PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacIntosh*, 2018 NSPC 45

Date: 2018-11-22
Docket: 8189240
Registry: Pictou

Between:

Her Majesty the Queen

v.

Emily Anne MacIntosh

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	2018: 19 July, 31 October, 22 November in Pictou, Nova Scotia
Charge:	Para. 334(a), *Criminal Code of Canada*
Counsel:	Bill Gorman for the Nova Scotia Public Prosecution Service Craig Clarke for Emily Anne MacIntosh

By the Court:

[1] Emily Anne MacIntosh is before the court for the continuation of a sentencing hearing that began 16 June 2018; Ms. MacIntosh elected trial in this court and pleaded guilty to an offence under para. 334(a) of the *Criminal Code*.

[2] Defence counsel sought initially to have the court refer Ms. MacIntosh to a restorative-justice program as authorised in (2018) NS Gaz I, 42-50. The program authorisation allows expressly for post-conviction/pre-sentence referrals for cases of this nature, and comprehends the referral being made by the court.

[3] In 2018 NSPC 23, I adjourned the sentencing hearing to allow counsel to make submissions to the court regarding the legality of the program authorization.

[4] Defence counsel informed the court on 31 October 2018 that Ms. MacIntosh was abandoning her application for a restorative-justice referral and wished to proceed with a sentencing hearing.

[5] Ms. MacIntosh has been found guilty by the court of an offence under para. 334(a); the prosecution has presented to the court a statement of facts in accordance with ss. 723-724 of the *Code*. I have found that the facts support the

guilty plea. I have received a s. 721 presentence report. I have received s. 722.2 community-impact statements.

[6] At this stage, subsection 720(1) of the *Code* fixes the court with a mandatory jurisdiction to conduct sentencing proceedings and "to determine the appropriate sentence to be imposed."

[7] The prosecution seeks a suspended sentence and a term of probation. Defence counsel seeks a conditional discharge. The parties agree that there should be a restitution order in the amount of $27,376.08, which Ms. MacIntosh is able to pay immediately.

[8] For the reasons that follow, I find that the granting of a conditional discharge would be in the interests of Ms. MacIntosh and not contrary to the public interest; the court will order that Ms. MacIntosh be discharged conditionally upon the terms of a two-year probation order which will include a term requiring speedy payment of restitution.

Circumstances of the offence

[9] The prosecution provided the court with a statement of facts in accordance with the provisions of ss. 723-4 of the *Code*.

[10] Valley View Villa (the "Villa") is a municipally owned home for special care which serves persons who require assisted-living arrangements; it provides an array of services to its residents, some of which are funded publicly, others, fee-for-service. The Riverton Guest Home Corporation (the "Corporation") operates the Villa; the board of the corporation is appointed by the Municipality of the County of Pictou (the "Municipality").

[11] Ms. MacIntosh served as administrator of the Villa from 2011 until her termination in 2016; beginning in 2013, she assumed the additional duties of finance manager. Ms. MacIntosh was paid a salary of $99,000 per year. She was not entitled to overtime pay but had a time-off-in-lieu arrangement with the Corporation , and was governed by a use-it-or-lose it vacation policy.

[12] In 2016, the Municipality conducted a review of the Villa's operations—short of an audit—to identify the causes of what had become annual financial deficits.

[13] It was determined eventually that Ms. MacIntosh had drawn a number of unauthorised cheques on operating bank accounts maintained by the Villa, totalling $27,676.08. These unauthorized cheques were drawn to the order of Ms. MacIntosh and members of her family. When confronted, Ms. MacIntosh

rationalised these illegal withdrawals as compensation for unpaid overtime and lost vacation time.

[14] In November 2016, the chief administrative officer for the Municipality turned over this information to the RCMP. A police investigator interviewed Ms. MacIntosh. Ms. MacIntosh told the investigator that she had felt overwhelmed in her job; she had gone through a divorce and taken on an unmanageable level of indebtedness. She had ended up using the stolen money to cover the purchases of a trailer for $27,000 and of some small appliances at Costco.

[15] Defence counsel did not dispute the facts, but noted that the annual operating deficits at the Villa were greater than the amounts stolen by Ms. MacIntosh.

[16] Defence counsel underscored the fact that Ms. MacIntosh had admitted responsibility for her actions very promptly, and had not contested her employment termination.

[17] Defence counsel holds in trust sufficient funds from Ms. MacIntosh to make immediate restitution in full.

[18] The court received, as Exhibits 1 and 3, community-impact statements in accordance with s. 722.2 of the *Code*.

