

CITATION: *R. v. Holmberg*, 2021 MBPC 30

THE PROVINCIAL COURT OF MANITOBA

BETWEEN

| | | |
|-----------------------|---|-----------------------------------|
| Her Majesty the Queen |) | for the Crown |
| |) | C. Bator |
| - and - |) | |
| |) | |
| Kelsi Holmberg |) | for the Accused |
| |) | J. Rogala |
| |) | |
| |) | Judgment delivered: June 29, 2021 |

Pollack S.P.J.

[1] Kelsi Holmberg is a first offender who has pled guilty to stealing money from two community-based non-profit organizations with which she was in a position of trust. The prosecution seek a sentence of imprisonment for one year and the defence take the position that, while incarceration is indicated, it ought to be served in the community under appropriate conditions. Against that introduction I was provided with an agreed statement of facts from the police report.

[2] The *Manitoba Association of Celtics Sports* (MACS) is a non-profit organization created to continue the tradition of the Scottish Highland Heavy Games. In 2015 the offender become its treasurer. She was given access to MACS' bank account, on-line banking and debit card. The *Manitoba Cheer Foundation* (MCF) is also a non-profit organization; it is dedicated to furthering the sport of cheerleading in Manitoba. In November, 2016 the offender joined its board and in June, 2017 became its treasurer with access to MCF's bank account, chequebook and on-line banking. At all material times the offender was not entitled to any compensation, reimbursement or other funds from either MCF or MACS.

[3] Between February 1, 2018 and July 31, 2019 (the "17 months") the offender wrote 60 cheques on the MCF account payable to herself in the total amount of \$20,801.63. Within those 17 months - between March 27, 2018 and May 8, 2019 - in 47 different transactions she electronically transferred \$11,425.82 to herself from the MCF account. Also within the 17 months - between May 30, 2018 and June 19, 2019 - she made 5 cash withdrawals from the MCF account totaling \$2,490.65.

[4] The offender also victimized MCF to replace funds stolen from MACS. Between March 25, 2019 and August 7, 2019 she sent \$2,055.00 to MACS from the MCF account electronically. In addition, on May 3, 2019, she deposited an e-transfer for MCF from a third party to the MACS account. And she did the same thing with MACS' funds: between March 5, 2019 and August 14, 2019 she used \$3,445.00 of MACS funds to repay MCF.

[5] The MACS thefts did not start until March 5, 2019. Between that date and August 16, 2019 she made 28 electronic transfers to herself totaling \$3,050.00 and withdrew cash on 16 occasions totalling \$2,362.70. She spent \$2,047.52 on herself in 31 unauthorized purchases and sent 6 electronic transfers totaling \$1,100.00 to unknown recipients. She spent stolen funds on groceries, liquor and taxis and used some to pay collection agencies.

[6] It can be seen that in March of 2019, having appropriated well over \$20,000.00 from MCF over the past year, this offender began to victimize MACS, not just to balance MCF's books but to continue to provide for herself.

[7] The application of *Criminal Code* sentencing principles requires an analysis of the antecedents of the offender as well as the impact of her crimes on the organizations and its volunteers. Kelsi Holmberg is 26 years of age and is fortunate to have come from a close and loving family. In her pre-sentence report interview she stated that "we were the model suburban text book family". Her parents' support

has continued; I am informed that a partial restitution payment has been made as a result of her parents refinancing their home.

[8] She lived at home until shortly before the offending began. She found that the independence of moving out of the family home was not inexpensive. Although she worked as a receptionist and at a daycare, neither became a career. When she realized that police were looking for her, she walked into the police station on January 9, 2020 where she was arrested, charged and released on an undertaking. Since then she has become employed full-time as a housekeeper for her sister and brother-in-law and has been promised that employment if she is available after sentencing. She has also started an on-line crafting business.

[9] Kelsi Holmberg also spent ten years coaching students from kindergarten to high school in cheerleading and she has been involved in Folklorama at the Scotland Pavilion. I am satisfied that she joined the victim associations as a volunteer and without a plan eventually to become treasurer so that she could steal.

[10] Although not emphasized by the defence, the pre-sentence report indicates that, since her arrest, she has used alcohol, cocaine and marijuana socially. She described heavy drinking when socializing although she claims that she has reduced her liquor consumption with her recent employment at her sister's home. It is clear to me that the time since her arrest and release has created great anxiety.

