IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Upton, 2008 NSSC 360

Date: 20081120
Docket: CRH287738
Registry: Halifax

Between:

Her Majesty the Queen

and

David Anthony Upton

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	November 20, 2008, in Halifax, Nova Scotia
Written Release of Decision:	December 1, 2008
Counsel:	Andrew Mcdonald and Mark Heerema, for the Crown Luke A. Craggs, for the defendant

By the Court:

INTRODUCTION

[1] Mr. Upton was arrested on December 22, 2003 in a small office located at Suite 202, 1160 Bedford Highway. The police were present to execute a search warrant and to arrest, if present, Nelson Higginbotham, Paul Upton and Trevor Myers. The police had not yet heard of David Upton.

[2] At the time of entry into the office David Upton was seated before a small TV table. Posted on the wall in front of the table was a map of the United States, a time zone chart from the telephone book and a small notebook. He was talking on a phone. The phone line associated with that phone was one that had been extensively used for calls to and from residents of the United States. Those individuals in the United States believed they were dealing with a company called Allstar Financial Services located in Winnipeg. Who they were really talking to were a group of greedy, unscrupulous individuals carrying out a simple, but apparently effective scheme to defraud members of the public who are desperate to obtain loans.

[3] Besides David Upton also present in the office were his younger brother, Paul Upton and Nelson Higginbotham. Trevor Myers was arrested later that day.

[4] For reasons unknown charges were not laid until December 27, 2006. By that time Nelson Higginbotham had passed away.

[5] Paul and David Upton and Trevor Myers were jointly charged with two counts of attempted fraud of the public and two separate time periods in 2003 and 53 counts of defrauding named complainants. Paul Upton and Trevor Myers were each charged with a separate count of possessing property obtained by crime contrary to s.355 of the *Criminal Code*. David Upton was charged separately possessing property, an IBM Laptop computer knowing it had been obtained by the commission in Canada by an offence punishable by indictment, contrary to s.355 of the *Criminal Code*.

[6] Paul Upton pled guilty in Provincial Court to the two counts of attempting to defraud the public between July 28, 2003 and September 17, 2003 and between October 24 and December 22, 2003 of money of a value exceeding $5,000.00. He was sentenced on October 24, 2007. He received a suspended sentence and was placed on probation for two years with a variety of condition, including to perform 150 hours community service and ordered to make restitution in the amount of $5,000.00. All remaining charges were withdrawn against him.

[7] Trevor Myers pled guilty to the charge against him that he possessed property, cash that he had obtained by crime of a value exceeding $5,000.00 contrary to s.355 of the *Criminal Code*. On June 18, 2007 he was granted a discharge, conditional on his successful completion of an 18 month period of probation with conditions.

[8] David Upton was tried in Supreme Court by judge and jury on September 2 to 25, 2008. The jury convicted David Upton of the two counts of attempted fraud of the public between July 28 and September 17, 2003 and between October 24

and December 22, 2003 and of 46 counts of fraud with respect to named complainants in those two time periods.

[9] The jury acquitted him of seven counts of fraud and of the charge of possession of stolen property knowing it had been stolen.

FACTS

[10] In relation to the facts, obviously the jury does not provide reasons or indication of its reasoning process that led to its decision. Section 724 of the *Criminal Code* provides that:

> Where the court is composed of a judge and jury, the court
>
> (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
>
> (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[11] Here there is really little or no dispute between the Crown and the defence about the basic facts. I will not go into all of the evidence that was adduced at trial, but I will say that in my opinion the evidence adduced at trial overwhelmingly demonstrated that a fraudulent advanced fee loan scheme operated between the two different time periods set out in the indictment which corresponded to premises known as 18B Rosedale Avenue in Dartmouth and 1160 Bedford Highway.

[12] The scheme was simple. Ads were placed in United States publications inviting those with bad credit to apply for a loan to finance a car, a home purchase or for debt consolidation. A toll-free number was listed. Typical of the ads that were placed were such in bold “Financial Freedom”, “Money to Loan”, “Good or Bad Credit”, “Home, Car, Debt Consolidation”. “Call toll-free 1-866-764-5550.” Applicants would call. Standard information was obtained from the applicant including such details as where the applicant had got the referral, the purpose of the loan, fax and phone numbers, age, monthly mortgage payment or rent, employment, other sources of income, previous involvement with bankruptcy and how much they could afford each month to service a loan. A form letter would then be faxed to the applicant. In the time-frame of July 28 to September 17, 2003 the name on the letter was Nationalwide Financial Services. They gave an address Nationwide of 844 Dakota Street in Winnipeg, Manitoba. This address was fictitious. This letter was conveniently labelled “Commitment to Service”. It thanked the applicant for selecting Nationwide and advised their professional staff were committed to ensure their financial objectives are satisfied. They offered a written guarantee about their services. The only thing guaranteed was that David Upton and his cohorts would do their very best to scam them out of as much money as they could, usually several hundred dollars.

[13] A call would be made by one of the accused, calling himself Kevin Cartwright, Steven Wellington, Robert Whitmore or Steven Cooper. All were fictitious names. The applicant would be advised their loan application had been approved at 9.25% interest. All Nationwide needed was confirmation of their identification. This could be supplied by faxing in copies of their social security card and driver’s license, along with two personal references. The applicant was

also advised that Nationwide's lender required the applicant to provide a retainer. The money would go towards payment of administration, processing, legal costs and to provide insurance on the loan. This insurance was toted as protecting the applicant by providing insurance in case there was a default by reason of sickness or loss of employment. The insurance fee was promised to be 100% refundable provided the applicant made all of the required monthly payments. An acceptance letter with blank spaces filled in by a typewriter would then be faxed to the applicant confirming the loan amount, the interest rate, the term of the loan and the monthly payment. It confirmed that the applicant had met the minimum requirement suggested by a broker to obtain a loan and requested copies of identification documents, proof of employment etc. The retainer fee was usually several hundreds of dollars, but in one case was some $6,000.00 U.S. dollars or just in excess of $8,000.00 Canadian.

[14] The applicant would be instructed to send the insurance or retainer fee via Western Union to one of Nationwide's "on-duty financial officers", either Paul Upton, or most frequently Trevor Myers. After sending the money via Western Union the applicant would be required to call Nationwide and provide the ten-digit control number used by Western Union. Armed with this number and the other relevant details including the name, address and approximate amount of the money being sent, Trevor Myers could go to any Western Union agent, provide these details along with his government photo ID and get a cheque. The cheque could be immediately cashed at the Western Union location.

[15] It was not until August 26, 2003 that Corporal Steven Hudson of the RCMP, Commercial Crime Section located here in Halifax received a call from a

complainant about Nationwide. The call was from a resident of West Palm Beach in Florida. She provided enough information for Corporal Hudson to conclude that an advance loan scheme was currently operating in Halifax.

