

January, 2013

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Message from the President

Happy New Year from the Board of Directors of the Toronto Chapter!

The chapter's directors are all volunteers who give generously of their time to, among other things, arrange our annual fraud forum, publish our monthly newsletter, write articles for the newsletter, book dinner meeting speakers, speak at dinner meetings, maintain our website, ensure our financial statements are complete and accurate, meet with members and students, liaise with the ACFE in Austin and with other professional associations in Toronto and represent the interests of ACFEs and associate members.

If you're interested in getting involved in chapter activities, please contact one of our directors (contact information is on the back of this newsletter).

At the beginning of this new year I've been thinking about the importance of ethics and a CFE's commitment to ethical behaviour. As CFEs we investigate situations in which individuals, often in positions of trust, have violated an organization's ethical principles and standards. When they violate codes of ethics the public expects that they will suffer consequences for those violations. But the public also expects that the individuals investigating violations will do so in a professional manner, abiding by professional standards.

As CFEs we are obliged to abide by the ACFE's Code of Ethics. As the ACFE Code of Ethics puts it: we "must exemplify the highest moral and ethical standards and must agree to abide by the bylaws of the

ACFE and the Certified Fraud Examiner Code of Professional Ethics."

In order to do this we must "demonstrate a commitment to professionalism and diligence." We must "not engage in any illegal or unethical conduct, or any activity which would constitute a conflict of interest" and we must "exhibit the highest level of integrity in the performance of all professional assignments". We must "comply with lawful orders of the courts and ... testify to matters truthfully and without bias or prejudice." We are obliged to "obtain evidence or other documentation to establish a reasonable basis for any opinion rendered".

It is interesting that the ACFE has taken the matter of professional ethics so seriously that it has incorporated ethics into its continuing professional education requirements:

"CFEs must earn 20 hours of CPE per twelve month period. At least 10 of these hours must relate directly to the detection and deterrence of fraud and 2 hours must relate directly to ethics."

The ACFE, in Austin and Toronto, is committed to providing you with the best possible anti-fraud training, including ethics training. Check our newsletter and our website for upcoming training opportunities.

"Ethics is knowing the difference between what you have a right to do and what is right to do." Potter Stewart

Thanks for reading!

Astra Williamson
President, ACFE Toronto Chapter

Handy Search Engines

More and more, Fraud Examiners depend on the internet in their investigations. The following is a listing of search engines that can assist Fraud Examiners in those investigations:

About.com	www.about.com
All Search Engines	www.allsearchengines.com
Alta Vista	www.altavista.com
Ask.com	www.ask.com
CanLII	www.canlii.org
Complete Planet	aip.completplanet.com
Dmoz	www.dmoz.org
Dogpile	http://www.dogpile.com
Excite	www.excite.com
Go.com	www.go.com
Google	www.google.com
HotBot	www.hotbot.com
Infomine	infomine.ucr.edu
Internet 101	www.internet101.org
Legal Engine (US)	www.legalengine.com
Legal Tree	www.legaltree.ca
Lycos	www.lycos.com
Meta Crawler	www.metacrawler.com
Monster Crawler	www.monstercrawler.com
MSN	ca.msn.com
Multicrawl	www.multicrawl.com
Search Monger	www.searchmonger.com
Search.com	www.search.com



The Re-birth of the “Restitution” Order in cases of Breach of Trust

By David Debenham (Partner, McMillan LLP)

In *R. v. Sanmugam* ^[1] the sentencing judge offered a ray of hope for those of us in the civil bar who find it troubling that after we finally get the police to investigate a fraud, and the Crown to prosecute it, the court refuses to issue a restitution order to compensate the victim. In the typical case the fraudster turns his pocket inside out, says he or she has no money, and the court simply passes sentence. After we finally get a prosecution rather than the police taking a pass on the complaint as a “civil matter”, or the prosecutors insist that the courts are not “collection agencies”, this is tough to take. It is truly a form of incomplete justice when the criminal courts simply pass over responsibility to send restitution to the victim of a fraud who has been financially and emotionally wiped out by the fraudster. Victims of financial fraud rarely, if ever, obtain legal aid, and are left to fund “private” litigation without any means to do so while the fraudsters’ counsel always appear to be well funded. It is the fraudsters’ last laugh at their victims.