[11] It is interesting that the pre-sentence report does not recommend application of any probation resources:

"...Ms. Holmberg was assessed as a very low risk for criminal re-involvement. Due to the subject's very low risk to re-offend, and lack of criminogenic factors that need attention, involvement with Probation Services and Community Supervision Order are not being recommended. It is the writer's assessment, supported by collateral sources, the subject may benefit from accessing counselling services to work on personal issues such as self-esteem and explore career aspirations." *(emphasis added)*

[12] The defence did not provide a forensic behavioral assessment but counsel stated that his client's decision was to forego that expense to leave further funds

available for restitution. A restitution payment in the sum of \$10,000.00 was paid into Court prior to the sentence hearing.

[13] The sentencing issue in this case is whether the required incarceration for a breach of trust should be served conditionally or by imprisonment. Sentencing is a principled task and begins with the judgment of LeBel J in *R. v. Nasogaluak*, [2010] 1 S.C.R. 206:

39 Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.

40 The objectives of sentencing are given sharper focus in s. 718.1, which mandates that a sentence be "proportionate to the gravity of the offence and the degree of responsibility of the offender". Thus, whatever weight a judge may wish to accord to the objectives listed above, the resulting sentence must respect the fundamental principle of proportionality.

[14] Guidance for breach of trust sentencing begins with *R. v. Paul*, 2003 MBCA 153. *Paul* was guilty of stealing funds from his First Nation, with the help of others, while employed in its finance office. The Court granted leave to appeal on the ground that the sentencing Judge failed to articulate why conditional sentencing was rejected as an option. On the merits of the appeal, Martin Freedman JA wrote for the panel:

14 Each appellant was in a position of trust. They stole from their employer and from their community. Much of the money was spent on gambling. Abuse of a position of trust is expressly stated to be an aggravating circumstance in sentencing (s. 718.2(a)(iii) of the *Criminal Code of Canada*). Deterrence is the most important principle in such a situation. (See *R. v. McEachern* (1978), 42 C.C.C. (2d) 189 Ont. C.A.).

15 Since the introduction of conditional sentences, courts have confirmed that abuse of a position of trust will tend to result in a custodial term. (See *R. v. Pierce* (1997), 114 C.C.C. (3d) 23 Ont. C.A.).

16 These crimes were not victimless. Money was taken from a community which sorely needed it, and was frittered away by the appellants who had access to this money solely because the community placed them in the position of trust.

[15] Recent guidance can be found in the detailed review of the factors to be considered by Rolston PJ in *R. v. Grant-Jury*, 2020 MBPC 6. The offender in that case abused her position of trust as a union employee and dishonestly appropriated over \$131,000.00 over a 4-year period. Her breach of trust caused a number of serious victim impacts involving the standing of the union in collective bargaining, others being suspected of fraud as well as the ability of the union to service its members.

[16] Rolston PJ was required to make a threshold determination whether conditional sentencing was available in that case due to the timing of certain *Criminal Code* amendments but he held that:

... a Conditional Sentence Order is not appropriate for Ms. Grant-Jury. It has been long noted that the abuse of a position of trust will tend to result in a custodial sentence (see. *R. v. Pierce, supra*).

That offender was sentenced to imprisonment for fifteen months.

[17] Kelsi Holmberg has admitted her guilt in committing frequent transactions involving the dishonest deprivation of \$50,000.00 from two community organizations whose operations were not for profit. Over that 17 months she wrote an MCF cheque to herself every few days. Within the 17 months she also transferred funds electronically to herself and withdrew some cash with the same frequency. At the end of that first year she started stealing from MACS and, for about six months, she was taking cash or electronic transfers from MACS, including that \$3,445.00 for MCF; during the same period she made nine transfers from MCF to MACS. Obviously some panic was setting in at that time. For about a year and a half, this offender benefited by pocketing over \$45,000.00 from the two organizations.

[18] The pre-sentence report makes it clear that, as a young adult, she no longer wished to live with her parents but needed to support herself in the lifestyle to which she had been accustomed while living at home. Independent living, even on a modest level, required a full-time job paying a decent wage and she was unable to accomplish that. There is no suggestion that addiction fueled these thefts, notwithstanding the use of alcohol as documented by the pre-sentence report, and there were no exceptional circumstances putting pressure on her to come up with sums of cash beyond what she earned.

