NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Kelly*, 2018 NSCA 24

Date: 20180314
Docket: CAC 465709
Registry: Halifax

Between:

Rhonda Kelly

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: January 22, 2018, in Halifax, Nova Scotia

Subject: Criminal law: sentencing; stand-alone restitution orders

Summary: The appellant was the executive director of a community development organization (CRDA). She submitted forged documents, on eight occasions over three years, to the provincial Department of Economic and Rural Development and Tourism (ERDT). ERDT acted on the documents as if they were genuine and disbursed monies to the CRDA.

CRDA's accounting system made it difficult to know precisely where the money was spent, but none of it went to the personal benefit of the appellant. CRDA spent the money on either operations or on community projects.

ERDT declined to file a victim impact statement. Nonetheless, the Crown asked the trial judge to impose a stand-alone restitution order in the amount of $97,000. The defence submitted many character references lauding the appellant's work on behalf of CRDA in pursuing and completing community projects, some of which were the subject of the forged documentation. The appellant was

unemployed and had just recently started a B&B business. Financial information demonstrated her inability to pay a stand-alone restitution order. Nonetheless, the trial judge imposed such an order for $97,000, along with a 12-month conditional sentence order, plus probation.

Issues: Did the trial judge err in principle in imposing the stand-alone restitution order?

Result: Leave to appeal is granted and the appeal allowed. A restitution order under s. 738 of the *Criminal Code* is only available where property has been lost as a result of the commission of the offence. There was no evidence that the Province lost money by the commission of the offence of uttering forged documents. Furthermore, the trial judge dismissed the appellant's inability to pay such an order on the basis that paramount consideration could be given to the victim of the fraud. This also reflected error. Diminished consideration of the offender's seeming inability to pay is legitimate where the offence involved breach of trust or where monies obtained have not been accounted for. Neither principle applied. The effect of the order would be to have the appellant pay out of her own pocket, over her lifetime, for projects and initiatives that had benefitted the community.

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Judges:	Beveridge, Saunders, and Van den Eynden, JJ.A.
Appeal Heard:	January 22, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Saunders and Van den Eynden, JJ.A. concurring
Counsel:	Patrick Hurley, Q.C. and Sabrina Winters for the appellant James Gumpert, Q.C. and Roland Levesque, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Rhonda Kelly seeks leave to appeal from the $97,000 restitution order imposed by the trial judge as part of the sentence for her having uttered forged documents. I am satisfied that the trial judge failed to apply the correct legal principles that guide this sentencing option.

[2] I would grant leave to appeal, allow the appeal and quash the restitution order.

THE BASIC FACTS

[3] Prior to her present difficulties, Ms. Kelly had no criminal record. She was a valued member of her community. She held a responsible position as Executive Director of the Cumberland County Regional Development Authority (CRDA).

[4] Ms. Kelly admitted she had uttered forged documents in order to obtain Provincial funding within certain fiscal years for approved community improvement projects. The monies obtained from the Province of Nova Scotia went to fund CRDA projects. Ms. Kelly received no personal benefit from her misfeasance.

[5] The CRDA is a corporate body created under provincial legislation (the *Regional Community Development Act*, S.N.S. 1996, c. 29). Its mission is to foster an environment to facilitate sustainable economic growth in the region in partnership with municipalities.

[6] CRDA's funding comes from the Federal Government through ACOA, municipalities, and the Nova Scotia Department of Economic and Rural Development and Tourism (ERDT).

[7] Documentation was required to obtain funding from ERDT for projects. If ERDT approved a project, a Project Funding Agreement was signed by the project proponent.

[8] ERDT only disbursed funds based on cost reimbursement. In other words, the cost must have been incurred and paid before reimbursement—all within the province's fiscal year.

[9] Former CRDA employees complained to the Ombudsman's Office of financial misbehaviour at CRDA. The Ombudsman's Report identified financial irregularities. It recommended a forensic audit of CRDA.