[19] Exhibit 1 was prepared by the chief administrative officer of the Municipality. It states in part:

> The loss of funds to a corporations means a change in priorities may be required or a program implementation delayed as you adjust to recover from the losses. As owners, the Municipality has advanced monies to the Riverton Guest Home to assist with some cash flow issues that the corporation experienced. The issue before the court is not the sole reason for the advancement of the funds, but the two are certainly linked. The advancements of funds to Riverton Guest Homes means that the Municipality does not have the funding to provide to the broader citizen base and this impact may not be truly quantifiable.

[20] Exhibit 3 was prepared by the chair of the board of directors of the Corporation. It describes irreparable damage done to the reputation of the facility, the negative effect on staff morale, and the impact on the delivery of services to a vulnerable population, all the result of the actions of Ms. MacIntosh.

[21] There is a final portion of the community-impact-statement form which provides victims or their representatives an opportunity to explain the reasons for submitting a statement on behalf of the community. In this portion of Exhibit 3, the chair of the board expresses an opinion regarding the moral culpability of Ms. MacIntosh. This would fall outside the scope of admissible evidence under sub-s. 722.2(1) of the *Code*, as it is not descriptive of the harm or loss suffered by the community. I adopt the principles which were followed by the sentencing judge in *R. v. B.P.*, 2015 NSPC 34 at para. 76. It is important that sentencing courts listen carefully and respectfully to victims in the sentencing process, particularly in cases

of serious crime—and this one falls in that category. The court must remain aware of the unique and personal response of each victim harmed by the criminal conduct of another: *R. v. Redhead*, 2001 BCPC 208 at para. 14. However, the integrity of the sentencing process would require that I redact from the record inadmissible contents of a community-impact statement. I shall edit Exhibit 3 to remove the final entry.

Circumstances of Ms. MacIntosh

[22] The presentence report informs the court that Ms. MacIntosh is 47 years old. She grew up in Pictou County. Her childhood and adolescence were unremarkable for the most part; however, there is a history of substance abuse in her family. Ms. MacIntosh enrolled in university , then in nursing school. Her first marriage ended unhappily in 2011 and was the source of much stress and anguish; however, Ms. MacIntosh remarried in 2014, and she describes this relationship as "respectful, loving, supportive and encouraging".

[23] Ms. MacIntosh has been employed continuously since she was a teenager. She worked at Valley View Villa from 1997 until she was dismissed in 2016; she started as an RN and advanced to the position she held until she was let go. At the time of the preparation of the presentence report, Ms. MacIntosh had begun

employment at a nursing home. However, I was informed by defence counsel during the last stages of the sentencing hearing that the governing body for nursing had suspended Ms. MacIntosh's registration; consequently, she has had to move to another job outside the health professions.

[24] Ms. MacIntosh informed the author of the presentence report that she had been diagnosed with depression and anxiety in 2011. She attended counselling between 2011 and 2013. She ended her sessions in 2013 as her first counsellor was replaced with another whose work did not seem to be achieving satisfactory results.

[25] Ms. MacIntosh pursues normal, prosocial pastimes, and values contact with her family. She has two adult children from her first marriage who live on their own.

[26] Ms. MacIntosh has no criminal history whatever. She admitted to her wrongdoing when confronted by the authorities. She pleaded guilty very soon after her arraignment. She is able to pay full restitution immediately.

Criminal Code provisions applicable to theft

[27] Para. 334(a) of the *Code* states:

> 334 Except where otherwise provided by law, every one who commits theft
>
> (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds five thousand dollars;
>
> . . . .

[28] Indictable theft-over is not eligible for a conditional sentence, given sub-para. 742.1(f)(vii) of the *Code*. However, it is eligible for a discharge, given s. 730 of the *Code*, and for a number of purely non-custodial sentences: a fine alone (s. 734); a suspended sentence (para. 731(1)(a)); a fine and probation (para. 731(1)(b)). The *Code* authorises custodial sentences; however, as the prosecution is seeking probation only, it would not be appropriate for the court to consider anything above that boundary without giving the parties a chance to respond: *R. v. Fead*, 2017 ABCA 222 at para. 5; *R. v. Abel*, 2011 NWTCA 4 at para. 23; *R. v. Burback*, 2012 ABCA 30 at paras. 13-14; *R. v. Scott*, 2016 NLCA 16 at para. 26; *R. v. Hagen*, 2011 ONCA 749 at para. 5; *R. v. Williah*, 2012 NWTSC 53 at para. 32; *R. v. R.O.*, 2017 ONCA 987 at para. 5. In my view, proportionality would not require the court to consider a sentence greater than the suspended sentence sought by the prosecution. The issue is whether to grant a discharge.