[16] Corporal Hudson had testified that from 2000 to 2003 he had received several similar complaints, but by the time they, the police, became involved nothing could be found. The information from this complaint was that the money had been sent via Western Union. Phone numbers were provided for Nationwide. Western Union officials were able to confirm that money was picked up at a Sobeys store in Dartmouth by one Trevor Myers. The store was contacted and they had the address and driver's license, details for Mr. Myers. Corporal Hudson obtained a photograph of Myers from the Registry of Motor Vehicles and details of vehicles registered to his name. He requested Sobeys employees to contact him if Trevor Myers picked up money at any other locations.

[17] On September 2, 2003 a Sobeys employee called Corporal Hudson. She had followed Trevor Myers after he picked up a Western Union money transfer. He was parked behind a building on Highfield Park in Dartmouth. Corporal Hudson went and located Myers and his vehicle close to that location. He arranged for a surveillance team to follow Myers for September 4 and 5, 2003. Myers was seen meeting with a driver of a red Nissan Pulsar, DTR 367. This vehicle was registered to Paul Edward Upton, a name that was familiar to Corporal Hudson as being associated with money pick-ups in an earlier investigation. They also observed Myers and Upton meet with the driver of a black Mercury Cougar, plate DZR 115. This was registered to Nelson John Higginbotham.

[18] On September 5, 2003 they followed Myers. They observed Myers meet Paul Upton at Tim Hortons on Highfield Park Drive. They then followed Paul Upton to try to locate the telephone call centre or boiler room where the calls were made and received. Paul Upton went to 18B Rosedale Avenue in Dartmouth. Parked outside this address was Higginbotham's Cougar. The RCMP later followed Paul Upton back to the Tim Hortons where he met with Myers. They met again later that day at the Westphal Tim Hortons. They had a total of three meetings that day.

[19] Corporal Hudson was able to obtain the name of the subscriber to the phone numbers that he had been provided. It was a business named Cana Collecting Services. The Registry of Joint Stock offices registration form contained patently false names and a fictitious address for this business name. From late August to September 15, 2003 Corporal Hudson was getting almost daily calls from Sobeys employees reporting pickups by Trevor Myers from their Western Union Offices. After September 15, he did not receive any for quite some time.

[20] A search warrant was obtained for 18B Rosedale Avenue and executed on October 1, 2003. The office was empty except for remnants of the boiler room, including garbage bags containing fast food containers and shredded documents. The phone jacks were confirmed to be the lines used by Nationwide Financial Services to communicate by phone and fax residents of the United States.

[21] The investigation became dormant until Corporal Hudson received a call from a Sobeys employee on December 15, 2003 that Trevor Myers had picked up a money transfer. The RCMP obtained a company name and phone numbers. They

found out the phones had been installed at 1160 Bedford Highway. They went to that location on December 15 and found Paul Upton's red Nissan Pulsar parked at the rear of the building. They then obtained a search warrant that was executed on December 22, 2003.

[22] The defence advanced by the accused at trial did not dispute the existence of the fraudulent scheme, just that the Crown had not proven beyond a reasonable doubt David Upton's involvement in it. The evidence about David Upton's involvement as a party was both direct and circumstantial. The Crown called Paul Upton and Trevor Myers as witnesses. In my opinion Paul Upton plainly tried to minimize his brother's involvement in this scheme.

[23] It is obvious to me that the jury accepted the evidence of Trevor Myers, which evidence plainly demonstrated that David Upton was one of the organizers and if not at the top, near the top of this scheme.

[24] I should also mention the evidence of Corporal Carver. Corporal Carver was a member of the Winnipeg Commercial Crime Unit. He testified in the fall, that is late August into September 2003, he started receiving complaints about Nationwide Financial Services about an advance loan scheme. They called him, as they mistakenly believed to be operating in Winnipeg, specifically at the 844 Dakota Street.

[25] It was on September 2, 2003 that Corporal Carver received the toll- free number from one of the complainants. He called it. He spoke with a male who identified himself as Kevin Cartwright. He explained to Mr. Cartwright who he

was. The phone got passed to Steve Wellington. Corporal Carver specifically testified that he told Wellington he was a police officer, where he was located, what he was involved in and why he was calling. Mr. Wellington told Corporal Carver that their office, that is Nationwide's office, was right next door to the MacDonald's and Burger King. When Corporal Carver was having none of that, Mr. Wellington calmly assured him that maybe he should speak with the owner, Mr. Walker. Corporal Carver described his first conversation with Cartwright as being brief, but with Wellington he noted Wellington was confident even arrogant, even though he was speaking with a police officer who was involved in detecting fraudulent schemes.

[26] Despite being called by the police on September 2, the evidence plainly shows that the advance fee loan scheme continued to carry on under the name Nationwide for almost two weeks after that. My recollection is that it was somewhere around September 13 or 14 was the last time that they sent out faxes or dealt with applicants at that address.

[27] Corporal Carver also confirmed the commencement of calls in December 2003 about Allstar Financial Services with the address of 449 Provencher Street. This is an accurate and existing address in Winnipeg. However, when Corporal Carver went there, there were a number of different businesses, all legitimate, none of which had ever heard of Allstar or any of the various names associated with that fictitious enterprise.

[28] The Crown has set out today the facts that they allege and the defence has not objected to those facts. In addition to the salient matters I have already referred

to, the Crown notes that often victims were defrauded a second and even a third time when they call back to find out about their money. And in the end they would be left trying to leave voice messages on mailboxes that are already full or discovering the number they were calling was no longer in service. The victims had no idea who had defrauded them or where they truly could be located. There was never anything of value provided to them in return for the advance fees.

[29] The Crown also notes that when the police executed the warranted at 1160 Bedford Highway on December 22, 2003 David Upton was on the phone. Before him was a notepad with various details of applicants in it. On the floor beside him was a binder or folder containing application form details and that phone that he was using had been used for many calls to the United States that very morning right up to five minutes before the police arrived. I also note the existence of sticky notes that have initials in front of them with the lines associated with the different initials. It is a reasonable inference to draw, and I draw it, that David Upton, the initial "D" stood for one of those lines. The only rational conclusion that can be drawn by the jury's verdict and by the evidence that I heard was that the jury accepted the evidence of Trevor Myers that David Upton had recruited him into this enterprise, that the group needed a person with identification to pick up the money. That is the only part of the enterprise that could possibly expose anybody to being discovered and the only one where an alias would not work. True names had to be used. Someone had to step up with government ID and say "I'm a real person, and I'm here to pick up some money".