In *Sanmugam*, counsel for the convicted agreed that a fraud of over a million dollars by his client, who was posing as a financial planner, warranted a restitution order. This probably forced the prosecutors’ to seek a restitution order. Nevertheless the sentencing judge was alive to the impediments that obstructed restitution orders in fraud cases, and he had the courage to overcome them. In *R. v. Taylor* ^[2] the Ontario Court of Appeal declined to make a restitution order because the accused had no hope of repaying the amount of the fraud and such an order would impair his rehabilitation.

In *R. v. Taylor* the convict was a pathological gambler defrauded his employer of \$4,000,000 over a two-year period. The trial judge recognized that the convict would never be able to repay even a minute part of the loss but made the order to save his employer the extra expense of civil litigation to recover these monies. The court noted that a restitution order is a discretionary order and “should only be made with restraint and caution and not only in order to avoid putting the victim through the extra legal expense of going to the civil courts or as a substitute for civil procedure”. A restitution order made by a sentencing court survives any bankruptcy of the accused ^[3]: Therefore, it is there for life. The courts have expressed the view that such a burden should not be imposed as it may affect the prospects for rehabilitation of the accused. Indeed a sentencing judge should consider: (i) the purpose of the aggrieved person in seeking a compensation order; (ii) whether civil proceedings have been initiated and are being pursued; and (iii) the means of the offender. A compensation order should not be used as a substitute for civil proceedings. Parliament did not intend that compensation order would displace the civil remedies necessary to ensure full compensation to victims. A compensation order is said to be an inappropriate mechanism to unravel complex commercial transactions. 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. 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. Any serious contest on legal or factual issues should signal a denial of recourse to an order. Double recovery can be prevented by the jurisdiction of the civil courts to require proper accounting of all sums recovered.

On the other hand a compensation order may be appropriate where a related civil judgment has been rendered unenforceable as a result of bankruptcy. The courts have also recognized that depriving the offender of the fruits of his crime is one of the overarching goals of making a restitution order. In cases of theft, robbery, fraud, breach of trust or the like there is no reason why the court should accept an offender's bald assertion that he or she has no ability to make restitution because the money "is gone" when no evidence is proffered in support of this assertion.

When the victims can clearly establish that "the replacement value of the property" is the amount of money taken, surely it is the offender asserting that he or she has no ability to make restitution who is in the best position to provide transparency concerning what has happened to that money. A bald assertion that the money is gone should be given no weight. Similarly, when the location of the money illegally obtained by the offender is unknown, the sentencing judge is entitled to take that fact into account with respect to ability to pay in making a restitution order. In addition, a consideration of ability to pay should take into account both the offender's present income and his

About the ACFE:

The ACFE is the world's largest anti-fraud organization and premier provider of anti-fraud training and education. Together with more than 50,000 members, the ACFE is reducing business fraud world-wide and inspiring public confidence in the integrity and objectivity within the profession. Visit www.acfe.com for more details.



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future earning ability as well as any assets controlled by him. Moreover there is authority for the proposition that when the offence involves a breach of trust, a primary consideration is the effect on the victim; rehabilitation is a secondary consideration. Thus in cases involving breach of trust, the court's recognize that the paramount consideration is the claims of the victims and 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.

In this case the court started its analysis with the fact that this case involved a particularly egregious breach of trust. As such, the court considered the convict's ability to pay to be a secondary consideration. The court was provided essentially no information about what has happened to the money the convict took from his victims. The court in this case went on to note this was a crime motivated by greed given the convict's insistence that he wants to provide full restitution to his victims, it would be incongruous not to make such an order. As no one else is implicated in the frauds, the court made the restitution orders in the full amount of the victim's losses.

In the course of sentencing the judge noted that criticisms of harsh sentences as having no appreciable effect on the protection of society had little or no applicability to cases of this nature because: (1) Financial frauds of this nature are rarely, if ever, spontaneous crimes; (2) The persons committing these crimes usually do so after careful and detailed advance planning. This will often involve a cost-benefit analysis on the part of the fraudster. Thus, the imposition of significant sentences for such crimes by increasing the cost of punishment can alter that calculus and deter the fraud; and (3) eventually almost all frauds of this nature will be discovered, as the money required to maintain the illusion of a successful investment program will run out. When this happens even financially unsophisticated victims are likely to realize that they have been swindled, and given the stakes involved, they are likely to go to the authorities. If the fraudster is apprehended the chances of a successful prosecution are high given the paper trail that will have been left behind. For all of these reasons I am of the view that general deterrence is particularly effective when dealing with criminals who are prepared to engage in large-scale, sophisticated financial frauds. While the deterrent value of any sentence is a matter of controversy and speculation, if the prospect of a long jail sentence will deter anyone from planning and committing a crime, it would deter people who are intelligent individuals, well aware of potential consequences, and accustomed to weighing potential future risks against potential benefits before taking action.