General sentencing principles

[29] In determining an appropriate penalty, it is important that the court recognize that sentencing is a highly individualized process: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 80; *R. v. Ipeelee* 2012 SCC 13 at para. 38; *R. v. Scott*, 2013 NSCA 28 at para. 7; *R. v. Redden*, 2017 NSSC 172 at para. 28; *R. v. MacBeth*, 2017 NSPC 46 at para. 8. "Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 533.

[30] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances: para. 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham* 2013 SCC 15 at para. 8; *R. v. Boutilier*, 2018 NSCA 65 at para. 21; *R. v. Skinner*, 2015 NSPC 28 at para. 33, varied by 2016 NSCA 54.

[31] Assessing a person's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of

the offender. That fundamental principle is set out in s. 718.1 of the *Code*. In *Ipeelee* at paragraph 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims, and proportionality seeks to ensure public confidence in the justice system; it was characterised in *Ipeelee* as a *sine qua non* of a just sanction.

[32] In *R. v. Lacasse* 2015 SCC 64 at para. 12, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. A consequential analysis requires the court to consider the harm caused by criminalised conduct. *Lacasse* recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of justice.

[33] Pursuant to para. 718.2(b) of the *Code,* this court is governed by the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is the

principle of sentencing parity. In *R. v. Christie*, 2004 ABCA 287 at para. 43, the reviewing court held that:

> [w]hat we must strive for is an approach to sentencing whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together . . . .

[34] This is the penalty analog of the principle of legality: not only must members of the public know what type of conduct is criminalised—see, *e.g*., *R. v. Lohnes* [1992] 1 S.C.R. 167 at para. 27—they must know also the penalties that might be imposed for engaging in that conduct. The theory is that knowledge of both the risk of liability and the extent of liability will help those contemplating illegal conduct to make informed choices. See Clayton C. Ruby, Gerald J. Chan & Nader R. Hasan, *Sentencing*, 9th ed (Markham: LexisNexis, 2017) at para. 1.25.

[35] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances. Furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstance. These restraint criteria are found in paras. 718.2 (d) and (e) of the *Code*.

[36] In *R. v. Gladue*, [1999] S.C.J. 19 at paras. 31 to 33, and 36, the Supreme Court of Canada stated that the statutory requirement that sentencing courts

> consider all available sanctions other than imprisonment was more than merely a codification of existing law. Rather, the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.

[37] The application of restraint criteria does not oust consideration of the other principles of sentencing in ss. 718-718.2; there is no such thing as a restraint-at-all-costs principle: *R v. Proulx*, 2000 SCC 5 at para. 96.

Seriousness of the offence and the moral responsibility of Ms. MacIntosh

[38] This was a high-dollar-value theft committed by a person who held substantial control over the finances of a publicly-funded facility. It occurred over a period of three years. It involved an enhanced degree of premeditation and calculation, as it involved Ms. MacIntosh drawing a succession of cheques intended to camouflage her thefts.

[39] The offence had an adverse effect on the reputation of the facility and on staff morale. It required the diversion of public funds to make up the loss. It impaired the ability of the facility to deliver services to a vulnerable population.

[40] With respect to the level of impact on the Villa and the Corporation, counsel adopted positions at polar ends.

[41] In sentencing hearings, para. 724(3)(e) of the Code provides that the prosecution must prove beyond a reasonable doubt the existence of aggravating facts. I find unproven the proposition that anyone's heath or well being at the Villa was jeopardised by Ms. MacIntosh's actions.

[42] However, neither do I accept the argument advanced by defence counsel at the sentencing hearing that this offence is rendered somehow less serious as "there is no evidence of the government going insolvent" or as "nobody missed out on lunch". In my view, this is a fallacy of false simplicity. In fact, the argument put forward by defence counsel offers its own *reductio-ad-absurdum* rebuttal. Surely, it is unnecessary to see proof of institutional collapse or that life-or-death experiences were endured in order for the court to conclude that a big theft or fraud against a public institution had a detrimental impact on the operation of that institution.

[43] Consider what has been described as the "salami fraud": a rogue financial-services insider contrives—usually with the aid of computerised automation—to carve fractional amounts off of individual transactions. No one client or account might take a big hit; but repeated a million times a day with each successive trade, the method can lead to a huge misappropriation. The impact on any one individual might, in dollar terms, be microscopic; but the broader impact on

service delivery, client confidence, staff morale and the security of the business could well be substantial.

