.S.S.C.))

[44] Ms. Lee told police in September 2009 she could pay back what she had taken but has not done so, even following her conviction, likely because that would be inconsistent with continuing to deny any wrongdoing.

Conditional Sentences for Breach of Trust Crimes

[45] Where conditional sentences have been ordered for breach of trust thefts and frauds there have usually been significant extenuating circumstances. An example of such circumstances can be found in *R. v. Alakija*, [2007] A.J. No. 1027, (*Alta. P.C.*) Mr. Alakija turned himself in and the thefts, which were the result of a pathological gambling disorder, took place over a period of less than two months. The court noted that Mr. Alakija’s gambling addiction could not be considered a mitigating factor but did operate to “reduce moral blameworthiness.” (*Alakija*, paragraph 13) In *R. v. Robinson*, [2003] O.J. No. 4722 (*Ont. Ct. Just.*), a conditional sentence of twenty months was imposed on a first offender who stole \$200,000 in her capacity as a manager of a small company. None of the money was recovered and Ms. Robinson, who denied responsibility and went to trial,

expressed no remorse. However, Ms. Robinson's overall health and the precarious nature of her husband's mental health played an influential role in sentencing. At the time of the thefts, both Ms. Robinson and her husband were experiencing a severe depression. The judge noted that Ms. Robinson had an auto-immune disorder (Lupus) and asthma and observed that if Ms. Robinson was sent to jail, her nine year old son would be left in the care of a suicidal and depressed father. (*Q.L. version, paragraph 26*)

[46] The ordering of a conditional sentence in fraud cases where there are no exceptional circumstances identified is rare. *R. v. Shaw, [2004] N.B.J. No. 322 (N.B.Q.B.)* is one example. The Prince Edward Island Supreme Court, Appeal Division also has not viewed exceptional mitigating circumstances as a necessary prerequisite to imposing a conditional sentence. (*R. v. Gauthier, [1998] P.E.I.J. No. 98, paragraph 18*) I will note that the Appeal Court in *Gauthier* was aware of the trial judge's findings that Ms. Gauthier had acknowledged the harm she had done, and was "emotionally devastated by her dismissal from her job and the public humiliation of being found out and charged." She was found to have experienced "extreme anxiety, depression, guilt and remorse." (*Gauthier, paragraph 38*)

[47] In a more recent case, the Prince Edward Island Supreme Court, Appeal Division reiterated the view of the majority in *Gauthier* that the objectives of deterrence and denunciation "can be achieved in many instances through conditional imprisonment orders." (*R. v. MacAdam, [2003] P.E.I.J. No. 20 (P.E.I.S.C., App. Div.)*) *MacAdam* was not a case of breaching the trust of an

employer. It involved fraud committed in the context of buying and selling used cars.

[48] Cases provided to me by the Crown where the thefts involved persons in positions of trust stealing from bank deposits have produced mixed results. In *Shaw*, as I just mentioned, an 8 month conditional sentence was ordered. Ms. Shaw was a manager at a Tim Horton's for four years until she was dismissed after \$30,992.01, that should have been deposited into the business' bank account, was found to be missing . In *R. v. Decoff*, [2000] N.S.J. No. 224 (N.S.S.C.), money was taken by a manager from deposits being "under-prepared, or deposits that were prepared but not taken to the bank" over an eight month period. Approximately \$44,000 was stolen. In imposing an 18 month conditional sentence, the judge took into account Ms. Decoff's personal circumstances of having a disabled spouse and the responsibility to care for a ten-month old baby. The judge referred to the *Gauthier* case and appeared persuaded that a conditional sentence should not only be available to offenders with exceptional circumstances. I do note that the judge in *Decoff* considered a sentencing case from the Newfoundland Supreme Court that involved offenders who each had significant responsibilities to their families: one woman was the primary care-giver to her ill father and supported two young children who lived with her and her co-accused had a grown daughter and new baby living with her and her seasonally-employed husband. (*R. v. Smith*, [1999] N.J. No. 6)

[49] In *Smith*, notice was taken of the fact that the offenders had experienced social stigma and publicity as a consequence of their convictions and this was seen as contributing to the sentencing objective of denunciation. (*Smith*, paragraph 20)