[10] The Province commissioned PricewaterhouseCoopers LLP (PwC) to conduct a comprehensive forensic audit of CRDA. PwC's report led the police to charge the appellant with one count of fraud contrary to s. 380(1)(a) and nine counts of uttering forged documents contrary to s. 368(1)(b) of the *Criminal Code*.

[11] Ms. Kelly pled guilty to one count of uttering forged documents between July 2007 and January 2010. The remaining charges were dismissed.

[12] A Pre-Sentence Report was prepared for the sentencing hearing of June 17, 2017. The trial judge was the Honourable Judge Rosalind Michie, Provincial Court Judge.

[13] The Crown and Ms. Kelly tendered an Agreed Statement of Facts. I will refer in more detail to this later.

[14] Ms. Kelly presented eleven character reference letters from community leaders and a report on her financial situation from a chartered accountant.

[15] The parties made a joint recommendation that Ms. Kelly receive a conditional sentence of 12 months, to be followed by a period of probation for 12 months, both with numerous conditions.

[16] The only issue in dispute before the trial judge was whether a restitution order was appropriate in light of the circumstances of the offence and those of the appellant.

THE SENTENCE HEARING

[17] To understand where the trial judge went astray, it is useful to highlight the submissions of the Crown and defence before the trial judge.

[18] The Agreed Statement of Facts set out the essential details. In the 2008, 2009 and 2010 fiscal years, Ms. Kelly submitted false documentation to ERDT in relation to the following eight community projects. ERDT acted on those documents to make payments to CDRA for the following projects:

1. Age of Sail
2. Cumberland Energy Office
3. Fundy Shore BDS
4. Main Street II Beautification
5. Pugwash Marina
6. Regional Energy Strategy
7. YMCA Fundraising Strategy
8. Youth Retention

[19] There was no dispute that monies paid out by ERDT went to CRDA. Nor was there any suggestion that CRDA did not participate in or pursue completion of these projects. Ms. Kelly did not commit the offence for personal gain. Crown counsel said this to the trial judge:

> A third aspect which the crown has considered seriously in the submission that the crown is making on sentencing is, as was pointed out in the agreed statement of facts, that in regards to the funds that were defrauded, Rhonda Kelly had no personal gain or benefit in regards to these funds. So this is not a situation where the court often times see a fraud perpetrated and the monies go into the pocket of the fraudster, and they're used to embellish the fraudster's lifestyle usually by buying expensive gifts, buying objects, financing their lifestyle, et cetera. That's, I would say, probably 95 percent of the cases that we see. In this case, that wasn't the situation. Ms. Kelly, although committing these fraudulent activities, did not do it for her personal benefit, to enrich herself. So this is certainly a mitigating factor that looms large in the crown's consideration.

[20] Crown counsel also advised the trial judge that he had reached out to the Province of Nova Scotia to enquire if it wished to file a victim impact statement. It did not. Nonetheless, the Crown requested a restitution order for $97,400 in favour of the Province.

[21] The request was based on the speculative possibility that absent the forged documents, the Province may have decided to use the money for some other provincial priority:

> As I understand my friend's position, and he'll correct me if I'm wrong, defence position is that Rhonda Kelly didn't profit from this money. She didn't take this money and put it in her pocket, or buy a house, or buy a car, or pay own her mortgage, or buy fancy jewelry, or whatever else you want, so really she shouldn't be made to pay back restitution for funds that she did not profit from, and

> eventually probably went somewhere in CREDA. But it would be almost impossible to determine where those funds actually went in CREDA, because there was a comingling of funds. The monies that were received from the province were not individualized per project. They were all comingled in the same accounts. So wherever those funds went, it would be almost impossible to determine that.
>
> But the crown's position is that restitution should be imposed, because the Province of Nova Scotia, through ERDT, paid out $97,400 that it should not have paid out. Those funds should never have gone out from the provincial coffers. And the province might well have been decided, if everything had been done legal and above board, the province might have decided well, we're going to use this money for the Department of Health, or the Department of Education, instead of funding beautification projects in downtown Amherst. Because the priority of health and education might have been more important at that time for the government, rather than one of the projects that are involved here, and that money would have been sent to a higher priority. **So through Rhonda Kelly's actions, the province and the taxpayers were defrauded of $97,400, and she should be held accountable for that, and there should be a stand alone restitution order against her for that amount.** And this is where I think my friend and I have the major disagreement.
>
> [Emphasis added]

[22] Ms. Kelly did not plead guilty to defrauding the Province. She pled guilty to uttering forged documents as if they were genuine and caused the ERDT to act upon them as if they were genuine. I will return to this issue later.

