

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Delgado*, 2017 NSPC 74

Date: June 14, 2017

Docket: 2956821

Registry: Dartmouth

Between:

HER MAJESTY THE QUEEN

v.

VERONICA LOUISE DELGADO

DECISION

JUDGE: The Honourable Frank P. Hoskins

DECISION: June 14, 2017

CHARGES: That between the 10th day of September, 2012 and the 12th day of September, 2015 at or near Dartmouth, Nova Scotia did by deceit, falsehood or other fraudulent means, did unlawfully defraud Can-Euro Investments of a sum of money, a total value exceeding \$5,000.00, contrary to s. 380(1)(a) of the Criminal Code.

COUNSEL: Peter Dostal, for the Crown
Jonathan Hughes, for the Defence

By The Court (Orally):

Introduction

[1] The following is the sentencing decision of Veronica Delgado, who pled guilty to the offence of fraud over \$5,0000 which is contrary to s. 380(1)(a) of the *Criminal Code*. The offence occurred between September 10, 2012 and September 12, 2015.

[2] The agreed statement of facts reads as follows:

Between May 12, 2008, and September 11, 2015, the accused was employed by Can-Euro Investments as the accounts clerk for Horizon Court, an estate consisting of two high-rise and two low-rise rental apartment buildings for a combined total of 480 rental units. She worked there until she was terminated once the index offence was discovered.

The accused worked in Horizon Court's administrative office where she was in charge of tracking and collecting money from the tenants of the Horizon Court buildings. This included damage deposits, rent deposits, garage and parking fees, storage fees, and numerous other miscellaneous fees. She was also in charge of handling late payments and arrears from tenants.

In her position as Accounts Clerk, the accused earned a salary of approximately \$39,000.00 per year during this time. There was no record of absenteeism or discipline during her employment. She was a tenant in the building up until her termination.

In late 2015, other staff members noticed a problem with the balancing of the accounting books and called the accused to respond to this issue. In that conversation, she admitted to taking tenants' money amounting to approximately \$40,000.00. She was let go of her job by way of a dismissal letter dated September 25, 2015. Upon further review of the accounting books, it was discovered by staff members that the total verifiable amount missing was \$110,157.66 ranging between January 1, 2012 and September 25, 2015. Records before January 1, 2012 were not easily reviewable as they pre-dated the current electronic accounting system.

Of the total verifiable amount missing, it is agreed that \$80,000.00 of this

amount is attributable to the activities of the accused on a criminal standard of proof.

From review of the accounting records, it would appear the accused would take payments from tenants and record them in the ledger but then appropriate the money for herself. The offending conduct involved misappropriating a variety of types of payments from the tenants, including security deposits, “prorated payment” (which are marginal payments of new tenants who move in before monthly rent is due), rent payments (in the form of cash, cheques and money orders), and other tenant fees. The deficits were hidden by means of a ponzi-like scheme where incoming payments from tenants were used to off-set the losses.

On February 5, 2016, she attended the police headquarters at the request of police with her Counsel. She was interviewed and gave a cautioned statement admitting that she took the money from her ex-employer Can-Euro Investment. She was released on a Promise to Appear and Undertaking.

The accused has no prior record.

Threshold Issue: Whether a Conditional Sentence is Available

[3] Before I provide my analysis as to what the appropriate sentence is for this offence, and Ms. Delgado, I will deal with the threshold issue of whether a conditional sentence pursuant to s. 742.1 is available to Ms. Delgado.

[4] The Crown contends that it is *not* for two reasons. First, a conditional sentence is not available even though the offence straddles the *Criminal Code* amendment. Second, even if a conditional sentence was available, it would be insufficient in the circumstances to properly emphasize objectives such as denunciation and deterrence.

[5] The Defence argues that a conditional sentence is available to Ms. Delgado, notwithstanding that the *Criminal Code* was amended, because of the application of s. 11(i) of the *Charter*. The Defence further contends that a conditional sentence can properly emphasize the objectives of denunciation and deterrence.

[6] It should be noted that Ms. Delgado does not challenge any legislation; nor does the Crown claim retrospective application of any *Criminal Code* provisions.

The issue is not one of statutory interpretation since the interpretation of each version of s. 742.1 is largely not in dispute.

[7] The dispute in this case lies in the correct temporal application of s. 742.1 of the *Criminal Code*. Put another way, the issue asks which version of s. 742.1 is to apply to Ms. Delgado in sentencing.

[8] Section 742.1 currently reads, in part:

742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

...

[9] This provision prohibits an accused from seeking a conditional sentence for any offence with a maximum penalty of 14 years, such as the offence of fraud over \$5,000.00. The accused would, therefore, be ineligible for a conditional sentence under this provision.

[10] However, the wording of s. 742.1 was not always in this form. On November 20, 2012, parts of the *Safe Streets and Communities Act* 2012, c. 1 (Bill C-10) came into force, which entirely replaced an older version of s. 742.1.

[11] Prior to the passing of the *Safe Streets and Communities Act*, s. 742.1, read in

part:

742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[12] Under this older version of s. 742.1, an accused charged with fraud over \$5,000.00 was eligible for a conditional sentence as long as the circumstances of the offence and offender satisfied the requirements that the appropriate penalty was under two years' incarceration, that a conditional sentence "would not endanger the safety of the community", and that the conditional sentence "would be consistent with the fundamental purpose and principles of sentencing".

[13] The Supreme Court of Canada, in *R. v. Johnson*, 2003 SCC 46, stated, at para. 41:

[41] As a general matter, persons accused of criminal conduct are to be charged and sentenced under the criminal law provisions in place at the time that the offence allegedly was committed. The *Charter* aside, the four respondents convicted of offences committed prior to the 1997 amendments are properly sentenced under the former regime. However, s. 11(i) of the *Charter* provides that any person charged with an offence has the right "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment".

[14] This principle is expressed in s. 11(i) of the *Charter*, which provides:

If found guilty of the offence and if the punishment for the offence has been varied between the time of the commission and the time of sentencing, to

the benefit of the lesser punishment.

[15] The parties agree that s.11(i) of the *Charter* has application to the case at bar. Section 742.1 is certainly a form of “punishment” within the meaning of s. 11(i). The case law has found that s. 742.1 amounts to a form of “lesser punishment” than a custodial sentence for the purposes of s. 11(i) of the *Charter* (see *R. v. Yusuf*, 2011 BCSC 626 at para 29). Therefore, the temporal application of s. 742.1 must satisfy s. 11(i) of the *Charter*.

[16] In the present case, the charging *Information* alleges an offence (fraud) occurring between September 10, 2012 and September 12, 2015. It is a single count *Information*. The *Safe Streets and Communities Act* came into force gradually between August 2012 and November 2012, with the amendment to s. 742.1 – governing the application of conditional sentences - coming into force on November 20, 2012.

When is a Crime Committed for the Purposes of s. 11(i) of the *Charter*?

[17] Thus, the first issue to address is determining when a crime is committed for the purposes of s. 11(i) of the *Charter*.

Position of the Parties

[18] The Crown submits that a conditional sentence is not available despite that the offence straddles the legislative amendment to s. 742.1. The Crown argues that the balance of the offence occurred during the period when conditional sentences were not available.

[19] However, the Defence contends that Ms. Delgado is entitled to make an application for a conditional sentence because of s. 11(i) of the *Charter*. The Defence argues that Ms. Delgado committed the alleged offence before the enactment of the increased penalty. In other words, she was culpable on the single count *Information* from the moment she committed the earliest of the frauds capable of supporting the charged framed in the *Information*, as she had committed a fraud before November 20, 2012, and continued to commit fraud until September 2015.

The Defence submits that had the Crown proved only one act of fraud, Ms. Delgado would have been convicted on the *Information*, as charged, because she had committed the *actus reus* and *mens rea* required to support a conviction before November 20, 2012. This is because the number of discreet acts capable of supporting liability for the offence as charged does not alter the fact that the *actus reus* and *mens rea* required to support a conviction coexisted as of the first act of fraud.

The Competing Authorities: The Meaning of “Time of Commission”

[20] It is trite law that s. 11(i) of the *Charter* will apply when offences are committed prior to legislative amendments where the punishment for the offence has been varied.

[21] In *R. v. V.I.C.*, 2005 SKCA 95, the Saskatchewan Court of Appeal addressed the issue of whether changes to the *Youth Criminal Justice Act*, which came into effect on April 1, 2003, applied to a single *Information* of alleged sexual assaults which occurred over a 14-month period, March 1, 2003 to April 30, 2004. In addressing whether s. 11(i) of the *Charter* applied, the Court at para. 11 held:

[11] ... It applies only where the punishment was varied between the time of the commission of the offence and the time of sentencing. Those acts of sexual assault which occurred during the period April 1, 2003 and April 30, 2004, occurred after the law was changed and, therefore, did not fall within the purview of s. 11(i). This was not a case of application of the law to an offence which occurred before the legislation came into effect, but of application of the law to an offence which was not complete, and therefore did not occur, until a date on which the legislation was in effect. Accordingly, the trial judge was obliged to consider the Crown application to have the offence designated as a serious violent offence, which he failed to do.

[22] In *R. v. Patricio*, 2011 QCCQ 5261, the Court held that the expression “between the time of commission” in s. 11(i) of the *Charter* referred to the full completion of the offence. In that case, the time frame of the offence covered a period between August 1, 2004 and February 1, 2005 and straddled an amendment to s. 380(1)(a) of the *Criminal Code* that came into effect on September 15, 2004, which increased the maximum penalty for this offence from 10 to 14 years. This

amendment rendered the offence ineligible for a discharge. At paras. 22-26, the Court held:

[22] The time frame of the offence covers a period between August 1, 2004 and February 1, 2005. It straddles an amendment to section 380(1)(a) of the *Criminal Code*, dated September 15, 2004, that modified the maximum penalty for this offence with a maximum of 14 years imprisonment. According to section 730 of the *Criminal Code* a discharge cannot be granted for such an offence but is possible if the Court considers that the prior maximum of 10 years applies.