[30] It was Mr. David Upton who instructed Trevor Myers on how to use Western Union, as he had never done it before. The evidence confirmed, or

corroborated the evidence of Trevor Myers that it was David Upton who usually called him, that he would then go with the information obtained - the names, control numbers. It was also confirmed by the existence of information found in Mr. Myers' vehicle when he was arrested. Trevor Myers would then routinely call David Upton's cell phone to indicate that he picked up the money and he would be given instructions on where to meet. The meeting would either be with Paul Upton and it was also with David Upton where he would turn over the money less his 10%.

[31] Mr. Myers also testified that he was told to go to different Sobeys stores and mix it up. Trevor Myers testified that he was kept completely in the dark about where the operation was underway. He guessed it might be close to Rosedale Avenue because out of just pure chance he happened to see Paul Upton's vehicle. He was always instructed, that is Mr. Myers, to bring the money to public locations, such as Tim Hortons.

[32] In total there were 46 named victims who were defrauded of a total of $45,353.20. The Crown seeks a restitution order only in relation to those victims who can now be located and only in such amounts that reflect the net amount that they have now lost. That is, after amounts that have been paid by Paul Upton have been deducted.

[33] It is hard to put a number of how many people were attracted by this advance loan fee scheme. The Crown suggests it is in the hundreds. The defence has not disputed this assertion. The assertion is, in my opinion, borne out by the evidence. First of all, there were slightly over 100 application forms found in the

two folders or binders at 1160 Bedford Highway. That comes, just by that number, to over 200. There were bags of documents that had been shredded at 18B Rosedale Avenue. It is impossible to put a number on it, but it is not an exaggeration that hundreds of individuals were victims or potential victims of the attempted fraud.

[34] It is important to realize the kind of people that responded to these advertisements. I have gone through the exhibits. Many of the application forms lists their occupation as being disabled, single income individuals. Individuals that were widowed. Individuals that were elderly. People who had recently lost their job. In fact eight of the application forms that were exhibits had markings on them. Markings not by Paul Upton. His evidence was that he did not write below the line "other income" on the application forms. Paul Upton testified it was either Nelson Higginbotham or David Upton that wrote comments. And again he tried to minimize that it was David Upton.

[35] On eight of them, or at least eight that I could find, someone had written in large bold ink "OLD" with exclamation marks. It would be naive to think that the members of this joint criminal enterprise were writing "OLD" to pass the time of day. They were aware of the kinds of individuals that they were attempting to, and eventually did take advantage of, shamelessly take advantage of. Individuals that did not have the means, the determination or sophistication to either detect that they were being defrauded nor even to follow through on a complaint.

[36] I note that on two of these eight application forms that had "OLD" on it, are found David Upton's fingerprints.

[37] One of the individuals was 72 years of age at the time. The other one 65. That's in relation to Charles Roache and in relation to Mary Alice. In relation to Mr. Roache his present employer was listed as Social Security.

[38] I think it is fair to say that there was no specific scheme to target elderly victims. They certainly knew that they would be targeting individuals that were in financial need and it would not take very long in this scheme to realize the very dire straits some of these individuals were in and I am satisfied Mr. David Upton certainly knew this, and once blessed with that knowledge, continuing on with it is an aggravating factor.

[39] The jury heard the evidence from four witnesses from the United Sates; three by way of video link, one in person. There is no need to go through their evidence. The pattern was exactly as described before. What is significant about one of those victims, Ryan Singleton, was that he was relatively young. He was employed. He had plans to get married. He thought to make it all right, he would consolidate his debt before that happened. So he submitted the application and was delighted he was approved. When he did not get the money, he called. He was told that because of the delay he would have to send in a pre-payment of three or four months in order to secure the loan. Desperate for that loan he borrowed money and sent it. When he still did not get the loan, he called again and was told, and I am paraphrasing now, because of the delay he needed to submit a further fee. He could not afford that money either, but he could not afford not to, so he sent it in again. Here is a man on his honeymoon, calling to find out why his $5,000.00 loan did not arrive.

[40] The evidence of impact, we do not have any specific evidence from Mr. Singleton about that. We do have victim impact statements from Jayme Padgett and Janie Cano.

[41] Jayme Padgett moved to Arizona to get medical treatment for what she describes as an auto-immune disorder. She moved there because she refused to accept the initial diagnosis that her condition was terminal. She had no money. A realtor arranged for rental accommodations. How does she come up with the money? She saw the ad. She described the offer to borrow a "lifeline". The same realtor loaned her the money to send to Nationwide. Ms. Padgett was to pay the realtor back and the rent, but it turned out to be a scam. She says in her victim impact statement - no money and deeper in debt. At the time she felt so sick from her treatments, weekly chemo-therapy treatments she had to ask for depression medication. She just could not believe that somebody would do this to people who are drowning.

[42] Janie Cano, she says the first year was very bad. It affected her relationship with her family. She said it made her hateful and created distrust between her and her husband. Afterwards he no longer trusted her to pay the bills. She says the money she took out to send to Nationwide, she said she took their savings, which had taken them a half a year to build and it took her a day to lose it. She also expressed concern that her social security number is known to so many. She says it took them a long time to save that money and they had to work hard to do so. Her hope is that no more people will fall for the same thing. She says she hopes to God it will never happen to her again or to someone else.

CIRCUMSTANCES OF MR. UPTON

[43] In relation to the circumstances of the offender, Mr. Upton, we have the benefit of a pre-sentence report dated July 25, 2008 which has been updated as of November 14, 2008. It has been supplemented somewhat by information from Mr. Craggs, on Mr. Upton's behalf this morning.

[44] The pre-sentence report is by no means a positive one. At the time of the commission of these offences Mr. Upton was 30 years of age. He is now 35. His upbringing appears rather unremarkable. His mother is employed at the IWK in Halifax, his father a school bus driver. He has one sibling, his brother Paul, with whom he has no contact at all. Obviously in 2003 he had lots of contact. The pre-sentence report reflects that Mr. Upton's parents separated approximately 20 years ago and his mother remarried. He is described as having a good rapport with his mother and occasional contact with his father. It also shows that he has had a long-term relationship with Tammy MacLeod for 13 years. From that relationship he has two children, a 13 year old son and 7 year old daughter. The children reside with their mother.

[45] The probation officer notes that during the interview Mr. Upton appeared to be agitated and had to be cautioned about his behaviour. Mr. Upton takes some exception with the description of that, but I think no exception is taken with the fact that the interview was cut short and was not rescheduled.