[44] Furthermore, contrary to mythology, public entities are not invested with limitless wells of cash. The supply that funds operations such as the Villa comes from tax dollars, which are finite and allocated according to budgetary priorities.

[45] The court need not be offered a proof that meal services were curtailed to know that the community-impact statements are correct and accurate in their entirety when they describe the effect Ms. MacIntosh's actions had on the delivery of services at the Villa and within the larger Municipality. Staff morale was harmed, the reputation of the Villa was damaged, and the Municipality had to divert money from other programmes to make up the loss.

[46] As the CAO of the Municipality noted in the first community-impact statement filed with the court, the loss might not be quantifiable precisely. But when an institution is trusted less, and its staff worry more, the impact will be far, wide, and weighty.

[47] Accordingly, I find that this offence had a significant impact on the Villa, engaging the provisions of sub-para. 718.2(a)(iii.1) of the *Code*.

[48] I find Ms. MacIntosh's moral culpability to have been high. She is responsible solely for her conduct. She held significant authority over the facility's finances, and occupied a position of trust. This is an aggravating factor under sub-para. 718.2(a)(iii) of the *Code*. Nor was this a grey-area defalcation: Ms. MacIntosh had worked at the Villa for many years, and would have been well familiar with the personnel policies regarding overtime and leave.

[49] Although not in play in this case, s. 380.1 of the *Code* lists a number of aggravating factors applicable to fraud-related sentencings; the statute is a codification of common-sense considerations which courts have used in defalcation sentencings.

> 380.1 (1) Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in section 380, 382, 382.1 or 400, it shall consider the following as aggravating circumstances:
>
> (a) the magnitude, complexity, duration or degree of planning of the fraud committed was significant;
>
> . . .
>
> (c) the offence involved a large number of victims;
>
> (c.1) the offence had a significant impact on the victims given their personal circumstances including their age, health and financial situation;
>
> (d) in committing the offence, the offender took advantage of the high regard in which the offender was held in the community;

> (e) the offender did not comply with a licensing requirement, or professional standard, that is normally applicable to the activity or conduct that forms the subject-matter of the offence; and
>
> . . . .

[50] As a matter of common sense, I consider as aggravating the magnitude of this theft, the long-term duration of it—with each unauthorized cheque or withdrawal requiring a discrete instance of deliberation and action—the impact that it had on a vulnerable community, including persons in public care. Particularly aggravating is that Ms. MacIntosh took advantage of the high level of regard in which she was held at the Villa—built up over years of dutiful employment prior to her decision to take advantage of her position—to perpetrate a theft against an institution that had promoted her to an elevated position of trust.

[51] These factors satisfy me that this was a very serious offence for which Ms. MacIntosh bears a high level of moral culpability.

Sentence parity

[52] To recap, the prosecution seeks a suspended sentence and probation; defence counsel seeks a discharge. There is a joint submission regarding restitution.

[53] I reviewed the sentencing-parity principle earlier in my judgment, at paras. 33-34.

[54] I have reviewed a number of sentencing precedents:

- *R. v. Lee*, 2011 NSPC 26: assistant manager stole a substantial sum from a small business over an extended period of time; convicted following trial; no remorse and offender asserted she had been "set up"; sentenced to 10 months in prison, followed by 12-months' probation; full restitution was ordered.

- *R. v. Johnson*, 2018 NSSC 10: over a three-year period, the offender stole over $100K from her employer by way of seventy-six fraudulent cheques. The offender was a member of a first nation; an agency of that first nation was the victim. Limited and dated criminal record. The offender pleaded guilty and was remorseful. Sentenced to a conditional-sentence order of 18 months, followed by probation with restitution. Given the date of the offence as described in the reported decision, and given the charge—para. 380(1)(a) of the *Code* with a maximum penalty of 14 years—a conditional sentence would appear to have been an illegal sentence given para. 742.1(c) as it read after 19 November 2012 in virtue of S.C. 2012, c. 1, s. 34 in force by SI/2012-47, or given 742.1 up to 19 November 2012 in virtue of S.C. 2007, c. 12, s.1 in force 30 Nov 2007 by s. 2 of the amending statute. However, the case is still useful in that the court concluded that a

term of imprisonment—albeit one served in the community—was appropriate.