[23] Defence counsel stressed two points before the trial judge: there was no basis to say that the Province had in fact suffered a loss of $97,400; and, in any event, Ms. Kelly's financial and other personal circumstances militated against a stand-alone restitution order.

[24] Counsel for Ms. Kelly acknowledged to the trial judge that the essential elements of the offence were not in dispute: Ms. Kelly caused ERDT to provide funding to complete community projects in a current fiscal year in order to avoid having to reapply in the next year for the funding to complete the projects. But, no loss of $97,400 had been made out to substantiate a restitution order:

> And there is no question, and Ms. Kelly has pleaded guilty to the offence that she created the documentation to avoid having to make that reapplication, on the basis that the project was not yet complete within the fiscal year. But the, as throughout the agreed statement of facts has pointed out, the funds were ultimately used to complete the projects. **And as my friend has pointed out, there was a**

> **comingling, so it may not be absolutely possible to show that the funding went, every nickel went to every project, but the projects that were under CREDA were completed. And so that it didn't leave any projects half completed or incomplete**. **And the money did not go to Ms. Kelly**. So in that regard she did issue a, utter a forged document that caused the Province of Nova Scotia to act upon it.
>
> Now my friend has indicated that perhaps the, the province would not have issued the funding if a reapplication had been made, as opposed to falsifying the documents. The difficulty with that is, is that we don't know whether they would have or not, or they would have in all regards. **But what we do know is that the $97,000 that had initially been approved for the projects went into completion of the projects, and did not go to Ms. Kelly.** So in that regard, it would suggest that a restitution order may not be the, in these circumstances, be appropriate for, against Ms. Kelly.
>
> [Emphasis added]

[25] Defence counsel referred to two of the leading cases that set out the relevant factors to guide trial judges on stand-alone restitution orders (which included *R. v. Zelensky*, [1978] 2 S.C.R. 940; and *R. v. Devgan*, [1999] O.J. No. 1825). Counsel related those factors to the facts of the present case. Twice he stressed the absence of any basis to say that the Province had suffered a loss. Counsel also emphasized that the personal and financial circumstances of Ms. Kelly made a restitution order inappropriate.

[26] Crown counsel did not dispute any of the assertions made by the defence.

SENTENCE DECISION

[27] The trial judge rendered an oral decision later that day. The decision was subsequently reduced to writing. It has a neutral citation (2017 NSPC 49), but has apparently not been published.

[28] I need only focus on the trial judge's reasons for making the stand-alone restitution order. Before doing so, it is important to identify the principles that she ought to have applied.

[29] As traced by Chief Justice Laskin in *R. v. Zelensky*, *supra*, the discretion to order compensation as part of the sentencing process has been in the *Criminal Code* since its inception. A stand-alone restitution order fulfills a number of purposes. It serves as a vehicle, in appropriate circumstances, to acknowledge the loss caused by the commission of the offence. The order survives bankruptcy so

that the offender, as much as the law can do, will not be able to personally benefit from the commission of the offence. People who may be tempted to commit an offence will know, crime does not pay. The victim will be saved the additional expense of being forced to pursue a remedy in the civil courts for the loss they suffered.