[46] Mr. Upton's mother, who was interviewed for that report indicates that Mr. Upton continues to rant and rave when it comes to his ex-common law wife, that he has a chip on his shoulder and he is bad for that. What is telling about this is her comments that her son does not listen to others, but instead has his own agenda and thinks he is always right. She agrees that he could use with anger management counselling. I would note that the purpose of the pre-sentence report was in relation to an offence under s.264.1 of the *Criminal Code*, uttering threats to his ex-common law wife.

[47] Mr. Upton has Grade 12 education, which to his credit he earned through GED equivalency while incarcerated at what was then known as the Halifax County Correctional Centre.

[48] In relation to employment Mr. Upton describes himself as a self-taught mechanic. He has been employed for six months in 2008, full-time with Imperial Cleaners, but he had to leave that job when his trial started in September 2008. It is also described that for another two and half years he was a mechanic with Affordable Auto in Dartmouth. And it is also noted that he gains income or work as a neighbourhood mechanic out of his home. He has done labour related jobs and for a period did tile work. In terms of financial matters he has approximately $2,000.00 outstanding loan. He does not possess any credit cards. In terms of health he describes himself as being in good physical health and does not need the services of a mental health practitioner. He has no known alcohol or non-prescription drug issues, but note that he does suffer from diabetes and requires two injections daily.

[49] What is telling about the pre-sentence report is that Mr. Upton in the initial report of July 2008 did not accept responsibility for the offence and made no apologies for his behaviour. In the update of November 14, 2008 it reflects that Mr. Upton indicated he is not guilty of any of these offences and he maintains his innocence. I will have more to say about that in a moment.

[50] Mr. Upton's mother also noted that up until recently Mr. Upton was a contributing employed member of society and she believed that her son had left his criminal past behind him and he looks forward to having this matter in the past and she remains supportive of him.

[51] By way of a criminal record, and I will leave aside Mr. Upton's Youth Court record. I place no weight on that whatsoever. On December 11, 1991 he was sentenced on eight charges, all involving theft under and received probation of nine months. Those offences all had various offence dates. All in 1991. He was then sentenced on August 26, 1992 for six fraud related offences. By that I mean two counts of theft under and three counts of use of a stolen credit card which he received seven days custody and probation. Then on January 12, 1993 he was sentenced to six months incarceration on three counts of possession of stolen property in excess of probably $1,000.00 at that time and a charge of breach of probation. Then on February 17, 1993 he was sentenced to a count of theft under and it just says possession. I do not know if it was under or over, and received additional sentence of two months consecutive on those two charges and one month concurrent on breach of probation. Then in March 1993, fraud under. He received one month consecutive. On March 25, 1993 a charge of break, enter and committed an indictable offence, six months consecutive. Then on March 31, 1993

three counts of theft, received six months consecutive. Then on June 23, 1993 he was sentenced on a charge of robbery and was sentenced to two years, obviously in a federal penitentiary, consecutive to the sentences he was serving.

[52] We then go through a gap after that sentence of some 11 years before his involvement in these offences commencing in July 2003. I note that on November 14, 2005 he was sentenced on a charge of uttering a threat and given probation for 12 months. Actually two counts of uttering threats. One he got probation and the other a fine. And then in March 13, 2008 one day in jail for failure to comply with one of the conditions of his release. And then October 28, 2008 the charge of uttering a threat and which he received 60 days intermittent incarceration.

[53] Mr. Upton is presently serving a sentence that I am told amounts to 140 days incarceration by virtue of the collapse of the 60 day intermittent sentence along with his desire to serve the default time of some 80 days in relation to *Motor Vehicle Act* offences. I note Mr. Upton's plans or hopes to complete some training to enable him to work on the oil rigs out west.

POSITIONS OF THE CROWN AND DEFENCE

[54] The positions of the Crown and the defence are as follows. The Crown suggests that in light of the existence of the many aggravating factors in the absence of any mitigating ones, that a conditional sentence would be inappropriate. First, by reason of the sentence should be in excess of two years and in particular they submit a sentence should be in the range of three years. Secondly, a

conditional sentence would not be appropriate in light of the circumstances of the offence and those of the offender. They also seek stand alone restitution orders.

[55] The defence suggests that the issue of parity must play a prominent role in arriving at appropriate sentence and that the evidence generally established that David and Paul Upton had similar levels of culpability. Paul Upton had a record, albeit dated and less serious than that of David Upton and suggests the issue is how much more seriously should David Upton be treated due to his having had a trial and having a more serious record than his brother Paul Upton. The defence does not advocate for a conditional sentence. In light of the 140 day sentence he is presently serving, the defence seeks a short sentence consecutive to the one he is presently serving in order to result in a short sentence in a federal institution. In other words, a sentence today of between 20 to 24 months.

[56] With respect to restitution, the defence suggests that the most Mr. David Upton should have to pay is one quarter of the loss suffered by the many victims.

PRINCIPLES OF SENTENCE

[57] I will deal first with the relevant principles of sentence set out in the *Criminal Code* and in the case law. Section 718 of the *Criminal Code* sets out that:

> 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 acknowledgement of the harm done to victims and to the community.

[58] Section 718.1 of the *Criminal Code* provides that:

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

[59] Other sentencing principles are referred to in s.718.2 of the *Code*. It provides that:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...

and then lists a number of those. Included in there is:

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

[60] Section 718.2 also goes on to provide:

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

...

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

[61] No two cases will be identical. Many times the facts which would be more aggravating in one, but the circumstances of the offender militate toward a more lenient sentence. There are any number of permutations of these two key driving factors. A judge must nevertheless consider these in arriving at an appropriate sentence. Furthermore arriving at an appropriate sentence is not a science. There is no predetermined table that spits out the end result. The difficult task of courts is always to be guided by the fundamental principle of sentence and to craft a sentence that best meets these principles.

[62] The Crown has set out a number of cases in its brief. I want to briefly refer to some of those. I do so because I think it is important for others and for you Mr. Upton to know what factors go into arriving at a sentence.

[63] The first one is a decision of the Ontario Court of Appeal in *R. v. Nichols*, [2001] O.J. No. 3220. Nichols was a telemarketing salesman. He convinced an 82 year old complainant to send him over $1,000,000.00. He transferred the money offshore and engaged in risky and speculative trades with it. According to the complainant the accused had told her that she had won $13,000,000.00 in a lottery but had to pay him a $1,000,000.00 in tax and insurance to receive the winnings. Nichols on the other hand maintained that the complainant had retained him to invest her money in return for a fee and the share of profits.