...

[24] According to the jurisprudence provided by the prosecutor, the expression “between the time of commission” refers to the full completion of the offence. The cases of *Thow* and *V.I.C.* are clearly to that effect. Other cases take this for granted without raising the issue.

[25] The defence did not provide any jurisprudence to the contrary.

[26] The court considers that the fact the time frame of the offence straddles the amendment doesn’t bring into play section 11(i) of the *Charter* since the modification came into effect before the full completion of the offence.

[23] In *R. v. Lalonde*, 2016 ONCA 923 at para. 11, Justice Doherty, in delivering the judgment for the Ontario Court of Appeal, commented on the purpose of s. 11(i) of the *Charter*. He wrote:

[11] Section 11(i) of the *Charter*, like s. 11(g) and s. 11(h), reflects a constitutional aversion to retrospective criminal legislation. Retrospective criminal laws are viewed as unfair and undermining the rule of law because they effectively change the rules in the middle of the “game” to the detriment of the individual affected by those rules. Fairness and respect for the rule of law require that a person’s maximum exposure to punishment for a criminal act be fixed as of “the time of commission” of the criminal act for which he or she is to be punished: see *R. v. K.R.J.*, 2016 SCC 31, 337 C.C.C. (3d) 285, at paras. 20-27.

[24] In considering the issue of when a crime is committed for the purposes of s. 11(i) of the *Charter*, Justice Doherty, at para. 17, stated:

[17] Section 11(i) fixes “the time of commission” of the offence as one of the two relevant points in time to be considered when applying the section. I see nothing in the language of s. 11(i), or the purpose underlying the section, justifying a departure from the plain meaning of the phrase, “the time of commission” of the crime. A crime is committed when culpability attaches.

[25] He then identified two appellate decisions that addressed the issue. In *R. v. Pouliot*, 2006 QCCA 643, at para. 4, the accused was charged with keeping a common bawdy house over a lengthy period of time. During that timeframe, the penalty for the offence was amended to increase the offender's exposure to forfeiture of property used in the offence. The accused argued that he should be sentenced under the regime that existed at the commencement of the timeframe alleged in the *Indictment*. The Quebec Court of Appeal rejected that argument. The Court reasoned, at para. 4, that keeping a common bawdy house is a continuing offence and that the accused continued to commit the offence well after the penalty increased. As a result, the accused was thus not entitled to the benefit of the old property forfeiture regime.

[26] The second appellate case was the decision of the Saskatchewan Court of Appeal in *V.I.C.*, at para. 11. After considering the reasoning of these two decisions, Justice Doherty concluded, at paras. 23 to 25:

[23] With respect, I cannot agree with *Pouliot* and *V.I.C.* While I accept that the offences in both cases continued beyond the enactment of the relevant legislation, I do not agree that the continuation of the offences meant that they were not committed before the enactment of the relevant legislation. The accused in *Pouliot* was liable for the offence of keeping a common bawdy house as of the date on which the increased exposure to forfeiture came into effect. Had he been charged on that date, he would have been convicted.

[24] Similarly, the accused in *V.I.C.* committed acts of sexual assault before the enactment of the increased penalty. He was culpable on the single count indictment preferred by the Crown from the moment he committed the earliest of the sexual assaults capable of supporting the charge as framed in the indictment. Had the Crown proved only that one assault, the accused would have been convicted on the indictment as charged. I do not agree that because the Crown chose to lay a single charge encompassing several discrete acts of sexual assault that occurred over several months, the offence for which the accused was convicted should be

viewed as “not complete”, or as if it “did not occur” until the last of the sexual acts occurred. The number of discrete acts capable of supporting liability for the offence as charged does not alter the fact that the *actus reus* and *mens rea* required to support a conviction coexisted as of the first act of sexual assault.

[25] Having reviewed the cases, I remain satisfied that the words of s. 11(i) should be given their plain meaning. Mr. Lalonde committed his crimes at the point in time when he agreed with one or more persons to traffic in cocaine or marihuana, intending to do so.

[27] In my view, Justice Doherty is correct. There is nothing in the language of s. 11(i), or the purpose underlying the section, justifying a departure from the plain meaning of the phrase, “the time of commission” of the crime. A crime is committed when culpability attaches. An offender is culpable when they have performed the required *actus reus* with the required *mens rea*. Criminal culpability exists from that point forward whether the offence is a continuing one or not. Thus, in the case at bar, Ms. Delgado would have been convicted on the *Information* as charged, because she had committed the *actus reus* and *mens rea* required to support a conviction before November 20, 2012. The number of discreet acts capable of supporting liability for the offence as charged does not alter the fact that the *actus reus* and *mens rea* required to support a conviction coexisted as of the first act of fraud.

[28] Having considered Justice Doherty’s compelling and persuasive analysis, I fully endorse his reasoning in reaching the conclusion that the words of s. 11(i) should be given their plain meaning. Therefore, Ms. Delgado is eligible to apply for a conditional sentence under s. 742.1 of the *Criminal Code*, because the amendment to the section does not alter the punishment available for her, as the continuing offence commenced prior to the coming into force of the *Safe and Communities Act*.

[29] Having determined that Ms. Delgado is eligible to apply for a conditional sentence, I will now proceed to address the issue of what is the appropriate punishment for this offence and offender, Ms. Delgado.

The Appropriate Disposition

[30] Sentencing is a difficult and challenging task for a judge. It requires the judge to carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while, at all times, taking into account the needs and current conditions of the community. The formulation of a fit and proper sentence is not a simple task.

[31] In accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence that I view as just and appropriate, and fit and proper, for this offender and offence.

[32] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327. Further, Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, these sources and the common-law guide courts in determining the proper sentence to impose.

[33] As stated, imposing a just and appropriate sentence can be a difficult a task for a judge. However, as difficult as the determination of a fit sentence can be, the process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[34] As Doherty J.A., in delivering the judgment of the Ontario Court of Appeal, in *R. v. Hamilton*, [2004] O.J. No. 3252, at para. 2, aptly stated:

[2] ... A sentencing proceeding is also not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or “make up” for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.

[35] Generally, it is recognized that a fit sentence is the product of the combined

effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[36] Section 718 of the *Criminal Code* codifies the fundamental purpose and principles of sentencing along with the factors that should be considered by a judge in striving to determine a just and appropriate sentence for the offence and offender.

[37] Although sentencing is a highly contextual individualized process, the judge must also take into account the nature of the offence, the victims, and the community. As Lamer, C.J., (as he then was), noted in *M. (C.A.)*, sentencing should not only focus on the individual, but also on the victim and community. He stated at para. 92:

[92] ... It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the “just and appropriate” mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. ...

[38] Similarly, in *R. v. Muller*, [1993] 22 B.C.A.C. 194 at paras. 32-33, McEachern, C.J. (as he then was) writing on behalf of the British Columbia Court of Appeal, expressed the view:

[32] ... that it is often unproductive to approach the sentencing process either at trial or in this court as if absolute priorities can be given to various sentencing principles, such as deterrence, in any particular case.

[33] Also, it is unlikely that individual just results can be achieved by the application of formulae in which degrees of importance are attached to specific sentencing factors. Sentencing is an art, not a science. It must take into account highly variable human behaviour and likely responses to penal sanctions. In some cases, deterrence may be more important than rehabilitation; in others, the opposite will be true. Sentencing, in my view, should not be approached as a contest between these two important principles, for the raw material of sentencing is past and future human behaviour, which is never completely predictable.

[39] In view of these observations, it is arguable that case law is only helpful for the limited purpose of ascertaining the range of sentences imposed on similar offenders for similar offences committed in similar circumstances.

[40] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends on the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objectives deserve priority. Indeed, s. 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing - proportionality. This principle is deeply rooted in notions of fairness and justice.

[41] I have considered the fundamental purpose of sentencing expressed in s. 718, of the *Criminal Code*, the fundamental principle as stated in s. 718.1 of the *Criminal Code*, and the other sentencing principles as set out in 718.2 of the *Criminal Code*, which stipulate that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or offender.

[42] I am also mindful of the principle of restraint, which underlies the provisions of s. 718 of the *Criminal Code*.

[43] As stated, s. 718.1 of the *Criminal Code* directs that the sentence imposed must fit the offence and the offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality.

[44] As Doherty J.A., in *Hamilton*, observed at para. 93:

[93] Fixing a sentence that is consistent with s. 718.1 is particularly difficult where the gravity of the offence points strongly in one sentencing direction and the culpability of the individual offender points strongly in a very different sentencing direction. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account... factors which may accentuate the gravity of the crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the

crime committed.

[45] While the paramount sentencing objectives in the present case are denunciation and deterrence, I must not lose sight of the prospect of rehabilitation.

[46] Given that sentencing is a highly contextual and individualized process, the Court must impose a sentence that addresses the two elements of proportionality. That is the Court must consider the circumstances of the offence and offender, Ms. Delgado. The Court must fashion a disposition from among the limited options available that take both sides of the proportionality inquiry into account.

[47] Even after a review of the cases, in an effort to find similar cases, with similar offenders, charged with similar offences, Ms. Delgado's case is clearly distinguishable. Perhaps this exercise is, as Lamer J., stated, "the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction". (*M. (C.A.)*, para. 92)

[48] In assessing the issue of what is the appropriate and just disposition for this offence and Ms. Delgado, I have carefully considered and reflected on the following:

- a) The circumstances surrounding the commission of the offence and Ms. Delgado;
- b) The relevant *Criminal Code* provisions, including ss. 718, 718.1, 718.2, and, 742;
- c) The *viva voce* evidence of Ms. Elizabeth Stephen, Clinical Addiction Therapist;
- d) The submissions of counsel, including the submitted case law;
- e) The letters of support; and
- f) The Pre-Sentence Report dated October 21, 2016.