[50] In *R. v. Seguin*, [1997] O.J. No. 5439(Ont. Gen. Div.), the offender was convicted of having taken advantage of her position as the bookkeeper of a rural drug store to steal a portion of the daily deposits. Over 28 months, \$76,000 was stolen. It was noted that Ms. Seguin was “keenly aware the business was having trouble meeting its financial commitments.” (*Seguin*, paragraph 9) Ms. Seguin maintained her innocence and expressed no remorse. The judge rejected rehabilitation as a primary concern, finding that “effective rehabilitation is usually only possible where the person recognizes his or her wrongdoing.” (*paragraph 18*) This focused the sentencing emphasis on general deterrence with the judge concluding that: “A message, clear and unambiguous, must reach the community that to commit serious and significant offences will attract similar punishment.” (*Seguin*, paragraph 19) Ms. Seguin received a nine month sentence which the judge was not prepared to permit her to serve as a conditional sentence. A restitution order was made in the amount of \$76,773.48. (*paragraphs 20 and 21*)

[51] In *R. v. Mastromonaco*, [2002] O.J. No. 4612 (Ont. S.C. Just.) - a breach of trust although not a bank deposit case - a lack of remorse was held to be fatally inconsistent with the sentencing objectives of promoting a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community. The court refused to permit the 21 month sentence to be served in the community as a conditional sentence. (*Mastromonaco*, paragraph 28)

[52] In the *Bowden* case I mentioned earlier in these reasons, Ms. Bowden pleaded guilty to forging cheques and manipulating the business’ books over a 29 month period. She stole approximately \$81,000 from her employer’s small business. Rehabilitation was not seen as a central sentencing theme, the court viewing Ms. Bowden’s offence as an “aberration” in an otherwise productive life.

Ms. Bowden's claim to have a gambling addiction was rejected as there was no evidence of any gambling before the thefts started. Sentencing Ms. Bowden to 17 months in jail, the court held "...the crime is of such significance that anything other than a term of incarceration would be inappropriate." (*Bowden*, paragraph 42)

[53] The Defence provided to me, and I have reviewed, three decisions of the Nova Scotia Supreme Court where conditional sentences were imposed for breaches of trust. (*R. v. Matheson*, [2001] N.S.J. No. 195; *R. v. Saunders*, [2000] N.S.J. No. 397; and *R. v. W.H.M.C.*, [2002] N.S.J. No. 412) Two of the cases involved lawyers stealing from clients, a very grave breach of trust. The third case, also very serious, was that of a doctor who breached the trust of several young patients by sexually assaulting them under the guise of conducting legitimate medical examinations.

[54] None of these cases add anything to the analysis required for Ms. Lee's case that is not found in the cases involving conditional sentences in theft breaches of trust. Mr. Matheson received a conditional sentence of two years less a day after consideration of his profound remorse, his mental health (a diagnosis of adult ADHD that was determined by the judge to have played a role in his commission of the thefts), and his professional ruination. Mr. Saunders' conditional sentence of twelve months was imposed in the context of the judge remarking that "a jail term is not necessarily the best solution" where the offender is 82 years old with a "probable future need for competent medical care." (*Saunders*, paragraph 11) And in the case of *W.H.M.C.* the judge, making the following statement - "I now consider section 742 of the *Code* and state the offender is not a danger to the community and a conditional sentence is consistent with fundamental principles of

sentencing” - imposed a conditional sentence without any analysis of how it was consistent with the purpose and principles of sentencing. (*W.H.M.C.*, paragraph 21)

[55] I will further note that in a decision I made last month – *R. v. Arlene Naugler*, [2011] N.S.J. No. 519, I discussed breach of trust cases and the principles of sentencing, including some additional cases from the Nova Scotia courts. (*Naugler*, paragraphs 47 – 63) I observed, as did the Crown in this sentencing, that the “stern emphasis on denunciation and deterrence in breach of trust sentencing is found in many cases.” (*Naugler*, paragraph 47)

Conditional Sentences and the Purpose and Principles of Sentencing

[56] As I noted in my reasons in *Naugler*:

87 Promoting respect for the law is a fundamental purpose of sentencing. Conditional sentencing has struggled to satisfy this objective although its effectiveness in this regard has been, in my opinion, undermined by a general misunderstanding on the part of the public and also a deliberate misrepresentating of its role as a legitimate, punitive sentencing option. Conditional sentencing was intended to reflect a new emphasis on the goals of restorative justice (*Proulx*, paragraph 19) Parliament had "mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society." (*Proulx*, paragraph 20) A conditional sentence is a hybrid:

... [it] incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and the promotion of a sense of responsibility in the offender. However it is also a punitive sanction capable of

achieving the objectives of denunciation and deterrence ...
(*Proulx*, paragraph 22)

[57] I went on in *Naugler* to make the following comments that are relevant to repeat in this sentencing:

88 The Supreme Court of Canada discussing conditional sentencing in *Proulx* recognized that "Inadequate sanctions undermine respect for the law" and fail to provide sufficient denunciation and deterrence. The Court understood that if a conditional sentence is not distinguished from probation, it will not be accepted by the public as a legitimate sanction. (*Proulx*, paragraph 30)

89 The punitive effect of a conditional sentence is to be achieved through the use of punitive conditions, such as strict house arrest, to constrain the offender's liberty. (*Proulx*, paragraph 36) Another feature of conditional sentencing is its ready conversion to a sentence in a jail cell. As noted by the Supreme Court of Canada in *Proulx*: "... where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender will serve the remainder of his or her sentence in jail." (*Proulx*, paragraph 39)

[58] The Supreme Court of Canada's authoritative findings in *Proulx* that conditional sentences are not lenient sentences and with strict conditions can satisfy the sentencing imperatives of denunciation and deterrence and be sufficiently punitive and stigmatizing is still good law. Despite a sustained political campaign against conditional sentences and much public misunderstanding about their suitability as a sentencing option, there is no reasoned basis for challenging the continued legitimacy of the Court's statements. However, *Proulx* must be carefully read to fully appreciate what it is saying.

[59] *Proulx* held that there is no presumption in favour of conditional sentences: the fact that the prerequisites for a conditional sentence have been met, as they have been here, does not presume that a conditional sentence is consistent with the

fundamental purpose and principles of sentencing. “The particular circumstances of the offender and the offence must be considered in each case.” (*Proulx*, paragraph 85)

[60] Two main objectives underpinned the sentencing amendments that produced the conditional sentencing regime: (1) reducing reliance on incarceration as a sanction, and (2) amplifying the role for restorative justice in sentencing as exemplified by the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender. (*Proulx*, paragraph 98) The Supreme Court of Canada described how the conditional sentencing option can “facilitate the achievement” of these objectives:

99 ...It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot...

100 Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

[61] *Proulx* determined that the need for denunciation, one of the sentencing objectives to be achieved by an offender’s sentence, may in some cases be “so pressing that incarceration will be the only suitable way in which to express society’s condemnation of the offender’s conduct.” (*Proulx*, paragraph 106)

Likewise, *Proulx* acknowledged that “there may be circumstances in which the need for deterrence will warrant incarceration” depending “in part” on whether there is the prospect of incarceration being likely to have a “real deterrent effect.” (*Proulx*, paragraph 107) In *R. v. Wismayer*, [1997] O.J. No. 1380, Rosenberg, J. for the Ontario Court of Appeal regarded the general deterrence issue in the context of conditional sentencing as follows:

General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those offences that are likely to be affected by a general deterrent effect. Large scale well-planned fraud by persons in positions of trust...would seem to be one of those offences. (*paragraph 50*)

[62] While Ms. Lee’s crimes cannot be described as “large scale”, they were “well-planned” and, as the trial evidence and the Caldarozzi’s Victim Impact Statements indicate, had a profound impact on the business and everyone associated with it.

[63] The Supreme Court of Canada in *Proulx* recognized the deterrence issue expressly in the context of that case, which involved dangerous and impaired driving causing death. These offences were described as “often committed by otherwise law-abiding persons, with good employment records and families.” Such persons, it was suggested by the Court, “are the ones most likely to be deterred by the threat of severe penalties.” (*Proulx*, paragraph 129) Offenders in fraud cases are likewise not oblivious to the consequences of their choices. As noted by the Ontario Court of Appeal:

...there are few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences.