[64] As it turned out some $800,000.00 of the monies were recovered and returned to the complainant. Nichols was 29 years of age and had no prior record. He was described by the sentencing judge as being articulate and bright. He was sentenced to a term of five years for that offence. His appeal to the Ontario Court of Appeal was dismissed. In doing so, the Ontario Court of Appeal noted the appropriateness of the following factors. Included were these:

> The need to deter and denounce those who prey on the elderly and vulnerable. In the trial judge's words:
>
> > Predators who target the weak, the sick, the elderly and the disadvantaged attract the most public opprobrium simply because such cowardly conduct strikes at the core values of our society: fairness and decency. Where large sums of money are involved and there is no recovery, the principles of public denunciation of the conduct and deterrence to others are the dominant considerations.

Also noted by the Court of Appeal:

> The need to deter cross-border frauds, which are both difficult to uncover and to prosecute. Again in the trial judge's words:
>
> > There is another factor present in this case which marks it as most serious. The facts illustrate a cross-border fraud industry that bedevils the authorities of both U.S.A. and Canada. The cost of international investigations, the overlapping local and international jurisdictions, and the obscurities which borders provide creates a huge thicket from which unscrupulous people pursue their criminal trade. No week passes without some story about someone who thought they had a sure thing but lost their money in a similar scam. Courts, by their sentences, must recognize the difficulty of apprehending and prosecuting such persons as the man before this court. It is another factor to be weighed.

[65] I would note that the only tempering by the Ontario Court of Appeal of the sentence was to reduce the sentence of five years three months to one of four years. One victim, a large amount of money, a lot of which was recovered, a sentence of four years.

[66] The next one is a decision that is unreported *R. v. Osunkwo, Iheukwu and Koripamo*. This is an unreported decision by Matlow, J. of March 15, 2002. The accused had been convicted on trial by judge and jury. Matlow, J. sentenced the three accused to two years plus two months, two years plus 10 months and one month for Mr. Koripamo. Mr. Osunkwo had already served two months in pre-trial custody. Iheukwu had served one month of pre-trial custody. A restitution order was made for $375,000.00. Of significance is that none of the offenders had a criminal record. All of them had good reputations in their respective communities. Justice Matlow said:

> The sentences are also designed to demonstrate to the world that Canada should not be considered to be a favourable destination for the exportation of crime. Fraud can, and in this case has, caused at least as much injury to the victim as most kinds of physical violence. To the extent that I can, I want to deter fraudsters from abroad and from here from contemplating similar kinds of conduct and the only way I can do that is by raising the stakes.

Two years, ten months including time spent in pre-trial custody.

[67] The next one is a decision of the British Columbia Court of Appeal in *R. v. Goertzen*, [2004] B.C.J. No. 2802. There were two accused. They were sentenced to three counts of fraud over $5,000.00, one count of forgery, one count of using a cheque knowing it to be forged. The British Columbia Court of Appeal noted the

offences involved two separate and elaborate schemes, carried out at different times and on different victims by the appellants and a third person. One of the victims lost their entire savings and pensions and ultimately forced into bankruptcy, $63,000.00 was involved. In the other scheme $36,000.00 was involved. Goertzen was 43 years of age, college education, employed at a private college and had no criminal record. He had not expressed any remorse for his involvement in these frauds. The other accused was 46 years old but had some 27 convictions for fraud, forgery, uttering and false pretences and theft, 13 for fraud or attempted fraud. The total sentence for Goertzen who had no prior record was 48 months - four years. The court ordered him to pay $85,000.00 restitution to the various victims. Ms. James with a worse record ended up with a total sentence of five and a half years, 66 months. The court noted that the sentences were well within the range for these separate offences and upheld the sentences.

[68] The next case is *R. v. Miller* 2005 ABCA 411. The accused appellant appealed the sentence he received of two years in Provincial Court. He pled guilty to one count of fraud exceeding $5,000.00 and one count of attempted fraud. In the summer and fall months of 2000 he persuaded one person, an acquaintance to allow him to make deposits into his bank account on some pretext. He forged deposit slips to show a higher amount and then got the victim to provide the difference to him. The loss suffered was $7,910.00. The accused pled guilty and admitted these facts. He requested a conditional sentence, or in the alternative, two years federal time. He got the two years federal time and then appealed that sentence as being too long. Mr. Miller had a significant prior record going back to the 1980's with at least 11 related offences of fraud, forgery and false pretences. The sentence of two years was upheld. One victim, $7,900.00, two years.

[69] The next case is *R. v. Deutsch* (2003), 205 O.A.C. 272. The accused was convicted by a trial by judge and jury of one count of fraud over $5,000.00 and possession over $5,000.00. The scam that was run by the accused there was ordering soap from a United States company that was supposed to be sent overseas. It was not. It was sold in Canada. He deposited the proceeds of that sale, some $84,000.00 and never paid for the soap. He received a sentence of four years. What is significant about that was the accused there had a lengthy record. This was described at paragraph 69 of the judgment as follows:

> As the trial judge observed, the appellant has a significant and extensive criminal history, including many convictions for fraud and other offences of dishonesty. In his written submissions to this court, counsel for the Crown put it fairly when he observed that the appellant 'has been defrauding the Canadian and American public with alarming frequency over the past 20 years. Given his criminal history, he may have been fortunate not to receive a more severe sentence."

[70] This caused the Ontario Court of Appeal to say:

> I agree. The sentence imposed by the trial judge was not excessive. If anything, I believe that it was lenient.

One count, one victim, four years.

[71] A case that has some similarities to yours Mr. Upton is that from the Ontario Superior Court of Justice in *R. v. Drakes.* Two accused were sentenced for a scheme known as the Nigerian Letter Scam. There were two accused who participated in an international scheme that defrauded hundreds of victims worldwide. The scheme involved an advanced fee fraud whereby prospective

victims received unsolicited correspondence purported to be from a senior Nigerian civil servant, government representative or successful businessman advising them of a business opportunity. The offer was premised on the promise of a transfer of a large sum of money out of Nigeria, allegedly coming from an over-invoiced contract from a Nigerian company or one of the Nigerian ministries.

[72] Of course in order to get this money a fee would be required and was forwarded to these individuals. The total loss here to the victims was some $850,000.00, significantly higher than for Mr. Upton, but notably neither of these individuals, Mr. Drakes or Mr. Brewster had any prior record. Nonetheless one received a sentence of five years incarceration in a federal institution and the other four years.

[73] The next case that is important to reflect on is *R. v. Chahine* 2006 ABCA 247. The accused there had pled guilty to a number of offences involving identity theft that was used to fraudulently purchase merchandise. In the space of some six to eight months he impersonated someone who had previously died by obtaining a duplicate birth certificate, creating credit cards to obtain telephone services, merchandise and services. The accused was a 35 year old, described as a career criminal. There were in total four victims that he had impersonated. He had served 10 months in pre-trial custody. He was sentenced to an additional 24 months. Effectively a 44 month sentence. That is almost four years.