[19] It is therefore my conclusion that this was a series of transactions that the offender treated as a convenience fund for her lifestyle. Of course, like many other thieves, she intended to treat the first appropriation as a loan and indeed there is evidence of some repayment but the repayments that were made were at the expense of the other victimized organization.

[20] It is important to note that, like the *Grant-Jury* case, these appropriations were public funds. Each organization exists to promote activities for athletes who want to participate in competition. As can be seen from the victim impact information, the public attends these events; and other public events, such as Folklorama and amateur sports, are supported by these organizations.

[21] Unlike the *Grant-Jury* case, this sentence hearing did not involve days of evidence of the amount of sophistication, planning, skill or deception involved in the criminal acts of the offender. It appears that she simply took advantage of the fact that the degree of trust she enjoyed was high and she was subject to little scrutiny. When attempts were made to scrutinize, however, she was able to stall and deflect until others in the victim associations went to the bank to hear the startling news that their funds were gone. This is not a case where, once confronted, the offender admitted her wrongdoing and assisted her victims.

[22] Borrowing some of Rolston PJ's language, the prosecution say that this offender made over 185 choices to be dishonest. Rolston PJ concluded, concerning *Grant-Jury's* 350 choices:

25 The number of transactions and the period of time over which they occurred is a stark illustration of the high moral culpability that is associated with her actions.

It is the frequency of the transactions and the admitted continuous use of the funds simply to support a lifestyle desired by the offender that illustrate why breach of trust attracts stark punishment. Kelsi Holmberg did not mitigate her thefts by making restitution; she compounded her offending by continuing to steal both to support herself and to make restitution.

[23] There are certainly mitigating factors in this case, including the fact that Kelsi Holmberg's background has no criminal conviction blemishes. That is, however, the least mitigating factor in a case like this. If she had come to each board of directors with a reputation for dishonesty or a known criminal record she would not have been trusted with the power to manipulate the victims' bank accounts. It is nevertheless to her credit that for 26 years she has been a peaceful law abiding citizen. And I accept that she has been on good behaviour while on interim release.

[24] Given the amount of disclosure and the timing of the case in relation to that havoc created by the pandemic, the offender is entitled to the consideration that her guilty pleas are timely. Although it was her parents who provided \$10,000.00 which has been paid on account of restitution, the decision to begin repayment is also a timely one.

[25] The conclusion of the pre-sentence report is that Kelsi Holmberg is of so low a risk to reoffend that the resources of Manitoba Probation Service are not necessary. That is a strange conclusion given the fact that the offender herself feels the need for counselling and she has been looking for resources to access after sentencing. And

judges often read pre-sentence reports where “personal issues such as self-esteem” and difficulty with “career aspirations” are noted as criminogenic factors.

[26] That the restitution payment is the only result of her efforts to obtain a loan is not surprising. Until she obtained employment as a housekeeper, she had no full-time job and no collateral. Indeed, that is why she could not go to her own bank and borrow funds legitimately instead of using her victims’ bank accounts dishonestly.

[27] The cornerstone for the defence submission that a conditional sentence is appropriate is the judgement of Lamer CJC in *R. v. Proulx*, 2000 SCC 5, a case on appeal from Manitoba. *Proulx* was guilty of dangerous driving causing death and causing bodily harm. *Proulx* was sentenced to 18 months in a judgement that cited his lack of criminal record, his youth and the fact that he was injured in the criminal collision. The Manitoba Court of Appeal held that the sentence over-emphasized denunciation and ordered the term to be served conditionally. In restoring the provincial jail sentence, the Supreme Court took the opportunity to analyze the conditional sentencing regime and conclude that, where the requirements of *Criminal Code*, s.742.1 were met, sentencing judges must consider the option of a conditional sentence. The statutory requirements are these:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the Court:

- a) imposes a sentence of imprisonment of less than 2 years, and
- b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencings 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 complying with conditions of a conditional sentence order made under section 742.3.