That awareness comes from the sentences given to others. (*R. v. Gray*, [1995] O.J. No. 92, paragraph 32, (Ont. C.A.))

[64] What conditional sentences are best at accomplishing is an effective balancing of the sentencing objectives of denunciation and deterrence with the objectives of rehabilitation, reparation and promotion of a sense of responsibility. Where those restorative objectives can be realistically achieved, “a conditional sentence will likely be the appropriate sanction...”, provided that denunciation and deterrence are not left out of the calculus. (*Proulx*, paragraph 109) In *Proulx*, the Supreme Court of Canada delineated the approach to be taken in deciding what type of sentence is the appropriate option:

113...In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive.

[65] Determining a fit and proper sentence requires that the sentencing judge assess “which sentencing objectives figure most prominently in the factual circumstances of the particular case before them.” (*Proulx*, paragraph 113)

[66] Where “punitive objectives such as denunciation and deterrence are particularly pressing, as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction.” (*Proulx*, paragraph 114) Aggravating factors do not rule out the suitability of a conditional sentence but they do “increase the need for denunciation and deterrence.” (*Proulx*, paragraph

115) Incarceration is recognized as generally more denunciatory than a conditional sentence due to the comparative leniency of a conditional sentence when contrasted “to a jail term of equivalent duration.” (*Proulx, paragraph 102*)

[67] The offender does bear some responsibility for making the case for a conditional sentence although there is no onus to be discharged by either Crown or Defence. *Proulx* notes that:

122...it will generally be the offender who is best situated to convince the judge that a conditional sentence is indeed appropriate. Therefore, it would be in the offender's best interests to establish those elements militating in favour of a conditional sentence...For instance, the offender should inform the judge of his or her remorse, willingness to repair and acknowledgment of responsibility, and propose a plan of rehabilitation...

[68] The offender should be able to demonstrate not only that she is a suitable candidate for a conditional sentence but that “the principles and objectives of sentencing will be met by such a disposition.” (*R. v. Fleet, [1997] O.J. No. 4553 (Ont. C.A.), page 8 (Q.L. version)*)

[69] Conditional sentences have been rejected solely on the basis of being inconsistent with the fundamental purpose and principles of sentencing. (*R. v. Lamoureux, [2011] P.E.I.J. No. 6, paragraphs 38, 40, 42 (P.E.I.S.C.); R. v. Stewart, [2002] B.C.J. No. 2456, paragraph 9 (B.C.P.C.); R. v. Mastromonaco, [2002] O.J. No. 4612, paragraph 28 (Ont. S.Ct. Just.)* I will observe that this was what determined the sentence I imposed on Ms. Naugler, which involved a breach of trust theft.

Sentencing Ms. Lee

The Good Character Evidence

[70] I have already discussed in considerable detail the seriousness of Ms. Lee's offences and the absence of any truly mitigating factors. Ms. Lee's support letters, which cast her character in an enviable light, do little to offset the contrasting character flaws that led her to steal from her trusting employers. From what I understand about the relationship with the Caldarozzi's, had Ms. Lee not stolen from them, I presume they would have described her in much the same way as her family and friends. It was Ms. Lee's hard work, apparent loyalty, and perceived integrity that enabled her to steal so successfully for such a protracted period without anyone suspecting. What her family and friends have experienced as sterling qualities in Ms. Lee are the qualities that disguised another facet of Ms. Lee's character. It was Ms. Lee's apparent good character that shielded her from suspicion as she drained away the Spa's revenues.

The Fraudulent Cancer Claim

[71] The issue of Ms. Lee's character also comes before me in the context of her false claims of being a cancer survivor. My knowledge of Ms. Lee's purported diagnosis came during the trial when on direct examination she volunteered that she had developed stomach cancer due to the stress she was experiencing at the Spa, emphasizing that she went to work every day notwithstanding, due to her "strong work ethic". She advised that she went to treatments on Mondays, Wednesdays and Fridays by leaving work a half-hour early. She then went home

and returned to work the next day as scheduled. She spoke of having a CT scan, a biopsy of a tumour that was “so small they could catch it.” It was “a long process to go through” which led to her losing her eyebrows. Her evidence was that she finished all her treatments in 2008 and received a clean bill of health. She testified that in August 2009 she was diagnosed with ovarian cancer. She received “one treatment and it was gone” according to Ms. Lee. Despite the somewhat questionable description of cancer diagnosis and treatment, there was nothing to indicate Ms. Lee’s claims were false.