[74] The next one sir, is that of *R. v. Faulner* 2007 NBCA 46. There the accused pled guilty of three counts of false pretences over $5,000.00, three counts of false pretences under $5,000.00. He spent three and a half months in pre-trial custody.

A global sentence of two years or 24 months was imposed. Effectively the sentence was one of, because credit is usually given on a two for one basis, of two years, seven months. I would note that there Mr. Faulkner had an extensive record, was a mature offender and the court described the scheme as sophisticated. There was obviously not a large amount of money involved in that one.

[75] The next one is *R. v. Gallagher* 2008 ONCA 252. A total loss there was $82,000.00. The accused assumed the identity of his cousin, forged his name to obtain loans from two banks and other services, which ended up defrauding them of, as I say, $82,000.00, $62,000.00 was recovered, leaving outstanding, $19,500.00. He pled guilty to these offences and was sentenced to three years incarceration after being given 12 months credit for pre-trial custody. There were several aggravating factors there that obviously have to be recognized. The court noted that Gallagher had a horrendous record for fraud and other property related offences. Since 1981 when he was 17 years old the accused appellant had amassed appalling 57 prior convictions, similar to the ones that he was sentenced on.

[76] The last case I will refer to is that of *R. v. Hunter* 2008 CarswellOnt 3073 by Duncan, J. A total of $50,000.00 was lost. Some 20 victims were involved. The accused pled guilty to a lottery scam. Victims were advised that they had won the lottery and were sent cheques and asked to forward monies to release the rest of the non-existent prizes. They were pleased to do so, unaware that the cheques they had been sent were bad cheques, or NSF. There was some $50,000.00 lost and 20 victims involved. The accused had a rather extensive record, dating back to 1988 for many offences of dishonesty. The court noted his most recent conviction was in 1998. This is a decision of May 1, 2008. So a 10 year gap. Similar to the 10

year gap Mr. Upton has in his record. Duncan, J. sentenced him the offender to 24 months for that offence, but because of his pre-trial custody, which he gave him 16 months credit for, required him to serve an additional eight months. Mr. Upton has no pre-trial custody to be taken into account.

DECISION

[77] By way of mitigating factors, there are none. It is a rare case that the defence and the Crown or the court cannot point to at least one mitigating factor. But here there are none.

[78] By way of aggravating factors, there is a long list. They are as follows. This was a well thought out and planned criminal enterprise. It went on over months. The evidence, in my view, is clear that David Upton, the offender, was one of the ring leaders. He recruited Trevor Myers and gave him his instructions. There were numerous victims, some 46 in number. All of them individuals except one business, a credit union.

[79] Section 380.1 of the *Criminal Code* provides:

> Without limiting the generality of section 718.2, where a court imposes a sentence for an offence referred to in sections 380, 382, 382.1 and 400, it shall consider the following as aggravating circumstances:
>
> ...
>
> (c) the offence involved a large number of victims;...

These offences obviously involved a large number of victims. Not just the named complainants but the offences of attempted fraud clearly demonstrate that. The impact on these individuals at least to some extent is not well described. We have the victim impact statements from two that speak of the impact on them. I think one of the things that struck me was the reminder from the Crown this morning in its submissions about the voice mail messages that were left by the victims. The fear that they were not going to get their loan. The anger that calls were not being returned. The disgust, perhaps with themselves, and certainly with the people who perpetrated this scheme, that money that they could ill-afford to do things such as buy Christmas presents for their children, would no longer be there.

[80] The degree in criminality and gall of these individuals almost knew no ends. When a member of the Commercial Crime Unit from Winnipeg called the toll-free number, they were unfazed. They continued to operate for some 10 days to two weeks, and then sensed it was getting too hot and tried to shred all they could and leave no trace. Rather than stop there was a short break until early November when they then set up the same scheme at a different location using a different name and set out to victimize another group of individuals. The people they targeted were vulnerable people. They had little money, poor credit and many times were elderly. When victims would complain that they had not received their loans attempts would be made, sometimes successfully to further defraud them of more funds.

[81] Also aggravating is that it was a cross-border scheme. Additional aggravating factors is that the only motivation for these offences were greed.

[82] I have already set out the extensive criminal record of David Upton. I remind myself that the existence of a criminal record is not an aggravating factor. The court not only should not, but cannot sentence someone again for what they did in the past. What it does do is it demonstrates that there is no need to be lenient. Leniency has been shown in the past and it has been unsuccessful.

[83] The Crown also argued that Mr. Upton participated in a breach of trust and that this is a statutory aggravating factor. Breach of trust as an aggravating factor has been well known in the case law and is now statutorily enshrined in the *Criminal Code*. Breach of trust as an aggravating factor in sentence usually involves employee/employer relationships, a professional such as a financial advisor, a lawyer, a police officer. I am not going to suggest this category is closed in some way, but in my opinion the conduct of Mr. Upton and his cohorts, however vile and predatory that was, does not meet this criteria.

[84] No case law was advanced by the Crown to suggest that this was a breach of trust. I do note the comments by the British Columbia Court of Appeal in *Goertzen* where the accused there over many months developed a trust relationship through a significant degree of interaction with the victims. Here the offence involved the victims responding to an anonymous ad placed in local flyers and papers. It was a straightforward business proposition. Even if you have credit problems, we can lend you money. They called, applied and were taken advantage of. There was no prior relationship. They did not stand in any kind of trust relationship with the victims and there is no evidence of any ongoing degree of interaction with the victims and no significant relationship developed.

[85] Was there a breach of trust in layman's terms, yes. After all, all offences of fraud involve some breach of trust. The victim was taken advantage of by the offender, because the victim trusted, that is, relied on the truth and accuracy in what they were being told by the offender. However despicable the acts of Messrs Upton and his cohorts were to prey on these individuals, it was not a breach of trust.

[86] The Crown also contended that because there was extensive police investigation even to the extent of calling it a tremendous amount of police resources having been expended, this also should not, in my opinion, be considered an aggravating factor on sentence. The only authority for this is the comment at paragraph 40 of the *Bhander* 2007 ABPC 142 decision. No authorities are referred to in that case. As a stand alone matter I do not consider it to be aggravating.

[87] The extent to which police resources are required to investigate and bring charges to trial may nonetheless be cogent evidence about the complexity and degree of premeditation involved in the offence which are well accepted as constituting aggravating factors, since they in turn speak volumes about the degree of moral blameworthiness of the offender who participates in such schemes.