The Personal Circumstances Surrounding the Offender, Ms. Delgado

[49] Ms. Delgado is 60 years old. She comes before the Court with an unblemished record. She has no prior criminal history. She is a person of previous good character. As reported in the Pre-Sentence Report (PSR), Ms. Delgado is the daughter of Harry and Eleanor Doherty. Ms. Delgado reported that she has an excellent relationship with her mother, noting that they have daily contact.

[50] In discussing her formative years, Ms. Delgado stated that her family was adversely affected by her father's alcoholism and abusive nature. She reported that her parents separated when she was 17 years old. While Ms. Delgado reported to the author of the PSR that there were no outside agency involvements with her family, she noted that she was the victim of physical abuse by her ex-husband, and reported that her uncle had sexually abused her when she was between ages of 5 and 13. She stated that some members of her family had a history of substance abuse and alcoholism.

[51] Ms. Delgado advised the author of the PSR that she left her family home when she was 17, to work at a bank and live on her own. She reported that she was married for 23 years and this union resulted in the birth of one of her two daughters. The marriage ended because of her husband's abusive behaviour. She married Joe Delgado in 2013 after sponsoring his immigration from Columbia. They separated in 2016.

[52] Ms. Delgado's daughter, Crystal Doherty, described her mother as caring, and wonderful mother, hardworking, and always there for the family. Ms. Doherty stressed that she was completely in shock when she heard about the offence. Ms. Doherty added that her mother should continue counselling.

[53] Ms. Delgado reported that she earned her grade 11 business diploma from Dartmouth High School.

[54] Ms. Delgado advised the author of the PSR that she has been employed full-time at Tim Horton's for nine months at the time of the interview for the report. Ms. Delgado's previous employment was at Can-Euro Investments where she was a Leasing Agent from May 2008 to September 2015.

[55] Ms. Delgado reported that she had no health concerns at the time of the interview for the report. She does not consume drugs or alcohol. She informed the author of the PSR that she used to gamble by playing video lottery terminals. She noted that she stopped gambling one year ago (from the date of the interview). She has attended counselling for addictions and counselling pertaining to being abused. She expressed that the sessions were beneficial. She believes that she could benefit from continued counselling and employment.

[56] Ms. Elizabeth Stephen, Clinical Addictions Therapist, reported to the author of the PSR that she had worked with Ms. Delgado for a period of one year and stated that Ms. Delgado has “tuned her life around, she has stopped gambling, accepted responsibility, addressed issues, and is rebuilding her life. She is smart and proactive about treatment.”

[57] Ms. Delgado reported that she is not currently a member of any community groups. She has never done any community volunteer work. She indicated that she never played sports, although she enjoys skating and swimming. She prefers to read in her free time.

[58] The author of the PSR noted that Ms. Delgado reported for the interview as requested and presented in a pleasant and cooperative manner. She appeared to have an average level of maturity, and presented in an open manner. She appeared to make her best effort to answer interview questions to the best of her ability, and appeared to take the interview process seriously.

[59] In respect to the offence, Ms. Delgado accepted full responsibility for her actions. She stated she took the money to gamble. She realized that she was digging a hole deeper and deeper. She stressed that she was remorseful for her behaviour.

[60] The author concluded the PSR by noting that in the event the Court deems a community disposition to be a suitable part of sentencing options for Ms. Delgado, she may benefit from the condition to report to a probation officer as directed. She may also benefit from the condition to continue counselling and to maintain employment.

The Evidence of Ms. Elizabeth Stephen, Clinical Therapist

[61] Ms. Elizabeth Stephen is a Clinical Therapist with Mental Health and Addictions Program at the Nova Scotia Health Authority. At the hearing, she was qualified as an expert able to provide opinion evidence with respect to the diagnosis, prognosis, and treatment of gambling addictions.

[62] Ms. Stephen is an experienced clinical therapist. She has eighteen years' experience with addictions, and specializes in gambling disorders.

[63] She explained that in the most recent version of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the designation of pathological gambling is changed from an impulse control disorder to a behaviour addiction and is grouped with "Addictions and Related Disorders" thereby acknowledging the neuroscience research which clearly establishes that gambling produces changes in the brain similar to drug addiction.

[64] Ms. Stephen is of the opinion that Ms. Delgado met the DSM-5 criteria for a persistent and severe Gambling Disorder when she began treatment in September 2015. She stressed that Ms. Delgado has been a severe and persistent gambler for a few years. She would gamble every day after work. Ms. Delgado is currently in sustained remission after more than a year of not gambling. She has received treatment which included: education about the highly addictive nature of Video Lottery Terminals (VLTs), relapse prevention, limiting access to money, understanding the issues which underlie harmful coping strategies, and developing healthy coping skills.

Impact on the Victim

[65] While no Victim Impact Statement was filed with the Court, an e-mail was presented. After reviewing the e-mail, which was not in the prescribed regulated form, it states:

Mr. Peter Dostal,

Please see below our victim statement. This crime has had a

significant impact on our company, our staff and clients and it continues to cause stress and challenges within the team. Financially the loss of more than \$100,000.00 was a major blow to the company.

[66] The parties agreed that the loss to the victim is \$80,000.00 for the purposes of this sentencing. The e-mail further states:

. . . to the company, as a result it has significantly impacted our ability to support our clients and improve our business. We had to spend additional time and money, as it took months to trace, discover and analyze the various methods of fraud and deception to account for the missing funds. We lost that valuable time and resources which should have gone towards improving the company and not wasting and researching this theft. It will take years of the company and the staff to recover from this loss. Our team was devastated by this person's actions, but still the betrayal runs deep within. It has been a very stressful year, if justice is served this will hopefully see ease the mental burden. It is hard to understand that often times crimes against companies are not punished with the strength of law as other similar crimes, it seems that the punishment for these crimes are often significantly less than the punishment or loss we the victims suffer. This is very frustrating because it is hardly the turn for future crimes against anyone, the likely that any funds can be recovered is probably minimal so without a strong sentence we are not left with much peace.

[67] I have ignored some of the comments because they are not relevant. However, it should be noted that I have considered the fact the Ms. Delgado's former employer suffered a loss of \$80,000 which is a significant lost. I am also mindful that Ms. Delgado breached a position of trust in committing the offence.

Analysis

[68] In the present case, a conditional sentence is an option that is not precluded by any of the relevant statutory provisions.

[69] Section 742.1 of the *Criminal Code* lists four criteria that a court must consider before deciding to impose a conditional sentence:

- (1) the offender must be convicted of an offence that is not punishable

by a minimum term of imprisonment;

- (2) the court must impose a term of imprisonment of less than two years;
- (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
- (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[70] It should be stressed that no offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment.

[71] In the present case, a penitentiary sentence is not necessary nor is a suspended sentence with probationary measures appropriate. In fact, having determined that the appropriate range of sentence is a term of imprisonment of less than two years, I now must consider whether it is appropriate for Ms. Delgado to serve her sentence in the community. In other words, the first two pre-conditions are not an impediment for consideration of a conditional sentence. It comes down to whether or not it would be consistent with the fundamental purpose and principles of sentencing.

[72] I am mindful of the requirement in s. 742.1(b) of the *Criminal Code*. That is the judge must be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community. This is a condition precedent to the imposition of a conditional sentence, but not the primary consideration in determining whether a conditional sentence is appropriate.

[73] In *Proulx*, 2000 SCC 5, Lamer C.J. addressed the issue of how courts should evaluate danger to the community. He expressed his views, at para. 69, in these terms:

[69] In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage

that could follow were the offender [page102] to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.

[74] In making this determination, I must consider the risk posed by Ms. Delgado, not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law. Thus, the factors that I have taken into account are:

- a) The risk of Ms. Delgado re-offending; and
- b) The gravity of the damage that could ensue in the event of re-offence.

The Risk of Ms. Delgado Re-offending

[75] With regard to the risk of re-offending, the Supreme Court Of Canada made the following observations at paras. 70-72 in *Proulx*:

[70] A variety of factors will be relevant in assessing the risk of re-offence. In *Brady* [*R. v. Brady* (1998), 121 C.C.C. (3d) 449], at paras. 117-27, Fraser C.J.A. suggested that consideration be given to whether the offender has previously complied with court orders and, more generally, to whether the offender has a criminal record that suggests that the offender will not abide by the conditional sentence. Rousseau-Houle J.A. in *Maheu* [*R. v. Maheu*, (1997) 116 C.C.C. (3d) 361 (C.A.)], at p. 374 C.C.C. enumerated additional factors which may be of relevance:

[TRANSLATION] ... 1) the nature of the offence, 2) the relevant circumstances of the offence, which can put in issue prior and subsequent incidents, 3) the degree of participation of the accused, 4) the relationship of the accused with the victim, 5) the profile of the accused, that is, his [or her] occupation, lifestyle, criminal record, family situation, mental state, 6) his [or her] conduct following the commission of the offence, 7) the danger which the interim release of the accused represents for the community, notably that part of the community affected by the matter.

[71] This list is instructive, but should not be considered exhaustive. The risk that a particular offender poses to the community must be assessed in each case, on its own facts. Moreover, the factors outlined above should not be applied mechanically. ...

[72] The risk of re-offence should also be assessed in light of the conditions attached to the sentence. Where an offender might pose some risk of endangering the safety of the community, it is possible that this risk be reduced to a minimal one by the imposition of appropriate conditions to the sentence.