[72] The impression left by Ms. Lee’s testimony was that she had nobly persevered in the face of extremely serious health crises. Her commitment to her employment obligations in the midst of the first cancer diagnosis was presented by her as nothing short of heroic.

[73] The cancer claim appears in the pre-sentence report which only records Ms. Lee having had stomach cancer. She told the author of the pre-sentence report that she “has been dealing with the anxiety and side-effects of treatment.”

[74] Mr. Katsihtis was also told about the cancer diagnoses and treatment which, in good faith, he then advanced in his sentencing submissions. The character letters from Ms. Lee’s husband, Robert George, and her mother, Wendy Lee, contain the cancer claims. Wendy Lee indicated that:

Sherri has been diagnosed twice with cancer. The first time was while she worked at Embrace Spa. She continued to work her scheduled hours and more. Many times she worked, went for her treatments and went back to work. The second time was two weeks before her wedding.

[75] Ms. Lee's husband told me in his letter:

At this time, Sherri had issues of her own, battling stomach cancer...Tragedy would strike again however, as within a month of our wedding in September 2009 she was diagnosed with ovarian cancer.

[76] I noted earlier in these reasons that Ms. Lee's family doctor provided a letter dated June 27, 2011 in which there is no mention of Ms. Lee having been diagnosed with or treated for any form of cancer.

[77] Ms. Lee's sentencing was to have occurred on July 7. It was adjourned as a result of a joint request from Crown and Defence to September 9. On September 9, it was adjourned again by joint request. I now know that these adjournments were to permit the investigation of Ms. Lee's claim of having had cancer once the Crown learned from Dr. Leckey that she was unaware of any such diagnosis.

[78] Mr. Heerema had intended to produce evidence to refute Ms. Lee's claims at the November 7 sentencing hearing, advising by letter dated October 31 that he would be tendering exhibits and calling witnesses. The evidence would have confirmed that there is no MSI record and no Nova Scotia Cancer Registry record that Ms. Lee ever had or was treated for any form of cancer. As stated by Mr. Heerema at the sentencing hearing, on November 7 the Crown was in a position to definitively show that Ms. Lee had not had cancer.

[79] The calling of evidence on this issue was pre-empted by Ms. Lee coming clean to her lawyer and in court. At the sentencing hearing Mr. Katsihtis on Ms. Lee's behalf confirmed that these claims were untrue. Ms. Lee acknowledged this when addressing me, admitting that the cancer claims were a fabrication. They

dated back to when she worked at the Spa and told co-workers she was undergoing cancer treatments. She explained her reasons for concocting the cancer story: the Spa was becoming very busy and she felt overwhelmed. She was under a great deal of stress trying to discharge her responsibilities, without the benefit of much formal education and with little assistance. She embellished her pre-existing stomach issues (which, as I noted, are documented by Dr. Leckey) and, in her words,

...fabricated the cancer as a means to break away. Over time it developed into a situation where I was truly in so deep I had no idea how to get out. I honestly never thought things would get so far...I will pay a heavy price for a severe error of judgment. (*Ms. Lee's statement to the court on November 7, 2011*)

[80] In her statement in court on November 7 at her sentencing hearing, Ms. Lee apologized to her family and friends, and me for dishonestly representing that she had had cancer. I hope she has also apologized to Mr. Katsihtis whom she had put in a very awkward position. Although the Crown began inquiring into the issue with Mr. Katsihtis once they saw Dr. Leckey's letter, Ms. Lee only disclosed her deceit to Mr. Katsihtis about a week before her sentencing hearing.