[28] It will be to provide denunciation and general deterrence, pursuant to *Criminal Code*, s. 718(a),(b) that a first offender is jailed for theft in a breach of trust. In the paragraph 127 summary of the *Proulx* judgment, the defence stressed these points:

7 Once the prerequisites of s. 742.1 are satisfied, the judge should 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. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

8 A conditional sentence can provide significant denunciation and deterrence. As a general matter, 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.

My essential task in this sentencing is to determine how pressing the need is for denunciation and deterrence: if there is no such need then the offender should be sentenced conditionally.

[29] Reflecting upon the purposes set out in section 718, it is not necessary to separate Kelsi Holmberg from society nor is imprisonment likely to assist in rehabilitating her. Certainly it will provide no opportunity for reparation to the victims. What a sentence of incarceration will promote is a sense of the gravity of the thefts for which this offender is responsible as well as a statement of the serious harm done to the victims and, as a foreseeable result, to the community at large.

[30] Two MCF volunteers described how they lost the confidence of the membership when the thefts became known. The organization lost its rented premises because of the defaults allowed by the offender. Because they chose to protect her identity, they became what they called the face of her crime. The MACS president spoke of how a personal friend betrayed not only the association but the Scottish community as a result. Both victims had to rely on the goodness and creditworthiness of volunteers in order to operate.

[31] Other principles found in *Criminal Code*, s. 718.2 influence my sentencing decision here. The obvious one is the aggravating factor that the offender abused her position of trust in relation to each victim. Of equal importance is the need for some consistency in sentencing similar offenders in similar circumstances. I have

made specific reference to the judgment of my colleague Rolston PJ in a similar case; that decision is recent and it reflects sentencing in Manitoba for cases involving abuse of positions of trust. That said, I note the distinctions between these offenders.

[32] It is my conclusion that only a sentence of real imprisonment will serve the relevant purposes and principles of sentencing. The transactions involved two victims. Whether the transactions were in cash, using a cheque book, a banking card or an electronic transfer, the victims had none of those in common. Each transaction selected a different victim. Accordingly there would be no justification for concurrent sentencing.

[33] Although the moral culpability in each case is the same, the duration of the thefts from MACS was less than the duration of the thefts from MCF. Therefore Kelsi Holmberg is sentenced to imprisonment for 5 months for thefts from MCF and to 4 months for thefts from MACS; those sentences are to be served consecutively for a total of 9 months. In my opinion, 9 months reflects an adequate amount of deterrence and denunciation in the circumstances that I have described.

[34] Upon her release from imprisonment Kelsi Holmberg will be supervised on probation for a period of 3 years, subject to these conditions:

- a) If you have not done so while imprisoned, contact your probation officer within two working days of your release to make your first appointment;
- b) Attend all appointments with your probation officer as directed;
- c) Participate in and complete an initial assessment as required by your probation officer and any counselling, programming or further assessment arising from your initial assessment, as directed;
- d) Do not accept responsibility for another person's or another organization's money without:
 - i. disclosing your criminal record, and
 - ii. obtaining the approval of your probation officer in writing;

- e) Within three months of your release from imprisonment,
- i. prepare a letter for your probation officer to deliver to each victim association expressing any thoughts that you have after serving your term;
 - ii. provide your probation officer with a plan for restitution and provide a progress report in writing at each subsequent appointment.

[35] There will be two orders of restitution suitable for filing in Court. These will treat the victims as if they had successfully sued the offender. *Manitoba Cheer Foundation* will have an order in the sum of \$26,102.26 and *Manitoba Association of Celtics Sports* will have an order in the sum of \$7,756.36. Attached is an appendix with the calculations.

[36] In view of the circumstances of the offender, there will be no costs or surcharges applied.

"Original signed by"
Pollack S.P.J.

Appendix

| MCF | |
|---------------------------|---------------------|
| loss | \$ 37,009.65 |
| etf from MACS | \$ (3,445.00) |
| restitution paid to Court | \$ (7,462.39) |
| net loss | \$ 26,102.26 |

| MACS | |
|---------------------------|--------------------|
| loss | \$ 12,585.22 |
| etf from MCF | \$ (2,055.00) |
| etf from MCF 3d party | \$ (236.25) |
| restitution paid to Court | \$ (2,537.61) |
| net loss | \$ 7,756.36 |