[76] I do not find that there is a risk that Ms. Delgado will re-offend. There is insufficient evidence in her past to warrant such a finding. She comes before the court as an adult first offender, which suggests that this offence was out of character for her. It appears to have been an isolated incident in her life. As stressed by Ms. Elizabeth Stephen, Clinical Addictions Therapist, Ms. Delgado in one year has “tuned her life around, stopped gambling, accepted responsibility, addressed issues, and is smart and proactive about treatment”. She added that Ms. Delgado is rebuilding her life.

[77] It should be stressed that in the present case, it is significant factor that Ms. Delgado has been involved in counselling and/or treatment for a significant period of time which has repressed her need to gamble.

Gravity of the Damage in the Event of Re-offence

[78] With regard to the gravity of the damage in the event of re-offending, the Supreme Court of Canada in *Proulx* recognized that, particularly in the case of violent offenders, a small risk of very harmful future crime may warrant a conclusion that the prerequisite is not met. At para. 74, Lamer C.J. commented:

[74] Once the judge finds that the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in case of re-offence. Particularly in the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met: see *Brady, supra*, at para. 63.

[79] I realize that consideration of the risk posed by Ms. Delgado should include

the risk of any criminal activity. It is not solely limited to the risk of physical or psychological harm to individuals.

[80] With respect to the gravity of the damage that could ensue in the event of re-offence, there is always some risk of re-offending. The risk of re-offending can never be completely eliminated, but a conditional sentence with stringent conditions can reduce the risk to an acceptable level that will adequately protect the community.

Consistent with Fundamental Principles of Sentencing

[81] As emphasized in these reasons, denunciation and deterrence must be given recognition in this case. However, it is my view that a custodial sentence is not the only sentence that respects these principles. As discussed, I recognize that a conditional sentence can provide significant denunciation and deterrence, and generally, the more serious the offence the longer and more onerous the conditional sentence should be.

[82] Once the prerequisites of s. 742.1 are satisfied, I must give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[83] As mentioned, the Supreme Court of Canada recognized that a conditional sentence can provide significant denunciation and deterrence.

[84] Generally, the more serious the offence, the longer and more onerous the conditional sentence should be. There may be some circumstances, however, where the need for denunciation or deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct or to deter similar conduct in the future.

[85] Essentially, the Crown's position in this specific case, is that because denunciation and deterrence are so pressing a custodial disposition is warranted.

[86] Generally speaking, it is recognized that a conditional sentence will be better

than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community.

[87] Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration.

[88] Where objectives such as denunciation and deterrence are particularly pressing, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved. However, a conditional sentence may provide sufficient denunciation and deterrence even in cases where restorative objectives are less important, depending on the nature of the conditions imposed, duration of the sentence, and circumstances of both the offender and the community in which the conditional sentence is to be served.

[89] A conditional sentence may be imposed even where there are aggravating circumstances, although the need for denunciation and deterrence will increase in these circumstances.

[90] I am also mindful that no party is under a burden of proof to establish that a conditional sentence is appropriate or not in the circumstances. However, it would be in the offender's best interests to establish elements militating in favour of a conditional sentence. A criterion that is implicit in the regime as a whole given that the offender will be under the scrutiny of a conditional sentence supervisor throughout and the efficacy of the sentence depends on the offender's amenability to this supervision, it follows that the sentencing court must also be satisfied that the offender will be amendable to supervision.

Position of the Parties

[91] The position of the Crown is that a custodial sentence of nine months followed by 18 months' probation, is an appropriate and just disposition. The Crown contends that this recommendation accounts for the seriousness of the offence and the circumstances of the offender. The Crown submits that the impact was grave given the size of the loss involved. The scheme continued over a period of two

years and involved some degree of sophistication only came to an end after being caught.

[92] The Crown also seeks a stand-alone restitution order pursuant to s. 738 of the *Criminal Code*, in the amount of \$80,000 payable to Can- Euro. Lastly, the Crown is asking for a discretionary DNA Order.

[93] The Defence contends that an 18 month term of imprisonment served in the community under a conditional sentence order, followed by a one year probation period, is an appropriate and just disposition for the offence and offender. The Defence contends that a conditional sentence order with appropriate liberty restrictions, followed by probation will be more than sufficient to satisfy the purpose and principles of sentencing, as the paramount considerations are denunciation and deterrence.

[94] Furthermore, the Defence submits that Ms. Delgado is a first-time offender at the age of 60. She took responsibility at a very early stage of the proceedings, thus saving the time and expense of a trial. Lastly, she is genuinely attempting to lead a pro-social life moving forward and has the necessary support from her family to accomplish that goal.

[95] Having given the matter careful consideration, I am reminded that the purpose of sentencing is to impose “just sanctions”. A “just sanction” is one that is deserved. A fit sentence in that context is one that is to commensurate with the gravity of the offence and the moral blameworthiness of the offender.

[96] In *Proulx*, Chief Justice Lamer repeated that principle, at para. 82, wherein he stated:

[82] ... [p]roportionality requires an examination of the specific circumstances of both the offender and the offence so that the “punishment fits the crime”. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence but also the offender.

[97] In *R. v. Priest*, [1996] 30 O.R. (3d) 538, at para. 26, the Ontario Court of

Appeal expressed the view that proportionality insures that an individual is not sacrificed “for sake of the common good”.

[98] An appropriate or reasonable disposition will depend on the circumstances of the case in the context of all relevant considerations which includes not only the personal circumstances of the offender and the degree of responsibility of the offender for the offence, but also the gravity of the offence itself.

[99] As stated, the principle of restraint underlies the provisions of s. 718 of the *Criminal Code*, and must be considered, especially in respect to first offenders, such as Ms. Delgado. It should be noted I am mindful that as the gravity of the offence become more serious, this mitigating effect decreases. However, even in the most serious offences, courts have been sensitive to the principle of restraint in cases involving first offenders. Similarly, the Ontario Court of Appeal in *Priest*, at para. 23 held:

[23] Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purposes of general deterrence.

[100] I am mindful that the paramount sentencing objectives at work in the present case are denunciation and deterrence. That said, since I am sentencing a first offender, I must not lose sight of the prospect of rehabilitation.

[101] As stated, given that sentencing is highly contextual and an individualized process, the Court must impose a sentence that addresses the two elements of proportionality. That is, the circumstances of the offence and the circumstances of the offender. Thereby, the Court must reach a sentence that fits not only the offence, but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

[102] The Court must also consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing in ss. 718 to

718.2 of the *Criminal Code*. It is here where the Crown stresses that a conditional sentence would be inconsistent with the fundamental purpose and principles of sentencing.

[103] In cases of fraud involving a breach of trust, denunciation and deterrence are the primary factors to be considered. Incarceration will generally provide more denunciation or condemnation than a conditional sentence, although a conditional sentence can also significantly denounce the offending behaviour: (*Proulx*, para. 102.) Similarly, incarceration may provide more deterrence, but a conditional sentence can serve as a general and specific deterrent. While the amount stolen in this case is not insignificant, I would not characterize this fraud as “large scale”, instead, as the Crown Attorney, Mr. Dostal, at p. 3 of his brief, appropriately and fairly characterized it, “as a scheme that continued over a period of two years, involving some degree of sophistication”.

[104] While denunciation and deterrence are the primary factors to be considered in this case, they are not to be considered at the exclusion of rehabilitation. Indeed, Ms. Delgado’s history and personal circumstances suggest there ought to be a rehabilitative component to any sentence imposed. This is supported by the PSR, and the evidence of Ms. Stephen, the Clinical Therapist. Ms. Delgado has begun to take steps toward her rehabilitation by engaging in personal counseling and treatment, and is willing to continue.

[105] Ms. Delgado is not opposed to the imposition of a stand-alone restitution order in amount of \$80,000.00. Her counsel, Mr. Hughes, has suggested that she understands and accepts the implications of a stand-alone restitution order. It might be parenthetically noted that the need to make reparations does not necessarily preclude a sentence of incarceration, as a restitution order under s. 738 of the *Criminal Code* would bind Ms. Delgado after her release from custody.

[106] As previously emphasized, the principle of parity requires that the sentencing court consider similar sentences imposed on similar offenders for similar offences committed in similar circumstances. Thus, a review of following cases is instructive as they provide the relevant principles and factors that should be considered in the determination of a just and appropriate disposition for both the offence and Ms. Delgado.

Gambling Cases

[107] I accept and find that during the commission of the offence Ms. Delgado was suffering from a persistent and severe Gambling Disorder. While the Crown acknowledges that gambling was a key motivation for the offence, the Crown stresses that, at most, it is an explanation for the offence and shows an absence of an aggravating factor, such as pure greed. In emphasizing this point, the Crown relies on the case of *R. v. Holmes*, a decision of the Alberta Court of Appeal. In that case, the offender was a bank manager in a small community and defrauded her employer over \$100,000.00 over a period of a year and a half. The offender relied on a gambling addiction to argue for a conditional sentence, which the sentencing judge ordered. The Court of Appeal rejected the notion that gambling mitigated the penalty stating at para. 7:

[7] This Court has consistently held, as have other courts, that, in the absence of truly exceptional circumstances, an individual guilty of embezzlement should go to jail. See, for example, *R. v. John (R.C.)*, *supra*, and *R. v. Wyffels (M.)* and *Oliphant (L.L.)* (1995), 178 A.R. 132. Some possible exceptional circumstances were discussed by Côté J.A. in the *John* case at p. 239:

One can always imagine circumstances of grave illness, stress, duress, small amounts of money, encouragement and other bizarre circumstances (such as maybe mental problems) which would be exceptional circumstances that would justify a judge in not giving jail in a case of embezzlement or other theft by someone in a position of trust.