[81] This, in my experience, unprecedented situation, calls for two issues to be addressed: (1) Ms. Lee's explanation for her false claim of cancer; and (2) the use to be made of this deceit in her sentencing. On the first issue I can say that while the stresses Ms. Lee experienced at the Spa may account for why she told co-workers she had been diagnosed with cancer and was undergoing treatment, this is not, in my view, a credible explanation for her volunteering this falsehood at trial or in the course of the sentencing process. She has said she eventually was "in so deep" she had no idea how to extricate herself from the lie. Perhaps that was true at

the Spa once she portrayed herself as a cancer survivor. But there was no need for her to volunteer the lie at her trial and repeat it in her pre-sentence report interview and to her lawyer. What claiming to be a cancer survivor offered was the opportunity to be seen in a sympathetic light when she was on trial and then when she was seeking leniency on sentencing. I find that like other deceits perpetrated by Ms. Lee, it was instrumental and intended to achieve a calculated objective.

[82] As for how the false cancer claim is to be treated in the context of this sentencing, Mr. Heerema is quite correct in stating that I am sentencing Ms. Lee for theft and fraud, not for lying at her trial. It does demonstrate however that the good character Ms. Lee put forward for my consideration in this sentencing has not resonated in these proceedings. When put to the test Ms. Lee once again showed herself willing to deceive.

A Jail Term or a Conditional Sentence?

[83] The only conduct for which Ms. Lee has taken responsibility is what we now know was her false claim of being a cancer survivor. Ms. Lee has offered nothing to suggest that the objectives of rehabilitation, reparation and promotion of responsibility can be achieved in this case. Effective rehabilitation is underpinned by an acknowledgment of responsibility and an appreciation of the harm caused. (*R. v. Seguin*, [1997] O.J. No. 5439, paragraph 18) Ms. Lee is not remorseful and has taken no steps to repay any of the money she took. She is entitled to maintain her innocence, and permit her supporters to express to this court their belief in it, but she is not entitled to expect that to have no effect on how I weigh the sentencing options before me. (*R. v. Mastromonaco*, [2002] O.J. No. 4612, paragraph 28 (Ont. S.C.J.); *R. v. T.R.J.*, [2004] O.J. No. 1286 (Ont. C.A.); *R. v.*

Nguyen, [2006] O.J. No. 796 (Ont. C.A.); *R. v. Catala*, [2006] O.J. No. 4917 (Ont.C.A.); *R. v. Upton*, paragraph 103)) As stated in *R. v. Williams*, [2007] O.J. No. 1604:

32 A sentencing court may take into account in the exercise of its sentencing discretion, not as an aggravating feature of sentencing, but as the absence of a factor entitling sentence reduction, and as relevant to whether restorative objectives can be satisfied in a particular case, an offender's lack of remorse and acceptance of responsibility for her crime: *R. v. Proulx*, at para. 113 [*other cites omitted*]

[84] The deceit about the cancer diagnosis and treatment is most appropriately factored into Ms. Lee's sentencing as a dimension of what I have just discussed: it is a further demonstration of Ms. Lee's failure to accept responsibility which is the platform on which rehabilitation can be built. It overshadows the testimonials to her good character and reveals her continued willingness to use dishonesty as a means to an end.

[85] *Proulx* held that conditional sentences are best suited to cases where restorative and punitive objectives can be served in a complementary, synergistic mix. Where the need to denounce and deter is particularly pressing, where the restorative objectives are ephemeral or non-existent, where the offender has committed offences that are more likely to be amenable to a general deterrence effect, and where there are no discernible mitigating factors, a conditional sentence is not the appropriate disposition. I further believe that a conditional sentence in this case would fail to serve the objective that sentences contribute to "respect for the law" as required by section 718 of the *Criminal Code*. This is not a case, in my opinion, where a conditional sentence can be justified. As in the cases of *Seguin*, *Mastromonaco*, and *Bowden*, I decline to permit Ms. Lee to serve her sentence in

the community. Consequently I sentence Ms. Lee to ten months in jail and direct that she be taken into custody. As I indicated in *Naugler*, I agree with the words of Wilkie, J. in the Ontario case of *R. v. Stoutley*:

Jail is always a last resort, and where it is imposed ... principally to satisfy the need for general deterrence and denunciation, its impact, in my view, comes from the fact of meaningful incarceration, rather than its precise length. (*R. v. Stoutly*, 2002 CarswellOnt 7759 (O.C.J.), paragraph 69)

[86] On the subject of my decision in *Naugler* and the sentencing principle of parity – the sentencing of similar offenders to similar sentences in similar circumstances – I will say the following: in *Naugler*, where the facts disclosed a larger fraud and theft over a more extended period and I imposed a jail sentence of eight months, I indicated that Ms. Naugler’s guilty plea, her mental health issues, and her remorse served to reduce the length of sentence I might have otherwise imposed. There are no such mitigating factors in Ms. Lee’s case.

