USING CRIMINAL CONVICTIONS TO RECOVER DEFRAUDED ASSETS

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There are two principal means by which fraud victims can recover money or the value of other defrauded assets.

First and foremost, the *Criminal Code* provides the Courts with the jurisdiction to impose compensation or restitution orders on convicted fraudsters. If the fraudster fails to pay, the order can be enforced just like a judgment obtained in a civil lawsuit.

The other primary means for recovery is through a lawsuit. Court-imposed restitution orders are restricted to recovering value of the defrauded asset. The Courts cannot include amounts that correspond to other damages suffered by fraud victims; for example, the costs of conducting a forensic audit or the harm the fraud may have caused to supplier or customer relationships. The only recourse a victim has to recover these damages is through a lawsuit.

Criminal convictions can be used to expedite civil lawsuits. Recently, the Ontario Superior Court of Justice had the opportunity to consider the interplay between the criminal and civil processes. In *Bank of Montreal* v. *Woldegabriel*, a former bank employee had defrauded the bank in excess of a million dollars. After a 7-day criminal trial, the defendant was convicted of two counts of fraud over $5,000.00, two counts of falsifying documents, and one count of possession of the proceeds of crime. The defendant was sentenced to four years imprisonment and was required to pay restitution. On appeal to the Court of Appeal, the restitution order was set aside.

The bank brought an application for summary judgment on the law suit it had commenced against the defendant shortly after the frauds came to light. It argued that as the defendant had been convicted, there was no genuine issue requiring a trial on the lawsuit. The Court allowed the bank's motion and granted summary judgment. Section 22.1 of *Ontario's Evidence Ac*t provides that proof that a person has been convicted in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person. The Court held that if the defendant sought to lead "evidence to the contrary" to explain why her conviction should not be taken as proof of the underlying facts in a civil lawsuit, she was required to demonstrate that re-litigating the issue would not constitute an abuse of process. Circumstances where re-litigation would promote, not abuse, the interests of justice would include:

- where the first proceeding is tainted by fraud or dishonesty;
- where fresh new evidence, previously unavailable, conclusively impeaches the original results;
- the issues raised in the two proceedings are different; or,
- when fairness dictates that the original result should not be binding in the new context, such as where the stakes in the original proceeding were too minor to generate a full and robust response, or there was a lack of effective representation in the prior proceeding.

This is an extremely high threshold that most convicted defendants will find difficult to meet. It should underscore to victims the importance of attracting and supporting police investigations. A successful investigation and prosecution can expedite recovery.

WHAT'S HAPPENING AROUND MILLER THOMSON

Our professionals invite you to a breakfast seminar on June 8, 2007, that will discuss practical steps to reduce, detect and investigate fraud. This seminar will take place in our Markham office at 60 Columbia Way, Suite 600, from 8:00 a.m. to 9:30 a.m. and will be hosted by **Rod McLeod**, **Doug Best** and **Bruce McMeekin**. Please rsvp to kmacdonald@millerthomson should you wish to attend.

Andrew Roman spoke in April at the Canadian Corporate Counsel Association's National Spring Conference on Competition Bureau Investigations.