- *R. v. Zinck*, 2013 NSSC 338: member of the Nova Scotia Legislature submitted fraudulent expense claims totalling $8400. Some of the amounts concerned community organizations to which the offender had agreed to give money but never did. No prior record. Guilty plea. Defence sought a conditional discharge or a conditional sentence. The prosecution sought 4-6 months in prison, followed by probation. Sentenced to 4-months' imprisonment, followed by a 12-month term of probation.

- *R. v. Wilson*, 2012 NSPC 40. Another MLA expense-claim fraud, almost $61K. Guilty plea. No record. Gambling addiction. Many letters of support. Nine-months' imprisonment followed by an 18-month term of probation with restitution.

- *R. v. Naugler*, 2011 NSPC 68. Bookkeeper of Dalhousie Faculty Association overpaid herself approximately $150K. Suffered from depression and anxiety during the period the funds were taken. No prior record. Full admission of responsibility. Had begun repayment through garnishment. Sentenced to 8-months' imprisonment followed by probation.

- *R. v. Sellars*, 2013 NSCA 129. Fraudulent claims against employee health-care plan of over $12K. Sentencing judge declined to order a conditional discharge, finding it would not be in the public interest. On sentence appeal to the Court of Appeal, appeal allowed and a conditional discharge imposed. The sentencing judge had imposed too high a standard as s. 730 required only that a discharge not be contrary to the public interest. Sentence varied to a conditional discharge, 3-years' probation, and a restitution order. Mitigating factors in that case were that Ms. Sellars was not the prime mover and she was not a finance trustee; she had been pressured by an abusive intimate partner to submit false medical-expense-reimbursement claims to her employer's health plan.

Analysis of circumstances and the governing law

[55] Although this offence was serious, and Ms. MacIntosh's moral culpability high, I find that these actions were out of character—at least as her character appeared to have been prior to 2013. She did not seek to conceal or minimise her wrongdoing once caught, and pleaded guilty very early on in proceedings. She is ready to make immediate restitution for the money she stole. I recognize that sentencing should not be reduced to a means test, which results in those with the ability to make restitution more entitled to lenient and rehabilitative sentences than those who suffer in poverty and might never be able to provide compensation to

victims. Nevertheless, the making of reparation for harm done is a core objective of sentencing in para. 718(e) of the *Code*, which should serve to promote a sense of responsibility in offenders as underscored in para. 718(f).

[56] I find it very unlikely that Ms. MacIntosh will reoffend: her history prior to 2013 was of a person committed to a high level of public service; this makes it easier to characterise her actions between 2013-2016 as aberrations.

[57] I take into account the fact that community-based sentences—and that would include conditional discharges—when enabled with stringent conditions, may have significant deterrent effect: *R. v. Barrons*, 2017 NSSC 216 at paras. 39-46; *see also R. v. T.S.*, [1996] N.S.J. No. 242 (C.A.) at para. 28, *R. v. Bursey* (1991), 104 N.S.R. (2d) 94 at 97 (C.A.). This proposition has regained currency since the decision in *R. v. Rushton*, 2017 NSPC 2 at para. 95.

[58] Finally, I have factored into my decision the collateral consequences which have arisen as a result of Ms. MacIntosh pleading guilty to theft. Job loss was inevitable; however, she has also lost temporarily her professional credentials as a result of a decision by the registered nursing licensing body. This will limit substantially Ms. MacIntosh's employment prospects, possibly for a long time to come, particularly in her chosen field of the health professions. This makes Ms.

MacIntosh unlike other persons convicted of theft. In my view, this should be considered in assessing the personal circumstances of Ms. MacIntosh, as in *R. v. Souter*, 2018 SCC 34:

> 46 As I have observed, sentencing is a highly individualized process: see *Lacasse*, at para. 54; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 82; *Nasogaluak*, at para. 43. In *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, this Court stated that a sentencing judge must have "sufficient manoeuvrability to tailor sentences to the circumstances of the particular offence and the particular offender" (para. 38). Tailoring sentences to the circumstances of the offence and the offender may require the sentencing judge to look at collateral consequences. Examining collateral consequences enables a sentencing judge to craft a proportionate sentence in a given case by taking into account all the relevant circumstances related to the offence and the offender.
>
> 47 There is no rigid formula for taking collateral consequences into account. They may flow from the length of sentence, or from the conviction itself: see *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 11; *R. v. Bunn* (1997), 118 Man. R. (2d) 300 (C.A.), at para. 23; *R. v. Bunn*, 2000 SCC 9, [2000] 1 S.C.R. 183 ("*Bunn* (SCC)"), at para. 23; *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289. In his text *The Law of Sentencing* (2001), Professor Allan Manson notes that they may also flow from the very act of committing the offence:
>
> > As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. [Emphasis added; p. 136.]
>
> I agree with Professor Manson's observation, much as it constitutes an incremental extension of this Court's characterization of collateral consequences in Pham. In my view, a collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender.
>
> 48 Though collateral consequences are not necessarily "aggravating" or "mitigating" factors under s. 718.2(a) of the *Criminal Code* -- as they do not relate to the gravity of the offence or the level of responsibility of the offender -- they