[30] Labrosse J.A., for the Court in *R. v. Devgan* (1999), 121 O.A.C. 265 consolidated the relevant factors that should guide a court's discretion in relation to a restitution order:

> [26] In *Zelensky*, Laskin C.J. identified certain objectives and factors that relate to the application of s. 725(1). These considerations have been expanded upon in subsequent cases. Below, I have consolidated these objectives and factors, all of which are relevant to the issue of what constitutes a proper exercise of discretion for the purpose of s. 725(1).
>
> 1. An order for compensation should be made with restraint and caution.
>
> 2. The concept of compensation is essential to the sentencing process:
>
> (i) it emphasizes the sanction imposed upon the offender;
>
> (ii) it makes the accused responsible for making restitution to the victim;
>
> (iii) it prevents the accused from profiting from crime; and
>
> (iv) it provides a convenient, rapid and inexpensive means of recovery for the victim.
>
> 3. A sentencing judge should consider:
>
> (i) the purpose of the aggrieved person in invoking s. 725(1);
>
> (ii) whether civil proceedings have been initiated and are being pursued; and
>
> (iii) the means of the offender.
>
> 4. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation orders would displace the civil remedies necessary to ensure full compensation to victims.
>
> 5. A compensation order is not the appropriate mechanism to unravel involved commercial transactions.
>
> 6. A compensation order should not be granted when it would require the criminal court to interpret written documents to determine the amount of money sought through the order. The loss should be capable of ready calculation.

> 7. A compensation order should not be granted if the effect of provincial legislation would have to be considered in order to determine what order should be made.
>
> 8. Any serious contest on legal or factual issues should signal a denial of recourse to an order.
>
> 9. Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered.
>
> 10. A compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy.

[31] Labrosse J.A. observed that the considerations he identified were not exhaustive, nor were any one of them determinative. Much would depend on the circumstances of each case:

> [27] It is in light of these considerations that an exercise of discretion under s. 725(1) must be assessed. None of these considerations by themselves are determinative of whether a compensation order should be granted. The weight to be given to individual considerations will depend on the circumstances of each case. Nor is the preceding list intended to be exhaustive. Indeed, other relevant considerations may arise in future cases.

[32] These principles have been consistently applied (see for example: *R. v. Nanos*, 2013 BCCA 339; *R. v. Fast-Carlson*, 2015 SKCA 86; *R. v. Biegus* (1999), 127 O.A.C. 239; *R. v. Castro*, 2010 ONCA 718).

[33] Like many aspects of sentence, the circumstances of the offence and of the offender can engage conflicting principles when it comes to restitution orders. Relevant to this case was the acknowledged minimal capacity of Ms. Kelly to be able to pay the requested restitution order.

[34] Ms. Kelly was 52 years of age. She had no job and was experiencing health issues. She had just recently started running a small B&B, which had yet to break even. She had significant debt with no ability to raise further funds.

[35] It is well accepted that if an offender has no present or realistic foreseeable ability to pay a stand-alone restitution order, making such an order may interfere with the offender's rehabilitation, justifying its refusal or reduction from the full amount of the loss (*R. v. Siemens* (1999), 138 Man.R. (2d) 90 (C.A.); *R. v. Spellacy* (1995), 131 Nfld. & P.E.I.R. 127 (Nfld. C.A.); *R. v. Ali* (1997), 98 B.C.A.C. 239; *R. v. Popert*, 2010 ONCA 89; *R. v. Fast-Carlson*, *supra*).

[36] While a restitution order should not be made where it would undermine the rehabilitative prospects for the offender, if the offence involved loss caused by breach of trust, paramount consideration can be given to the victims' claims. Weiler J.A., for the Court, explained this interplay in *R. v. Castro*, *supra*:

> [26] In general, the omission of a judge to give consideration to a relevant factor gives rise to reviewable error. Thus, the omission of a sentencing judge to give any consideration to the relevant factor of the offender's ability to repay the amount of money taken is an error. A restitution order is not intended to undermine the prospects for rehabilitation of the offender. See e.g. *R. v. Ali* (1997), 98 B.C.A.C. 239; *R. v. Biegus* (1999), 141 C.C.C. (3d) 245 (Ont. C.A.), at paras. 15 and 22; and *R. c. Ford* (2002), 2 C.R. (6th) 348 (C.Q. crim. & pén.).
>
> [27] Reviewing courts have, however, consistently held that no single factor is itself determinative of whether a compensation order should be granted and that the weight to be given to individual considerations will depend on the circumstances of each case. Those circumstances include two considerations I wish to emphasize: the nature of the offence and, when money has been taken, what has happened to the money.
>
> [28] Insofar as the nature of the offence is concerned, in cases involving breach of trust, the paramount consideration is the claims of the victims: *Fitzgibbon* at pp. 1014-15. Ability to pay is not the predominant factor. Indeed, where the circumstances of the offence are particularly egregious, such as where a breach of trust is involved, a restitution order may be made even where there does not appear to be any likelihood of repayment: *R. v. Yates* (2002), 169 C.C.C. (3d) 506 (B.C.C.A.), at paras. 12 and 17.

[37] Of course, it is important to emphasize that a restitution order under s. 738(1)(a) of the *Criminal Code* is only available where property has been lost "as a result of the commission of the offence". It provides:

> 738 (1) Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:
>
> > a) in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;

(See for example *R. v. Debay*, 2001 NSCA 48.)

[38] With these principles in mind, I turn to the trial judge's reasons.

[39] After accepting the jointly recommended 12 month conditional sentence and setting its terms, the judge focussed on the issue of restitution. She commented that the total loss was clearly ascertainable "as detailed in the agreed statement of facts" as being $97,400.06.

[40] The judge referred to the sometimes difficult balancing of the interests of the victim with the position of the accused. She observed that institutional victims should not be treated differently:

> [26] …It is not uncommon to hear defence counsel submit that because the victim is an insurance company or a government entity it is not the same thing as a personal victim. But it really is, because with an insurance company, it is all of the people in that insurance "pool" of insured customers that pay their premiums who provide that money, and if there is a fraudulent insurance scheme, those are the people that are paying. **In this case, it's the taxpayers who fund the public coffers, and that money is distributed for programs. Ultimately, it's those people who have lost out in this case.**
>
> [Emphasis added]

[41] The emphasized words are in keeping with the judge's earlier reference that "the community-at-large perceives" itself to be the victim of fraud because "the funds were diverted from programs designed to be invested in the betterment of the local community" (¶19).

[42] With all due respect, this reveals error in principle. There was absolutely no evidence that the Province lost money by the commission of the offence of uttering forged documents. The appellant was not charged with theft of monies. She was charged with uttering forged documents and fraud. She was not found guilty of fraud.

[43] Even if the fraud charges had still been in play, a conviction for fraud does not automatically equate to a loss of property that opens the door to a potential restitution order.

[44] Obviously, most fraud cases involve a victim suffering a loss, but the offence of fraud can be committed without actual loss to the victim. Fraud

involves deceit and deprivation. Deprivation can be made out by mere risk of economic loss (*R. v. Olan et al.*, [1978] 2 S.C.R. 1175).

[45] The notion that the monies paid by ERDT were "diverted" from programs designed to benefit the local community is unsupported. The Crown made no such suggestion. There is absolutely no evidence that was the case—in fact, the inverse.

[46] The Agreed Statement of Facts said the money went to CRDA. None of it went to Ms. Kelly's personal benefit. CRDA existed and operated to better the local community through management and completion of different projects. The Agreed Statement included assertions by Ms. Kelly that, "the bottom line is the project gets done…".

[47] Defence counsel asserted multiple times that the funds obtained from ERDT by the forged documents were used to fund CRDA projects. The trial judge did not require any evidence to be adduced to prove this assertion.

[48] The Crown did not dispute the assertions made by defence counsel, either before the trial judge or in this Court.

[49] The record supported defence counsel's assertions. The Agreed Statement of Facts says the money went to CRDA. Ms. Kelly received no personal benefit. Ten letters of reference lauded Ms. Kelly's leadership in spearheading and completing dozens of CRDA projects, some of the same ones listed in the forged documentation.

[50] If the money went to CRDA and not to Ms. Kelly's personal benefit, the funds could only have been used to pursue CRDA goals and objectives. There is no evidence to suggest that funds were "diverted" from community projects.