In *R. v. McIvor*, *supra*, this Court said:

In our view, an addiction to or an obsession with gambling is neither an exceptional circumstance justifying the imposition of a non-custodial sentence nor a mitigating factor warranting a sentence of less than what would otherwise be fit and proper. Similarly, neither addiction to alcohol nor to drugs is recognized as an exceptional circumstance or a mitigating factor in cases of embezzlement. The sentencing judge erred in principle in finding that the respondent's addiction to gambling constituted an exceptional circumstance.

[108] In *Holmes*, the Court of Appeal ultimately ordered a sentence of nine months' incarceration followed by probation.

[109] In Nova Scotia, fraud cases have led to custodial sentences and conditional sentences, where the breach of trust fraud has been significant. In order to get a sense of how the courts dealt with that issue, I will first address the cases which specifically involved offenders suffering from a pathological gambling addiction.

[110] The Nova Scotia Court of Appeal, in *R. v. Rizzeto*, upheld the imposition of a suspended sentence of two years, coupled with probation conditions, which included that the offender refrain absolutely from any form of gambling. At the time of sentencing, the offender was 55 years of age and for many years had been a compulsive gambler.

[111] In *R. v. Bambury*, 2001 NSSC 73 Justice Cacchione considered the effects of a gambling addiction on a police officer who committed the offence of fraud while on duty in an attempt to obtain money for his gambling addiction. Mr. Bambury had been a police officer for 11 years. Mr. Bambury was 36 years old, and had been married for nine years with one child. He had a grade 12 education together with one year of university courses. He had no prior criminal record. Mr. Bambury was fired from the police force as a result of the charge. He was also forced to declare bankruptcy as a result of his gambling addiction. Mr. Bambury accepted full responsibility for his actions and was remorseful. He intended to repay the victim the balance of the monies owing to him. Mr. Bambury had undergone a treatment program for his addiction. Mr. Bambury argued that a conditional sentence and a period of probation were appropriate. The Crown argued that there should be a period of incarceration, but was not opposed to that period being served in the community. Mr. Bambury was sentenced to a 12 month conditional sentence followed by probation for two years.

[112] In reaching that decision, Justice Cacchione considered the evidence of Ms. Elizabeth Stephens, the Clinical Therapist, who dealt with Mr. Bambury at that time. After considering the totality of the evidence adduced in that case, Justice Cacchione concluded that there was no doubt that the offence in which Mr. Bambury committed was directly related to his gambling addiction. Justice Cacchione also referenced two reports in his decision. At para. 19, he references the first report, entitled, *Final Report – Convenience Gaming and Social Impacts in Nova Scotia*, which was prepared in 1999, for the Alcohol and Gaming Authority, the authors of the report describe pathological gamblers as being:

High frequency and excessive gamblers who have difficulty controlling their gambling expenditures. They are not yet emotionally dependent on gambling, but they are harmfully involved in it, either because they crave “the rush” or because gambling has become a sanctuary from boredom, loneliness, work and social anxieties. They have a vestige of control over their gambling but they are gambling longer, with more money than planned, and finding it harder and harder to set limits on time and spending. They are at an early sequential stage, moving along a continuum of gambling use which, if left unchecked, could result in chasing, dissociation, blackouts and withdrawals....They continue to play, trying endlessly to recoup their losses with no apparent regard for the consequences, such as financial ruin, reduced productivity, disruptive family life, reduction of previous interests and leisure activities and possible involvement in illegal projects... Even when not gambling, the pathological gambler is often preoccupied with thoughts about gambling. Their behavior(sic) has become compulsive and addictive, driven by overpowering and uncontrollable cravings and impulses to gamble... “pathological gambling is chronic and progressive” and is not unlike other addictions involving alcohol and other drugs.

[113] Justice Cacchione later refers to a report, at para. 20, prepared by the Gambling Authority, which describes the history of VLTs and their impact. It stated as follows:

They are currently available in neighbourhood bars, taverns, licensed lounges, restaurants, and service clubs. For most residents, video lottery venues are within a five minute driving radius. Play is simple, fast, and straightforward requiring little skill or pre-knowledge of the game. This allows for instant results and returns. The atmosphere of play is casual, friendly and competition consists of “beating the machine”, not outwitting other players. Play, however, can be performed alone, or carried out in the company of others. It fits easily into the informal environment of enjoying a drink, meeting with friends, and just winding down and relaxing. No dress codes prevail. Video lottery terminal play tends to be more passive than table games or bingo...video lottery machines actually play the numbers and facilitate either socialization activities or alternatively allow players to withdraw and interact primarily with the terminal. Play tends to be continuously available, limited only by the hours of business. Betting is low stakes, but small wagers are constantly made and they can add up to considerable expenditures when compared to other more time restricted forms of gaming such as bingo or lottery draws.

[114] After acknowledging the impact of VLTs have made in the community, he turned his attention to the adverse impact that VLTs and Mr. Bambury's addiction to them, has had on Mr. Bambury.

[115] Justice Cacchione's comments about the effectiveness of general deterrence is apposite. He wrote, at para. 27:

[27] With respect to general deterrence I find it difficult to see how anyone in the same position as Mr. Bambury, that is being a pathological gambler, could be deterred by anything this Court or any other Court can do. I am sure that a pathological gambler, if he or she were to hear that Mr. Bambury had been incarcerated for 20 years, that that would not stop the pathological gambler from continuing with gambling. I think that point was made clearly this morning by Mr. Bambury's testimony. All he thought about day and night, on duty, off duty, whenever, was getting money so that he could gamble. The primary thought was gambling. The secondary thought was how do I get the money to gamble.

[116] He further commented, at para. 28:

[28] That gambling addiction will impact upon sentencing considerations can be seen from various cases in this province. I quote *The Queen v. Rizzetto* (1983), 59 N.S.R. (2d) 132 as well as *The Queen v. Landry*, [1997] N.S.J. No. 508 and *The Queen v. Wilson* [1999] N.S.J. No. 476.

[117] Justice Cacchione concluded that an addiction to gambling can be a mitigating factor. He quoted several cases in support of that proposition, including *Horvath*, a decision of the Saskatchewan Court of Appeal. At paras. 30 to 31, he observed:

[30] In *R. v. Horvath*, and I will refer to that case because it really does have some very good principles stated in the body of the decision. In *Horvath* the accused pled guilty to several counts of fraud and theft of money from two banks where she was employed. She was 36 years old and a pathological gambler. She used the proceeds of her frauds to gamble some more. She defrauded one bank of almost \$200,000.00 and then she forged her husband's signature in order to obtain another \$25,000.00 in a line of credit from a second financial institution. She was sentenced to two years less a day conditional sentence to be served in the community. Chief Justice Bayda stated at paragraph 41:

Perhaps the factor that carries most weight in assessing the gravity of the offences in this particular case is the one that generated those offences. The offences were the products of a distorted mind - a mind seriously diseased by a disorder now recognized by the medical community as a mental disorder. The acts committed at the command of that mind were not acts of free choice in the same sense as are the acts of free choice of a normal mind. A pathological gambler does not have the same power of control over his or her acts as one who does not suffer from that complex disease. Accordingly, where those acts constitute criminal offences, the moral culpability - moral blameworthiness - and responsibility are not of the same order as they would be in those cases where the mind is not so affected.

[31] Further on at paragraph 44 the Chief Justice states:

...Common sense tells us the best way to prevent a pathological gambler from committing offences designed to raise money that will be used to feed a potent gambling addiction is to emasculate the addiction by curing it or where no cure is available, by providing long-term care. Putting a pathological gambler in jail for a short period is not a cure. Nor does it provide the necessary long-term care. On the other hand, a condition that requires the offender to participate in gambling addiction treatment, programming and counselling - such as the first additional condition in the conditional sentence order in the present case - is a much more effective preventative measure and one much more likely to secure the good conduct of the offender.

[118] Justice Cacchione further stated, at para. 32:

[32] In the *Queen v. Mitchell*, [1996] A.J. No. 1176 (QL) (Alta. Prov. Ct.) Provincial Court Judge Van de Veen was dealing with an accused who had stolen approximately \$5,500.00 from her employer over a 16 month period. The accused was also addicted to video lottery terminal gambling. She had admitted the offence and had taken steps to deal with her addiction. A conditional sentence of nine months and probation for two years was imposed on the 60 year old offender with no prior record. At paragraphs 98 to 100 Judge Van de Veen states:

...Her crime was motivated by an addiction to video lottery terminal gambling, an addiction for which she has sought treatment. Judging from her unblemished past, the accused would not likely be before these courts at all except for the increased availability of

video lottery terminals which has recently resulted in these courts seeing many vulnerable people involved in criminal activity whose motivation for their offences is their unfortunate addiction to video lottery terminal gambling. This recent influx of individuals before these courts does not include people who have frequented casinos or searched out gambling opportunities by going to Las Vegas or other known gambling centres. They are often ordinary people with no prior criminal involvement, who appear unaware of the risks which accompany their use of video lottery terminal machines initially and who unexpectedly find themselves addicted to video lottery terminal gambling. While our society is well aware of the risk of addiction presented by alcohol and drugs, the addiction to gambling and in particular to video lottery terminal gambling, is not something we have had historical experience with until recently. It is therefore less well understood and the threat of addiction is not appreciated by the public generally, and in particular by those persons to whom it poses the greatest risk.

[119] Justice Cacchione concluded, at para. 33, that:

[33] In the present case I am satisfied that the offender would not have involved himself in the criminal activity presently before this Court had it not been for his pathological gambling addiction. Apart from this addiction and the consequences which led to his involvement in this offence, Mr. Bambury was an honest and law-abiding member of the community. In fact he was a police officer sworn to uphold the laws of this country. Some people may feel that because he was in a position of authority he should be dealt with more harshly. Should this path be taken it would completely disregard the reason for the commission of this offence, that is his pathological gambling addiction.