> nevertheless speak to the "personal circumstances of the offender" (*Pham*, at para. 11). The relevance of collateral consequences stems, in part, from the application of the sentencing principles of individualization and parity: ibid.; s. 718.2(b) of the *Criminal Code*. The question is not whether collateral consequences diminish the offender's moral blameworthiness or render the offence itself less serious, but whether the effect of those consequences means that a particular sentence would have a more significant impact on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit.
>
> 49 Collateral consequences do not need to be foreseeable, nor must they flow naturally from the conviction, sentence, or commission of the offence. In fact, "[w]here the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished" (Manson, at p. 137). Nevertheless, in order to be considered at sentencing, collateral consequences must relate to the offence and the circumstances of the offender.
>
> (footnotes omitted)

Conditional-discharge criteria

[59] The recommendation made by the prosecution that the court consider a suspended sentence is an eminently reasonable one; indeed, the preponderance of authority would support even the imposition of a period of imprisonment. Defence counsel recommends a discharge.

[60] Section 730 of the *Code* states:

> 730 (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

[61] This is a close call. The court is dealing with a large, breach-of-trust theft. However, I believe that a case has been made out for a discharge.

[62] I take into account Ms. MacIntosh's immediate guilty plea, her lack of criminal record, and her ability to make immediate restitution. Based on her history, I find it unlikely that she would ever re-offend. The loss of her professional credentials may have a significant and long-term effect on her ability to obtain employment in her chosen field. The entering of a conviction could make her professional rehabilitation very much harder.

[63] Further, as I discussed earlier in my judgment, there is an increasing recognition of the deterrent—as well as rehabilitative—effects of community-based sentencing. One important component of that deterrent effect will be found in sub-s. 730(4) of the *Code*, which provides that a person convicted of an offence while subject to the terms of a conditional discharge may have the discharge revoked and get sentenced anew.

[64] *R. v. Fallofield* [1973] B.C.J. No. 599 at para. 21 (CA) expanded on the qualificational criteria for discharges; those criteria have been applied by sentencing courts in Canada continuously for the past four decades:

> The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
>
> (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
>
> (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
>
> (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
>
> (6)In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
>
> (7)The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sentence.
>
> (8)Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[65] While discharges should not be granted easily or routinely, they are not reserved for exceptional circumstances: *R. v. Scheper*, [1986] Q.J. No. 1806 at para. 9 (CA). The test is whether a discharge would be in the interests of the person to be sentenced and not contrary to the public interest. In *Sellers* (which I summarised earlier dealing with sentencing parity) the Court of Appeal found the

sentencing judge to have erred in holding that a discharge must be in the public interest; that was too stringent and not in line with the statute.

[66] I find that it would be in Ms. MacIntosh's interests and not contrary to the public interest that Ms. MacIntosh be discharged conditionally. The public may be well assured that Ms. MacIntosh will make amends, and then some, and will not reoffend. A discharge may help restore her professional credentials, lessening her employment and financial insecurity.

[67] There will be a 24-month probation order. In addition to the statutory terms, Ms. MacIntosh shall:

- Report to the local Community Corrections office within two working days and thereafter as directed by your probation officer;
- Remain within Nova Scotia unless with prior written permission from your probation officer;
- Perform 120 hours of community service within the first year of this order;
- Attend for mental-health assessment and counselling and any other assessment or counselling directed by your probation officer;

- Participate and cooperate in any arranged assessment and counselling and notify your probation immediately of any missed appointments;

- Inform your probation officer within 24 hours should you accept any volunteer or paid position requiring you to handle money, valuables or negotiable instruments for an employer or other agency;

- Make restitution through the clerk of the court in the amount of $27,676.08 in favour of the Riverton Guest Home Corporation by 30 November 2018;

- Sign all consents to release of information required by your probation officer to arrange rehabilitative services.

[68] There will be a $200 victim-surcharge amount with six months to pay.

[69] I wish to thank counsel for the very thorough submissions made in this case.

JPC