[51] The absence of any basis to say that the Province suffered a loss of property as a result of the commission of the offence is sufficient to quash the restitution order. In fact, this aspect of the trial judge's reasons for imposition of the restitution order permeates the remainder of her reasons. However, there are other aspects of the judge's reasoning that are troublesome and cannot withstand scrutiny.

[52] The judge properly observed that a restitution order is not simply an ancillary order, but forms part of the sentence and must be included when considering the totality of the sentence. However, with respect to the role that

ability to pay plays, she asserted that it was not determinative and paramount consideration should be given to the victims of fraudulent transactions. She said this:

> [28] The ability of the accused to pay, and even the future ability to pay is not the determinative factor in whether restitution is ordered by the court, and paramount consideration should be given to the victims of fraudulent transactions, see *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, also *R. v. Yates* (2002), 169 C.C.C. (3d) 506 (B.C.C.A.). Section 739.1 of the *Code* also states that "the offender's financial means of ability to pay does not prevent the court from making an order under section 738 or 739".

[53] There are certainly some circumstances where patent inability to pay may not deflect a restitution order. Cases where monies or property have been obtained by an offender in breach of trust stand out (see: *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005; *R. v. Scherer* (1984), 5 O.A.C. 297 (leave to appeal to S.C.C. refused, [1984] S.C.C.A. No. 29), both where lawyers committed egregious breaches of trust). As well as where monies have been taken and cannot be accounted for.

[54] The decision of the British Columbia Court of Appeal in *Yates*, cited by the trial judge above, was not a breach of trust case. The offender committed welfare fraud. The trial judge imposed a restitution order on an offender who had substantial equity in her home. The Court of Appeal upheld the order on the basis of deference.

[55] Other than referring to the general concept of Ms. Kelly's doubtful ability to pay as a factor, the trial judge made no further comment on it. She dismissed it as unimportant, because of the paramount consideration for the victim of the fraudulent transactions. With respect, the failure to appropriately consider the offender's patent inability to pay such a restitution order reflects legal error.

[56] I have already referred to the well-established relationship between losses in circumstances of breach of trust (¶53 above). Bennett J.A. in *R. v. Nanos*, *supra* canvassed the relevant caselaw and summarized it as follows:

> [17] The case law is uniform on the consideration of restitution orders when the offences involve **a breach of trust or other theft-related cases when the stolen money is unaccounted for or not accounted for adequately. In such a case, the fact that an offender has little or even no ability to pay the restitution order will be given little weight, as one of the principles behind the legislation is that an accused should be deprived of "the fruits of his crime".** The Law Reform Commission of Canada Working Paper 5, Restitution and Compensation

> (Ottawa: Information Canada, 1974), cited with approval in *Zelensky* at 952-953; Castro at para. 34; see also R. *v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at 1014; *Yates*.
>
> [Emphasis added]

[57] This approach was echoed in *R. v. Johnson*, 2010 ABCA 392. The offender breached his trust as an assistant pastor and investment broker to defraud 50 individuals of over $2M. At the time of sentence, approximately $1.7M was unaccounted for. No financial information was submitted. The trial judge imposed a restitution order. On appeal, the Court commented on the applicable principles:

> [29] More important, an offender's means have limited import in cases of fraud: *R. v. Cadieux* 2004 ABCA 98, 346 A.R. 56 at para. 9**. Depriving an offender of the fruits of his or her crime continues to be one of the overarching goals of a restitution order. Thus, ability to pay must take into consideration what disclosure an offender has made - or not made - concerning disposition of the proceeds of the crime. Further, where, as here, the case also involves a breach of trust, the paramount consideration must be the victims' claims**: *Castro*, *supra*, at para. 28; and *R. v. Fitzgibbon* [1990] 1 S.C.R. 1005 at 1014-1015. In fact, where a breach of trust is involved, a restitution order may be made even where there does not appear to be any likelihood of repayment: *R. v. Yates* 2002 BCCA 583, 169 C.C.C. (3d) 506 at para. 17; and *R. v. Scherer* (1984) 16 C.C.C. (3d) 30 (Ont. C.A.) at 38, leave den. [2004] 2 S.C.R. x, [1984] S.C.C.A. No. 29. This is as it should be. **Economic predators should not be permitted to walk away in the future from any obligations to their victims, especially where the proceeds of the fraud remain unaccounted for in whole or in part. Otherwise, crime would pay.**
>
> [Emphasis added]

[58] Here, as already observed, the monies were accounted for—they went to CRDA. Ms. Kelly received no fruits of the crime.