[120] In *R. v. Wilson*, 2012 NSPC 40 Judge Ross of this Court sentenced Mr. Wilson to a custodial sentence of nine months, followed by a period of probation for 18 months. In that case, the offender pleaded guilty to defrauding the Province of Nova Scotia, breach of trust, and causing the Province to act on forged documents. Mr. Wilson was a former MLA who defrauded the Province of \$60,995.00 by submitting false expense claims. Reports indicated that the offender had a pathological gambling addiction and had spent the funds on gambling. The Crown sought a sentence of at least 12 months' imprisonment. The offender suggested that a two-year conditional sentence was appropriate.

[121] In reaching his decision, Judge Ross raised the issue of pathological gambling. He asked, “Does it matter?” “Should it matter?” “If so, in what way and to what extent?” In addressing these questions, he made the following apposite observations:

[24] Counsel said today that it approached the gambling issue with some skepticism. I think that is appropriate and I think that courts and perhaps people generally should approach it with some proper skepticism. Claims of being pathologically addicted to something, especially in a context like this, especially where a person criminally accused seeks help for it only after the person is caught – skepticism is a proper response. Some would say that in a more general sense there is too much pathologizing of human behaviour these days. This can tend to strip it of its moral content. There’s a tendency to pathologize sadness into depression etc. The Diagnostic and Statistical Manual has grown almost exponentially over the years. There is some general skepticism about pathologies and again I think it’s appropriate to approach them with a skeptical frame of mind.

[25] Some turns of phrase were used in court today. One was that Mr. Wilson became a “victim of gambling.” Another was that “bad things happen to good people.” I certainly don’t adopt that terminology and certainly Dr. Bloom doesn’t either as will be seen when I turn to his report. Phrasing things that way tends to disassociate the person from the behaviour. It’s as though gambling were contracted like a virus. It’s as though a bad thing happened like getting hit by a car. It’s not quite the same thing. One cannot disassociate the pathology from the individual, from his or her actions and from the choices that were made. It was said that the gambling was a “primary causal factor.” I suppose in a sense that’s true. Animosity towards a person could be a primary causal factor in an assault. But the question is, is the factor so outside the person’s self-control, self-discipline, that it diminishes their responsibility for it, makes them less culpable? Nobody is claiming that gambling makes Mr. Wilson innocent, and he is not himself. But this is the difficult and vexing issue here.

[26] One might analogize with other forms of addiction. There is always a danger in analogies and I recognize that, but two very common addictions that are raised in court are alcoholism and drug addiction. In those cases, and in this, the habits themselves are unsavory, the conduct itself is worthy of censure of some sort. Being continually drunk is something that should be discouraged by society. This kind of gambling is not something anybody would want to see. In itself it is worthy of censure of some sort. Mr. Wilson himself recognized this by not wanting to gamble in Sydney. He did not want to do this in full view of his constituents. And so one

might ask, and Courts have had to ask in other cases, to what extent does drug addiction mitigate trafficking? Selling coke to support a cocaine addiction? To what extent does alcoholism mitigate drinking and driving? A person might have a drinking habit but do you get behind a wheel of a car and maybe kill somebody? And to what extent does gambling addiction mitigate stealing from an employer? Or in this case the taxpayer? And to what extent does it mitigate breach of a public trust?

[122] While Judge Ross seems to have exercised proper skepticism in dealing with the issues he raised regarding the relevancy and probity of a gambling addiction, he did attribute some reduction to general deterrence due to the gambling problem. In doing so, he recognized the importance of denunciation in the sentencing calculus.

[123] In reaching the decision to impose a custodial disposition rather than a conditional sentence, Judge Ross clearly considered the serious breach of trust by Mr. Wilson in his position as an MLA. He stated, at para. 56:

[56] The more difficult aspect is the question of the custodial sentence, whether it should be a conventional jail sentence, and the length of that sentence. If I were to take circumstances like this, if it were possible, you know it isn't, but if it were, and just distill from all those circumstances the fact that Mr. Wilson was an MLA, if it were possible to remove that from the equation altogether, then I think a lengthy conditional sentence, a community based sentence with a curfew and house arrest might well be an appropriate sentence. If Mr. Wilson were here as an MLA having perpetuated the fraud that he did over such a long period of time, but if I could subtract the gambling addiction, if that didn't exist as part of the equation, I would have no hesitation whatsoever in sentencing Mr. Wilson to a lengthy jail sentence in the range of one to two years that was recommended by the crown. Here I'm persuaded by evidence on gambling, by the things that I referred to earlier and attempted to explain, that the appropriate range or length of sentence should be less than which the Crown is seeking, that of 12 months. I think something in the range of eight to ten months is more appropriate.

[124] It seems from this passage Judge Ross may have considered a lengthy conditional sentence, but for Mr. Wilson's significant position of trust that he held as an MLA. Further, it also seems that Judge Ross was persuaded to reduce the length of the custodial sentence because of Mr. Wilson's gambling addiction.

[125] Another similar case is the *R. v. Salikin* a decision of the Saskatchewan Provincial Court. In that case, the offender was the administrator for the Village of Mortlach. She had several duties including receiving payments for water bills and making deposits including deposits for the post office. She was the sole employee. She devised a system using the four copies of the water bill, by taking payments and stamping “copy one” that was mailed to homeowners “paid”. She would destroy the second and third copy of the water bill that were in the ledger box and copy number four was filed away. She would not include the cash payment for the water bill in her deposits, and instead kept a substantial portion. She would also receive funds for the post office account, although she did not run the post office herself. She would replace the post office account monies with cash and cheques from the water bill payments to the post office account and then keep the post office money. Then she would purchase a post office money order with her own personal cheque and substitute it with the village money.

[126] In June 2009, the offender quit her job at the village. She stated in the Pre-Sentence Report that she could not live with herself any longer. She left so the temptation to steal was no longer present.

[127] In January 2010, the new administrator noted irregularities with the water bill payments. On further investigation, she found her own past payments for water bills had not been recorded as received. An auditor was hired to review the period time period in question. The auditor found that a substantial amount of money was missing. The offender admitted to stealing \$65,000.00.

[128] The investigation ascertained that the money order purchased by the accused was being sent to a trustee in bankruptcy under a consumer proposal in bankruptcy. Other withdrawals showed monies paid to the Casino and Heritage Inn for gambling.

[129] In *R. v. Naugler*, 2011 NSPC 68 Judge Derrick provided a thorough review of several cases where conditional sentences have been imposed in breach of trust cases, and where they were not; at paras. 50 to 57, she wrote:

[50] It is common for judges in breach of trust cases to reject the option of a conditional sentence on the basis that such a sentence is not consistent with the principles of denunciation and deterrence. The courts in Alberta seem to be particularly hardline in this regard, (see for example, *R. v. Miles*,

2011 A.B.C.A. 133; *R. v. Stirling*, [2010] A.J. No. 1297 (C.A.); *R. v. Westerson*, [2008] A.J. No. 1047 (Alta. P.C.); *R. v. Toews*, [2007] A.J. No. 944 (Alta. P.C.); *R. v. Bracegirdle*, [2004] A.J. No. 827 (Alta. C.A.)), but they are not alone. (see, for example, *R. v. Lamoureux*, [2011] P.E.I.J. No. 6 (S.C.); *R. v. Williams*, [2007] O.J. No. 1604 (Ont. S.C.J.); *R. v. Korol*, [2007] B.C.J. No. 2719 (B.C.S.C.); *R. v. Coxall*, [2006] B.C.J. No. 107 (B.C.P.C.); *R. v. Reid*, [2004] Y.J. No. 3 (Y.T.C.A.); *R. v. Stewart*, [2002] B.C.J. No. 2456 (B.C.S.C.); *R. v. Stoutley*, 2002 CarswellOnt 7759 (O.C.J.); *R. v. Sequin*, [1997] O.J. No. 5439 (Gen. Div.)) Moral blameworthiness in breach of trust cases is seen as being high and jail sentences have been imposed even where the offender has accepted responsibility and started paying restitution.

[51] In Nova Scotia, fraud convictions have led to sentences of incarceration and conditional sentences. (see, for example, *R. v. Ferguson*, [1999] N.S.J. No. 481 (P.C.) -- conditional sentence; *R. v. Matheson*, [2001] N.S.J. No. 195 (S.C.) – conditional sentence; *R. v. Decoff*, [2000] N.S.J. No. 224 (S.C.) – conditional sentence; *R. v. Trask*, [2005] N.S.J. No. 561 (P.C.) -- conditional sentence of two years less a day, joint recommendation; *R. v. Pottie*, [2003] N.S.J. No. 543 (S.C.) – conditional sentence; *R. v. Hill*, [1997] N.S.J. No. 236 (C.A.) 12 months incarceration upheld on appeal; *R. v. Teresa Cox-Kubas*, unreported decision of MacDougall, P.C.J., November 22, 2005 -- 12 months incarceration)

[52] Conditional sentences have been ordered in cases where the breach of trust fraud has been very significant. In *R. v. Ferguson*, for example, the offender defrauded his employer between September 1995 and April 1998 of \$390,000 consisting of bogus salary and increased pension contributions. Hundreds of premeditated fraudulent transactions were involved. The company was left with a very significant shortfall after Mr. Ferguson declared bankruptcy. Prospects for further recovery beyond what the trustee in bankruptcy was able to collect were found to be dim. (*Ferguson*, paragraph 5) Mr. Ferguson's theft from his employer fueled unrestrained spending: at the time of his bankruptcy he had \$470,000 in debt of which \$220,000 was on credit cards. A conditional sentence of eighteen months was imposed on the basis that "the imposition of appropriately harsh and meaningful conditions will serve both the rehabilitation of Mr. Ferguson and send a message of deterrence to Mr. Ferguson and others." (*Ferguson*, paragraph 18)

[53] The Crown in *Ferguson* had been looking for a three year penitentiary term to satisfy the sentencing imperatives of denunciation and deterrence. (*Ferguson*, paragraph 3) The judge's decision to impose a conditional sentence was not appealed.