[87] I do not wish however to place no emphasis on Ms. Lee’s potential rehabilitation. I note that in her remarks to me at the sentencing hearing she said she has been seeing a counselor and has found that to be helpful. Ms. Lee has overcome considerable real adversity in her life: I do not want to think she is incapable of confronting her failings and rehabilitating herself. In order to support any such potential, I am ordering that Ms. Lee serve a period of twelve months on probation following her release from jail on conditions to keep the peace and be of good behaviour, report within two business days of release to probation service and thereafter as directed, have no direct or indirect contact or communication with Bonnie and Peter Caldaroizzi, or Michelle Price, or any present or former employees of Embrace Spa, and attend for such assessment and counseling as

directed by her probation officer and participate in and cooperate with such assessment and counseling.

[88] I have some concluding remarks to make on each of the issues of conditional sentencing, Ms. Lee's genuine health problems, and restitution. On the issue of conditional sentencing, I want to say that aside from its unsuitability in this case, I find it hard to imagine a conditional sentence being granted where an offender admits to having lied at trial about a matter that re-emerges for consideration at sentencing. Conditional sentencing involves an element of expectation and trust that the offender will comply with conditions and act in good faith under those conditions in the community. Instrumental lying to the court would shatter any confidence a Court might have in an offender's commitment to the terms of a community-based sentence.

[89] On the issue of Ms. Lee's health I want to note that she does have real health issues that will have to be properly addressed by correctional officials during her sentence. Dr. Leckey's letter is authority for this concern. She said that: "In increasing Sherri's stress level it is possible to precipitate a re-occurrence of the above noted illnesses. If such a recurrence happens she will undoubtedly require medical attention." I direct that a copy of Dr. Leckey's letter and these reasons be included with Ms. Lee's Warrant of Committal to ensure correctional officials are informed about Ms. Lee's health needs so they can respond appropriately and without delay as required.

[90] The Crown is seeking a restitution order and I am imposing one under section 738 of the *Criminal Code* in favour of Embrace Spa in the amount of \$68,782.22. Ms. Lee will have to re-establish employment once she has served her

jail sentence. She is known to be a hard worker and I understand she has been employed through most of her adult life. She is 38 years old with many productive working years ahead of her. Despite her lawyer's representations about her household income and her husband's child support obligations, I am not satisfied there is little prospect of her being able to pay back what she stole. Indeed she told the police she could. Furthermore, I note that the issues of ability to pay and likelihood of repayment receive relatively minor consideration where a breach of trust has been involved. (*R. v. Yates*, [2002] B.C.J. No. 2415 (B.C.C.A.); *R. v. Seguin*, [1997] O.J. No. 5439 (Ont.Gen Div.)) In the *Seguin* case, which involved a breach of trust theft from an employer, a nine month jail sentence was imposed and restitution in the amount of \$76,773.48 was ordered.

[91] The ability of a restitution order to facilitate a means of recovery for a vulnerable victim, in this case, small business owners with no pensions, "is one of the considerations in favour of making such an order." (*R. v. Castro*, [2010] O.J. No. 4573 (Ont.C.A.)) Other purposes served by a restitution order include: it emphasizes the sanction imposed on the offender; it makes the accused responsible for making restitution to the victim; and it prevents the accused from profiting from the crime. (*Castro*, citing *R. v. Zelensky*, [1978] 2 S.C.R. 940) Considering all the factors I have mentioned, it is my determination that this is an appropriate case for the ordering of restitution.

[92] Finally, I acknowledge that this sentence will place a heavy burden not only on Ms. Lee but also on her family and friends. It pains me to think of how difficult this outcome, particularly the jail sentence, will be for Ms. Lee's daughter and step-children especially. They have no responsibility for what happened yet they

pay a significant price. There is no role however for sentiment in sentencing. Justice must be vindicated in accordance with a principled application of the law.