[88] Taking into account the complete absence of any mitigating factors and the presence of many aggravating ones including but not limited to the fact that these offences involved a complex and relatively prolonged scheme, one that I have no doubt would have gone on until they were caught, and that it involved predatory cowardly behaviour and Mr. Upton's continued insistence that he takes no responsibility whatsoever for his actions, has certain consequences. Usually

specific deterrence is a factor that often courts do not have to be concerned with. Mr. Upton has every right to maintain his innocence, but it bespeaks of the pattern of behaviour referred to by his mother. It is never his fault. It is someone else's. To assert or profess his innocence in these offences before the court is delusional. Not only did the Crown have a compelling circumstantial case against the offender, it was made complete and cemented by the half-hearted testimony of his brother Paul Upton who appeared to do his best to downplay or minimize his older brother's involvement and by the evidence of Trevor Myers, whose evidence the jury obviously accepted, as they should in light of the nature and extent to which it was corroborated in many aspects by the Crown's case, both documentary and from other witnesses. As I said, protestations of innocence do not constitute an aggravating factor. But it obviously negates any remorse by the offender, as he or she has nothing to be remorseful about. It also indicates that specific deterrence is something that I do need to be concerned about.

[89] General deterrence must also be considered. A sentence must be imposed that will hopefully deter other like-minded individuals looking to make some easy money, perhaps believing that if and when they are caught the consequences will not be too onerous. Courts must disabuse them of that notion.

[90] I am cognizant of the fact that general deterrence is not simply something that courts hand out by imposing longer and longer sentences. General deterrence comes about because our society has well funded professional police investigation teams that are able to locate, detect, investigate, gather evidence and bring it to the Crown who prosecute appropriate charges before the court. Courts nonetheless

have a role to play in that once an offender is brought before the court and if the circumstances warrant it, impose an appropriate sentence.

[91] Furthermore, I must also impose a sentence that reflects the court's denunciation of such a vile, greedy, predatory victimization of innocent individuals. While fraud under $5,000.00 does not sound that serious, to these individuals it was. And when practised so often, so persistently, with such purpose to prey on the desperation of some segments of our society who find themselves in a financial bind, a denunciatory sentence is warranted.

[92] As Epstein, J., as she then was, wrote in *Her Majesty the Queen and Drakes*, (*supra)*:

> ...Predators like Mr. Drakes, who are prepared to victimize the elderly, attract the most public condemnation because such cowardly conduct strikes at the core values of our society; fairness and decency.
>
> para.50

[93] In my opinion, taking all relevant sentencing principles into consideration, the circumstances of the offender and of the offence, a fit and appropriate sentence is a global sentence of three years incarceration consecutive to the sentence he is presently serving.

[94] The defence admits in its submission that a three year sentence is decidedly within the range of sentence for the circumstances of Mr. David Upton and the circumstances of this offence, but argues that due to the principle of parity that some lesser sentence must be imposed. The principle of parity is one that has long

been an important principle of our law. It is statutorily set out in s.718.2(b) requiring that:

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

[95] I have specifically considered the issue of parity. Not just in relation to other cases, but in relation to the sentence of the two co-accused, Paul Upton and Trevor Myers. First of all, Trevor Myers played a completely different role in the commission of these offences. He in no way admitted any involvement in the frauds. He pled guilty to possession of property knowing that it was obtained by the commission of an indictable offence. He did so on the basis of being wilfully blind. That is, he suspected the funds were obtained by crime, but nonetheless participated.

[96] At the time of Mr. Myers' sentencing the Crown noted that Mr. Myers was in desperate financial circumstances at the time he was recruited. By the time of sentencing he had turned his life around. He had no prior record. Buchan, Prov.Ct.J., at the time of sentence said to Mr. Myers:

> You were vulnerable to being used by those that had developed this scheme and were looking for someone to facilitate the exchange of these or the pick up monies and the delivery. And, of course you were the perfect target and you were very needy at the time and they, no doubt, knew that or sensed that, your vulnerability and, as I say, they used you.

[97] With respect to Paul Upton, he pled guilty to the two counts of attempted fraud over $5,000.00. The facts presented at the time of his sentencing were that he was a minor player. Well the evidence here suggests, at this trial and in the

submissions today, that perhaps Paul Upton was not such a minor player. I am nonetheless satisfied and find that his role was not one of the leaders of this fraudulent scheme. The evidence was that he manned the phones. He took the applicant's details, but did not close the deal. He was not involved in the set up of the fictitious names and addresses, nor in the voice to voice contact with the victims. Mr. Craggs points out that Mr. Paul Upton had a script in his pocket when he was arrested. Paul Upton at trial maintained that he had this because he was practising to become the next financial advisor when they set it up again. Mr. Paul Upton had no reason in his evidence to downplay his involvement. If anything, he had every reason to own up to what he did and downplay that of his brother David Upton.

[98] Although Paul Upton's involvement was despicable the evidence is that his role was a lesser one. In addition, there were significant mitigating factors. Paul Upton had a positive pre-sentence report. He had made positive changes in his life and had no record as an adult. He was then approximately 31 years of age. He pled guilty, thereby saving significant resources and is also important as demonstrating remorse. Lastly, I would note that the sentence that Paul Upton received was as a result of a joint recommendation. Buchan, Prov.Ct.J., also was the judge who sentenced Paul Upton. At the time of passing sentence Judge Buchan said:

> Because of those mitigating factors, and I think the Crown has gone a long way in a recommendation for a suspension of your sentence as opposed to spending time in jail. Because when there's that many victims, that certainly would be a route that would normally, the court would normally be inclined to go.

[99] One should also not lose sight of the fact that exact parity can rarely be achieved. In the case of *Her Majesty the Queen v. Chisholm* (1985), 67 N.S.R. (2d) 66 MacDonald J.A. in giving the majority decision of the court wrote:

> [32] Sentencing is of course an inexact science involving a blend of many factors with aims that often conflict and competing interests that not always can be harmonized. Generally speaking, however, a court should try to make its sentence conform with that imposed on a co-accused for the same offence by some other court. The reason of course is more than simply to achieve equality of treatment. Similar sentences under such circumstances avoid bitterness and resentment that otherwise might be harboured by the recipient of the more severe sentence - such feelings or sentiments can lessen the chances of rehabilitation. Sentences imposed upon a co-accused that appear to be obviously inadequate or excessive should be ignored. The point simply is that if all the relevant circumstances are similar the sentences imposed upon an accused and his co-accused should be the same.
>
> [33] In the present case the material circumstances of Mr. Chisholm and his co-accused do not appear equal in all respects. The unrebutted, indeed, unchallenged evidence before Judge O Hearn was that Mr. Chisholm suffers from a severe personality disorder which is of course a form of mental illness.

[100] There the disparity of sentence was that Mr. Chisholm received a suspended sentence and probation and his co-accused was sentenced to a period of incarceration of some 15 months.