[54] The *Matheson* case involved a lawyer who pleaded guilty to stealing over \$117,000 of clients' money. The offences were committed over a significant period of time and involved planning and premeditation. The grave nature of the breaches of trust was noted. Mr. Matheson's remorse, lack of criminal record and his guilty plea were all considered to be mitigating factors. The Supreme Court of Canada decision in *R. v. Bunn*, [2000] S.C.J. No. 10, also involving a lawyer stealing from clients, was reviewed in detail. MacAdam J. in *Matheson* concluded that since "... the advent of the Legislative mandate and statement of principles and factors to be considered in the imposition of a sentence that would involve the 'least intrusive measure', periods of incarceration in an institution are no longer called for in circumstances where they have been in the past." (*Matheson*, paragraph 81) Mr. Matheson's diagnosis of ADHD was held to be "relevant in helping to explain the why of these offences and as such is a factor to be considered." (*Matheson*, paragraph 86) Mr. Matheson received a sentence of two years less a day to be served in the community.

[55] The *Decoff* case involved the manager at a small business. Soon after assuming this position Ms. Decoff began to take money from deposits slated for the bank. A jury found Ms. Decoff to have taken \$44,000 over a period of eight months. (*Decoff*, paragraphs 12 and 16) During this time she had a new baby and a disabled spouse. She apologized to her employers and voluntarily returned to them over \$17,000.

[56] The Crown sought to have Ms. Decoff incarcerated. A conditional sentence of eighteen months was imposed. The Court determined that Ms. Decoff did not pose a threat to the community and took account of the mitigating factors, including Ms. Decoff's responsibilities to her disabled partner and baby. She was ordered to pay \$26,480.73 in restitution.

[57] In 2003, Clifford Pottie was sentenced for having stolen \$46,475 from the Nova Scotia Hockey Council. This breach of trust came late in Mr. Pottie's uneventful tenure with the organization as Secretary Manager. He held the position for fifteen years without incident and then resorted to embezzlement through a forgery scheme that was, as the Court described it, "thinly disguised [and] unsophisticated." Mr. Pottie refused to accept responsibility however, and the Crown, citing the amount of money involved and the breach of trust, sought a jail sentence of 6 to 12 months. Mr. Pottie proposed a conditional sentence, indicating his poor health and the fact that he was the primary daytime care giver for his five year old grandson.

[58] The Court determined that a conditional sentence was consonant with the purpose and principles of sentencing, observing that the Supreme Court of Canada had recognized in *R. v. Proulx*, [2000] 1 S.C.R. 61 that "... a

conditional sentence can provide significant denunciation and deterrence, particularly when onerous conditions are imposed ...” In sentencing Mr. Pottie to an 18 month conditional sentence, the Court found that Parliament had intended through the use of conditional sentencing to “... encourage the courts to reduce the reliance upon incarceration of offenders where appropriate.” (*Pottie*, paragraph 14)

[130] In the Crown’s written submissions, Mr. Dostal provided a helpful summary of Nova Scotia cases as well, which included the most recent major fraud decision in Nova Scotia, *R. v. Clarke*, 2016 NSSC 101, popularly known as the “Knowledge House” fraud. One of the three accused pled guilty to conspiracy to affect the public price of shares and fraud over \$5,000.00 of two union institutional investors. The criminal conduct involved conspiring with 12 other people to keep the stock price artificially above market value for over six months. The accused also made false representations to investors. The crime had the effect of bankrupting a company with a market cap of over \$100 million. It was a complex and long fraud. Justice Coady approved the joint recommendation of three years incarceration.

[131] There is also the decision of *R. v. Caine*, 2016 NSPC 54, in which Chisholm P.C.J. sentenced the offender to a period of three months for unlawful use of a credit card and fraud under \$5,000.00 in relation to an elderly victim to whom she was a personal care worker. The total loss was \$3,617.00. The Court rejected the Defence request for a conditional sentence so that she may continue a re-training program and take care for her ailing mother. He took note of the period over which the offence was committed, the amount taken, the breach of trust and the vulnerability of the victim. He found that a conditional sentence would be inadequate to address the purpose and principles of sentencing.

[132] Lastly, there is the case of *R. v. Elmadani*, 2015 NSPC 65 (CanLII), where Judge Derrick, in one of her most thorough fraud sentencing decisions to date, dealt with the sentencing of an accused charged with fraud over \$5,000.00 in relation to his employment in a recruiting company. In his position, the accused logged false claims into the company’s tracking system which permitted him to obtain a total of \$22,700.00 in fraudulent commissions. He had a conviction for fraud from approximately six years prior. Judge Derrick sentenced him to a period of incarceration of 12 months. Judge Derrick, again, provided a comprehensive list of Nova Scotia cases involving a breach of trust fraud convictions that have led to sentences of incarceration and conditional sentences, including *R. v. Hurlbert* as a

recent example of a breach of trust case that resulted in a conditional sentence. In that case, Mr. Hurlburt's offence was a very serious breach of trust by an elected official. He had no prior record, pleaded guilty early on, was remorseful, and had paid full restitution.

[133] While all of the aforementioned cases can be distinguished from the case at bar, they are helpful in the sense that they provide guidance in the application of the relevant sentencing principles.

The Aggravating Factors Surrounding the Circumstances of the Offence

[134] There are several aggravating factors surrounding the commission of the offence that must be considered in determining the appropriate sentence, including the following:

- a) the nature and manner of the offence involved planning and execution of numerous transactions;
- b) the scheme continued over a period of two years, involving some degree of sophistication;
- c) the loss of \$80,000.00 was a significant loss for the company;
- d) the victim impact statement; and
- e) the offence involved the abuse of a position of trust which is a statutory aggravating factor according to s. 718.2(a)(iii) of the *Criminal Code*.

[135] It should also be noted that I have considered s. 380.1 of the *Criminal Code*.

The Mitigating Circumstances Surrounding the Offender and Offence

[136] The mitigating circumstances surrounding the offender, Ms. Delgado, and the

offence, include the following:

- a) Ms. Delgado has pled guilty at the first reasonable opportunity;
- b) She readily admitted her guilt to the authorities when she was cooperating with them in the initial interview wherein she accepted responsibility and expressed remorse, shame, and embarrassment for her actions. She has felt the effects of public shame;
- c) She entered a guilty plea and as a result, there was no need for a preliminary hearing or trial;
- d) She was not motivated by greed or personal gain. She no longer gambles;
- e) She is a low risk to re-offend and is taking steps to address her risk factors;
- f) She readily engaged in counselling and/or treatment, and has been benefiting from that for a significant period of time;
- g) She has expressed a willingness to continue her counselling and/or treatment;
- h) Ms. Delgado has close family support to assist her in her rehabilitation;
- i) There are no concerns with any other addictions, such as alcohol or drugs; and
- j) Ms. Delgado is very compassionate and responsible person in relation to her family.

[137] In sentencing offenders for frauds involving a breach of trust, the courts have considered key factors to be the amount of funds taken, the period of time over which the fraud occurred, the sophistication of the plan, whether a position of trust was violated, the offender's motivation, including evidence of gambling, drug, alcohol, psychological or financial problems and any criminal record.

[138] In support of its position, the Crown relies on the *Wilson* and *Elmandani* cases

which emphasize that deterrence and denunciation are so pressing in these types of cases that a period of incarceration is necessary to deter similar conduct in the future and express society's condemnation for Ms. Delgado's conduct.

[139] The Defence, however, relies on the cases that have considered the effects of a gambling addiction on the offender, including: *Rizzeto*; *Bambury*; *Wilson*; and *Salikin*. In my view, the *Bambury* case is similar to the case at bar. In respect to the circumstances surrounding the offender, like Ms. Delgado, Mr. Bambury accepted full responsibility for his actions and was genuinely remorseful. He had undergone a treatment program for his gambling addiction. Like, in the *Bambury* case, I have no doubt that in this specific case, the offence in which Ms. Delgado committed was directly related to her gambling addiction, which is a significant factor in my determination of whether a conditional sentence is warranted. In this case, Ms. Delgado immersed herself in playing the VLTs with the money she had taken from her previous employer. In other words, she simply committed the offence of fraud to feed her gambling addiction; she did not spend the proceeds of her crime on lavish material items to enrich her lifestyle. Rather, she simply fed her addiction with it. Put differently, her re-offending behaviour was not motivated by greed or personal gain. She no longer gambles, and has taken measures to ensure that she is at a low risk of re-offending.

[140] Again, it is of significance that Ms. Delgado's unlawful conduct was not motivated by greed.

[141] Let me be clear, the case at bar can be distinguished from the cases where the offender was not suffering from a gambling addiction at the time of the fraud, as I am satisfied in this specific case that Ms. Delgado was suffering from a severe addiction to gambling during the commission of the offence.

[142] As previously mentioned, while I recognize that rehabilitation is an important objective in the sentencing calculus, I must not over-emphasize it, as there is a real pressing need in this case for a denunciatory sentence as well as one directed at both specific and general deterrence.

[143] While there appears to be a wide range of dispositions for this type of offence, the aggravating circumstances surrounding this specific offence necessitates a strong

emphasis on the principles of denunciation and deterrence. Subsections 718(a) and (b) of the *Criminal Code* identify denunciation and deterrence as appropriate objectives of sentencing. Where the primary objective of sentencing is denunciation, the sentence must publicly condemn the offender's conduct.

[144] Where the primary objective is also deterrence, the sentence must attempt to discourage individuals through specific deterrence as well as to deter other potential offenders from committing similar offences by way of general deterrence.

[145] Where, as here, the primary purpose of sentencing is to deter and denounce this type of behaviour, the Court must ensure its sentences are perceived by the public as strong condemnations for this type of behaviour.