With this decision, at least some fraud victims have a ray of hope that the criminal court can provide them with one stop justice without the time and expense of duplicate civil proceedings adding further insult to their injury. A fraudster about to face sentencing is less likely to engage in the kinds of obfuscations that routinely plague civil fraud proceedings where the only sanction is the hollow threat of a costs award, and it is better that the state bear the costs of such machinations than the penurious victim. One can only hope that this decision serves as a beacon for courageous criminal courts to take the fraudster by the scruff of the neck and do complete justice at the sentencing hearing.

About the Author:

David Debenham is a barrister and solicitor in the Ottawa law office of McMillan LLP (formerly Lang Michener). David, a lawyer with full accounting credentials and an overlay of forensics, is the author of *The law of Fraud and the Forensic Investigator* (2nd edition) from CARSWELL.



**David Debenham , LL.B, LL.M,
MBA, CFE, CMA, DIFA**

1. 2012 ONSC 6663
2. (2003), 179 O.A.C. 285 (C.A.)
3. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s.178(1)(a).



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DID YOU KNOW...?

The first step to disaster planning is to create a family emergency plan including:

- ▶ Designating a location away from home to meet in the event you are unable to return home.
- ▶ Maintaining an emergency kit including food and water (two litres per day, per person)
- ▶ Ensuring your emergency plan includes caring for your pets.
- ▶ Consider taking a first aid course
- ▶ Ensure you keep an emergency kit in your vehicle at all times.

Emergency preparedness begins at home. Practice your plan with your family. This will increase your comfort level and help correct any deficiencies.

Coming Events

- 🕒 **January 17, 2013: ACFE Presents:** Fraud and Corruption in the Construction Industry (Toronto)
- 🌟 **January 23, 2012: IIA Presents:** Developing an Effective Business Continuity Governance Program (Toronto)
- 🌟 **January 29, 2013: IIA Presents:** Leading Practice Examples of Audit Committee Reporting (Toronto)
- 🕒 **January 30, 2013: ACFE Presents:** Detecting Fraud Through Vendor Audits (Dallas)
- 🌟 **March 26 - 27, 2013: IIA & ISACA Presents:** Canadian Conference on IT Audit, Governance and Security (Toronto)
- 🕒 **June 23 - 28, 2013: ACFE Presents:** 24th Annual ACFE Global Fraud Conference (Las Vegas)



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Coming January 17:

Fraud and Corruption in the Construction Industry

The construction industry has been no stranger to front-page headlines revealing significant fraud and corruption allegations. Even before the foundation is poured and throughout the construction process, there are inherent fraud risks present that could lead to wrongdoing. Most large construction projects are tendered in order to obtain the lowest, fair market price and to promote transparency in the process. However, from the pre-tendering phase through to invoicing and payment for work conducted, there are several opportunities for fraud to occur. Citing real-life cases, this session will provide participants with a high-level overview of the various ways that fraud can occur in the construction process, including a discussion of the indicators or "red flags" of fraud to watch out for.

Edward Nagel is a seasoned forensic accountant who since 1998, has focused exclusively on providing investigative accounting services to corporations, individuals, public sector and not-for-profit organizations and their legal advisors/boards, primarily in the area of corporate fraud. Mr. Nagel is recognized as a specialist in Investigative and forensic accounting by the Canadian



Edward Nagel

Institute of Chartered Accountants and has testified before the Ontario Superior Court of Justice. Mr. Nagel is also a Chartered Business Valuator and licensed private investigator.

Mr. Nagel is Principal and founder of nagel + associates inc., a Toronto-based boutique forensic and investigative accounting firm that specializes exclusively in conducting forensic investigations, providing anti-fraud consulting and developing and delivering anti-fraud training courses. nagel + associates is also the exclusive forensic accounting partner of The Listening Post, an independent and confidential ethics hotline or reporting service for businesses, not-for-profit organizations, government, and professional bodies. Mr. Nagel can be reached at 416-594-6742 or by email at edward@nagel-forensics.com.

*"Good resolutions are simply cheques that men draw on a bank
where they have no account." ~ Oscar Wilde*