[101] Manson in his text The Law of Sentencing at page 93 refers to some of the difficulties in achieving parity or avoiding disparity in these circumstances. He writes:

> At the simplest level, there should not be disparity between co-accused with similar backgrounds because the offence will be empirically identical. However, co-accused are not always dealt with at the same time with the same judge. By itself the difference between a guilty plea and a trial may create a distinction depending on timing, effect on witnesses, and sincerity of remorse.

> More importantly, when co-accused are tried separately, the factual basis of sentencing may differ depending on such things as what facts formed the basis of a guilty plea, evidentiary rulings, or findings of fact. Accordingly, it is not always easy to achieve parity between co-accused.

[102] I do not have before me what facts were submitted in relation to the sentencing proceedings for Paul Upton. But based on the facts that are before me, the aggravating factors, the complete absence of a mitigating factor, make it inappropriate to reduce what is otherwise a fit and appropriate sentence for David Upton due to the sentence imposed on Paul Upton.

[103] I would note that I have also taken into account the ten year gap in David Upton's record. It is, I hope, a sign that Mr. Upton has the ability and at least during that time, chose to function as a law abiding member of our society. However, I find it inappropriate today to give that gap much credit. Usually a gap shows, not just an ability but a desire and willingness to abide by the norms of our society. Here I have no explanation as to why you chose to pursue such a planned, premeditated, complicated scheme to defraud vulnerable victims. It is easy today to call it a simple scheme, but think of the planning and the premeditation, the steps that had to be gone through to achieve this. You did not do it just once, but on two separate time frames, two separate locations. Mr. Upton had every opportunity not to be involved from the start. He certainly had the opportunity to stop after shutting down the Dartmouth operation. Your persistence in being unwilling to accept any responsibility for these offences, while not an aggravating factor, disentitles you to leniency and is telling in relation to your attitude.

[104] As you have heard here today, Mr. Upton, even individuals who have no prior record may well receive a sentence of incarceration in a federal institution. I

have also considered the issue of totality. I see no reason to reduce what is in my view a fit and proper sentence in light of all the relevant principles of sentence on account of Mr. Upton's present 140 day sentence, particularly where he was serving a 60 intermittent sentence and the only reason it turned to 140 days was his desire to serve time in default.

[105] In relation to restitution, I note that Mr. David Upton today does not have the present ability to make restitution. The amount that is being requested by the Crown amounts to $7, 576.68. It is not an insignificant amount, nor is it one that is overwhelming in its totality. The appropriate principles that should be applied in whether to order restitution orders is referred to by the Supreme Court of Canada case called *Her Majesty the Queen v. Fitzgibbon*, [1991] 1 S.C.R. 1005. The principles that are established are set out in the judgment of the court delivered by Cory J. as follows:

> [12] Laskin C.J. further observed that a compensation order should only be made when the amount can be readily ascertained, and only when the accused does not have an interest in seeing that civil proceedings are brought against him in order that he might have the benefit of discovery procedures and the production of documents. Obviously, though, neither the production of documents nor the examination for discovery will be of much, if any, significance if the amount owing to the victims is fixed and acknowledged.
>
> [13] Sentencing is always a difficult process, requiring a careful balancing of many factors. The courts must strive to make every sentence imposed fit and proper not only for the crime, but also for the convicted person and the community.
>
> [14] In appropriate cases, compensation orders provide an extremely useful and effective tool in the sentencing procedure. The order can provide flexibility and sensitivity to the ever difficult task of sentencing. It can be an effective means of rehabilitating the accused because this order quickly makes him directly

> responsible for making restitution to the victim. Indeed it will often be counsel for the accused who will suggest that a compensation order be made. The order also benefits the victim by providing a speedy and inexpensive manner of recovering the debt. It requires no more of the victim than a request for the order. Society as a whole benefits from the order since its imposition may reduce the term of imprisonment and provides for the reintegration of the convicted person as a useful and responsible member of the community at the earliest possible date. The practical efficacy and immediacy of the order will help to preserve the confidence of the community in the legal system.

[106] The British Columbia Court of Appeal in a case called *Her Majesty the Queen v. Yates*, [2002] B.C.J. No. 2415 held:

> [17] Thus, when determining whether a restitution order is appropriate, the court must consider, amongst other things, both the present and future ability of the accused to pay restitution. Further, where the circumstances of the offence are particularly egregious (for example, where a breach of trust is involved) a restitution order may be made even where there does not appear to be any likelihood of repayment. In those cases, the ability of the accused to pay may be relegated to a relatively minor consideration in the overall sentencing process.

[107] The defence refers to the decision in *R. v. Biegus*, [1999] O.J. No. 4963 (C.A.). I have obtained a copy of the case and the circumstances there do not assist. Why there was a concern about fairness there amongst the accused was because of some of the losses were covered by insurance and others may not have been able to obtain that benefit. In addition, two of the accused were involved in entirely separate thefts and neither of them would be entitled to any credit on his judgment for a payment on the other to the bank. Here there is one scheme created over two separated time periods, the same parties, the same *modus operandi*. It was the same. All were involved. Everyone who has been found liable, criminally liable for these offences, should be jointly and severally liable to the victims for their losses.

[108] Mr. Upton, while you do not presently have the ability to make restitution, you have sufficient training making it certainly possible that in the future you will have that ability. Furthermore, the amount is not so large as to interfere with your prospects of rehabilitation. You may have to do without when you repay these amounts. When you do, you may well realize how these individuals scrimped, saved, borrowed from others in order to send you the funds to feed your greed. I certainly hope that you, Mr. Upton, will understand fully why it is. I also hope that you can learn to gain some insight into the consequences of your behaviour. You have before demonstrated an ability to be a productive, law abiding member of society and I hope that you will return to being one at the end of your sentence.

[109] The sentence will be a period of incarceration of three years in a federal institution on the first count in the indictment and on the 38th count in the indictment concurrent. On the counts on which you were found guilty on in relation to the named complainants, that is count 3, 4, 5, 7, 10, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 and 55 the sentence is six months incarceration concurrent to each other and concurrent to count #1.

[110] I also order the stand alone restitution orders be prepared. Ten in number. The first one to Cheryl Rainone of Rhode Island in the amount of $1,110.39; Ryan Singleton of Idaho in the amount of $1,551.06; Nola Whiting of Idaho in the amount of $465.34; Linda Hinnant of Florida in the amount of $530.57; Janie Cano of Oklahoma in the amount of $614.02; Jayme Padgett of Arizona in the amount of $997.81; Mandy Artz of Idaho in the amount of $697.77; Crystal Moore of

California in the amount of $646.51; Theresa Williams of California in the amount of $490.60 and Kelly Martin of Arizona in the amount of $472.61.

Beveridge J.