[146] I am of the view that a term of imprisonment is warranted in this case, given the gravity of the offences committed by Ms. Delgado and her level of moral blameworthiness which is indicative given the nature and scope of her involvement in committing the offence.

[147] In this specific case, having regard for the personal circumstances surrounding Ms. Delgado and the circumstances surrounding the offence, as described in these reasons, I am satisfied that a lengthy conditional sentence order, a term of imprisonment in the community with onerous conditions coupled with a substantial period of probation, will be a suitable way to express society's condemnation for her conduct and will deter similarly minded individuals.

[148] In the present case, the objectives such as denunciation and deterrence are particularly pressing. Therefore, a period of imprisonment is necessary notwithstanding that Ms. Delgado is a first offender who has accepted full responsibility, expressed genuine remorse, and feels the effect of public shame

[149] In the circumstances of this case, I am satisfied that a conditional sentence is consistent with the principles of sentencing. Denunciation and deterrence, both general and specific to this accused, are the primary focus in sentencing Ms. Delgado.

[150] However, because of her background and personal circumstances, rehabilitation is also an important factor that cannot be excluded by an emphasis on the principles of denunciation and deterrence.

[151] I am satisfied that a conditional sentence of significant length with stringent conditions will serve to denounce and deter. Her rehabilitation and ability to make reparations can be addressed by the conditions imposed. Such a sentence is proportionate to the seriousness of this particular offence and is consistent with other sentences for similar offenders who have committed this type of offence because they, like Ms. Delgado, were suffering from a severe gambling addiction during the commission of the offence. Moreover, conditional sentences have been ordered even for breach of trust frauds, including cases where the amount of the fraud was very significant. Some Nova Scotia examples include: *Ferguson*, \$390,000; *Matheson*, \$117,000; and *Trask*, \$340,000.

[152] Notwithstanding all of the mitigating factors present in this case, this offence is a very serious crime that requires an appropriate disposition that effectively emphasizes the principles of deterrence and denunciation while at the same time balances the need to ensure the rehabilitation of Ms. Delgado.

[153] The Ontario Court of Appeal in *R. v. Priest*, expressed the view that proportionality insures that an individual is not sacrificed “for sake of the common good”.

[154] In my view, but for all of these mitigating factors, the sentence that I am about to impose would have been much higher.

[155] Given the gravity of the offence, and degree of Ms. Delgado’s responsibility in such circumstances, deterrence and denunciation must be reflected in the sentence imposed.

[156] I wish to stress that in reaching this decision, I grappled with whether a conditional sentence was necessary. In other words, this decision was not reached lightly. I thought of imposing a short period of incarceration as a means of expressing society’s condemnation for the offence. However, after considering all of the personal circumstances surrounding Ms. Delgado and the offence, and the

law, I have concluded that rather than a short sharp period of incarceration, a lengthy term of imprisonment in the community will address society's condemnation of the serious and gravity of the offence, and will also fulfill the objectives of rehabilitating, restoring, and promoting a sense of responsibility in Ms. Delgado as she is a first offender, unlike Ms. Elmadani, who had a previous conviction.

[157] In my view, when sentencing first time adult offenders with a severe addiction to gambling that is directly related to the commission of the offence, such as in the *Bambury* case and here in this case, requires careful consideration of the offender's unique and individual characteristics as the protection of the public in the long term is best served by the imposition of a sentence that promotes the fundamental purpose of sentencing and appropriately balances all of the principles of sentencing, while emphasizing the principles of deterrence and denunciation, but not to the detriment of rehabilitation. In other words, rehabilitation should not be abandon.

[158] Thus, the imposition of a conditional sentence of imprisonment in the community for 24 months, coupled with a three year period of probation, strikes a just proportion between the offence and the offender. The 24 month conditional sentence will impose stringent conditions that will restrict Ms. Delgado's liberty for an extended period of time, and will appropriately achieve the principles of denunciation and deterrence. Furthermore, a significant period of probation will provide Ms. Delgado the opportunity to further rehabilitate herself, and with the imposition of carefully crafted conditions, such as terms and conditions that require Ms. Delgado to perform community service hours, will promote a sense of responsibility in her and will acknowledge the harm done to the victim and the community.

[159] The conditional sentence order is longer than what would have been imposed had Ms. Delgado received a custodial sentence.

[160] It should also be noted that, as Clayton Ruby stated in his autorotative text, *Sentencing*, the most distinctive aspect of a conditional sentence is the threat of incarceration that hangs over the offender's head for the duration of the sentence like, it is sometimes said, the "sword of Damacles".

[161] In reaching this decision, I am of the view that a reasonable, a thoughtful

person, who is properly informed about the purposes and principles of sentencing, would be confident that the protection of the public in the long term is best served by sentences that emphasize the principles of denunciation and deterrence coupled with the consideration of rehabilitating an adult first offender who was suffering from a severe gambling addiction during the time of the commission of the offence.

[162] Would you please stand. Ms. Delgado, the Court sentences you to imprisonment for 24 months and is satisfied that you serving this sentence in the community will not endanger its safety and is consistent with the fundamental purpose and principles of sentencing. You shall serve this sentence in the community under the following conditions:

- keep the peace and be of good behaviour;
- appear before the Court when required to do so by the Court;
- report to a supervisor at 277 Pleasant Street, Suite 112, Dartmouth on today's date, while you are here and thereafter as directed;
- remain in the Province of Nova Scotia, unless written permission is obtained; and
- you must notify promptly of any change of name, address, employment or occupation;
- reside at 47 Chadwick Street, Apartment 302, Halifax, Nova Scotia unless permission to reside elsewhere is obtained from the Court;
- not to possess, use or consume alcohol or other intoxicating substances;
- you are not to possess, take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act*, except in accordance with a physician's prescription for you or legal authorization;
- you are to complete 180 hours of community service work by November 30, 2018 as directed by your supervisor;
- attend for mental health assessment and counselling as directed by your

supervisor;

- attend for gambling addiction assessment and counselling as directed by your supervisor;
- attend for assessment and counselling or program as directed by your supervisor;
- and participate and cooperate with any assessment, counselling or program as directed by your supervisor;
- you are going to make reasonable efforts to locate, maintain employment or an educational program as directed by your sentence supervisor;
- you are to refrain from all forms of gambling, including electronic and internet gambling and from entering any premises where the primary function is gambling, such as a casino;
- you are to remain in your residence at all times beginning at 6:00 pm on today's date for the first 14 months, house arrest;
- for the expiration of the conditional sentence order, after the first 14 months you will be on curfew, you will remain in your residence from 10:00 pm until 6:00 am the following day, seven days a week.

[163] It is my view the terms and conditions of this Order will assist you and help you in your rehabilitation.

[164] There are the exceptions:

- when at regularly scheduled employment, which your supervisor knows about and travelling to and from that employment by a direct route;
- when attending a regularly scheduled education program, which your supervisor knows about, or a school or educational activity supervised by a principal or teacher and travelling to and from an education

program, or activity by a direct route (including her children's or grandchildren's school activities, which your supervisor knows about);

- when dealing with a medical emergency or medical appointment involving you or a member of your household, and travelling to and from that by a direct route;
- when attending a scheduled appointment with your lawyer, supervisor or probation officer and travelling to and from that appointment by a direct route;
- when attending court at a scheduled appearance or under subpoena and travelling to and from court by a direct route;
- when attending a counselling appointment, a treatment program or a meeting of alcoholics anonymous or narcotics anonymous, at the direction or with the permission of your supervisor, and travelling to and from that appointment, program or meeting by a direct route;
- when in a residential treatment program, if your supervisor is told in advance, where you will be and you agree that the facility can tell your supervisor if you are there should your supervisor inquire;
- for not more than four hours per week, approved in advance by your sentence supervisor for the purpose of attending to personal needs;
- when performing community service work arranged with your supervisor and travelling to and from that location by a direct route;
- and you must prove compliance with the house arrest and curfew condition by presenting yourself at the entrance of your residence should your supervisor or peace officer attend to check compliance.

[165] The probationary period is 36 months which will commence upon the expiration of the Conditional Sentence Order. You must comply with the following terms and conditions:

- keep the peace and be of good behaviour;

- appear before the Court when required to do so by the Court;
- notify the Court or probation officer, in advance, of any change of name, address, employment or occupation;
- report to a supervisor at 277 Pleasant Street, Suite 112, Dartmouth within two days from the date of expiration of your Conditional Sentence Order and thereafter as directed by your probation officer or supervisor;
- you are going to make reasonable efforts to locate, maintain employment or an educational program as directed by your probation officer;
- attend for mental health assessment and counselling as directed by your probation officer;
- attend for gambling addiction assessment and counselling as directed by your probation officer;
- attend for assessment and counselling or program as directed by your probation officer;
- and participate and cooperate with any assessment, counselling or program as directed by your supervisor; and
- you are to refrain from all forms of gambling, including electronic and internet gambling and from entering any premises where the primary function is gambling, such as a casino.

[166] In addition, I will grant a stand-alone restitution order in the amount of \$80,000.00, to Can-Euro Investments at 105-7 Horizon Court, Dartmouth, Nova Scotia.

[167] Lastly, you are to report back to Court on June 15, 2018. I will be monitoring your progress as you complete your Conditional Sentence Order and Probation. This is something that this Court does routinely in these types of cases where there is an underlying issue that needs to be addressed. I want to ensure that you are getting the necessary counseling and treatment that you require.

[168] Lastly, the DNA order is granted.

[169] The victim surcharge is \$100.00 which will be due on or before June 18, 2018. If for some reason, you do not have the money to pay the victim surcharge, you can attend court and ask for an extension. The victim surcharge is not meant to cause an undue hardship.

[170] The remaining count on the *Information* is dismissed.

F. Hoskins, J.P.C.