[59] In support of the restitution order, the Crown suggests before us that this was a breach of trust case. Hence, Ms. Kelly's impecuniosity should not forestall the restitution order. Its submissions are:

> 4. The Appellant did not profit personally from her fraudulent actions. The CRDA's accounting system prevented determining exactly where the $97,400 actually went in the CRDA projects. However, by getting funding money from the Province, the Appellant would have enhanced her reputation as a leader who had the ability to complete projects.

> 5. The Province of Nova Scotia relied on the integrity of the Appellant when the CRDA applied for funding. By falsifying invoices and claims, the Appellant was acting in breach of trust.
>
> 6. Recent case law from the Saskatchewan Court of Appeal holds that even if an accused does not personally profit from a fraudulent scheme, restitution can still be ordered if there was a breach of trust. A current inability to pay is not determinative in those circumstances.

[60] With respect, there is no merit in the suggestion the appellant committed a breach of trust. The Crown never alleged at trial that Ms. Kelly committed a breach of trust. I do not doubt that provincial officials trusted her documents, but every fraudulent transaction involves a victim placing trust in the offender; that does not make their relationship one of trust in the sense of a recognized aggravating factor in sentence such as a solicitor-client, principal-agent, doctor-patient or other similar relationships.

[61] Ms. Kelly was in a position of trust *vis-á-vis* her employer, CRDA. She did not steal from nor defraud her employer. She obtained funds for CRDA from ERDT for CRDA's use to operate and fund community projects. That does not mean she deserves any praise for her conduct. Far from it. Not only did she commit, on a number of occasions, a criminal offence, she involved others, even exposing CRDA itself to potential criminal liability.

[62] The trial judge commented that justice must not only be done, but it must be seen to be done in the community. She went so far as to say that if restitution were not ordered, it may appear that justice was not being done. At the conclusion of her decision, the judge reasoned as follows:

> [33] I think that in this case if there was not restitution ordered, it may serve to create an appearance that justice is not being done in this case. I won't go so far as to say that it would bring the administration of justice into disrepute, but I think there is some expectation that there has to be some responsibility taken. **And again, as I have said, there should be no benefit simply because the scheme was so elaborate that the final exact destination of the funds cannot be determined**. Restitution is an important component of punishment in this case and it serves to compensate the victim and also assists in addressing both general and specific deterrence.
>
> [Emphasis added]

[63] With respect, this reasoning is also flawed. There was no elaborate scheme that disguised where the funds were spent. As the Crown acknowledged in its

factum, it was CRDA's general accounting system that prevented knowing exactly where every dollar raised was spent, because there was a co-mingling of project funds. That was the practice at CRDA, not part of an elaborate scheme hatched or perpetrated by the appellant.

[64] I agree justice should be seen to be done. But how is it just that $97,000 of taxpayer's money was spent on CRDA operations and projects, but Ms. Kelly becomes the sole taxpayer that must, over her lifetime, be required to pay for those projects? Based on this record, that would be the effect of the restitution order imposed by the trial judge.

[65] Of course, nothing I have said prevents the Province, should it choose, from advancing a civil claim against Ms. Kelly, or even others, if it can establish that it suffered damages as a result of her misfeasance.

[66] I am satisfied that the trial judge erred in principle. The errors impacted her decision to impose the restitution order. I would grant leave to appeal, allow the appeal against sentence and quash the restitution order.

Beveridge, J.A.

Concurred in:

Saunders, J.A.

Van den Eynden, J.A.