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### LAW OF FRAUD AND RELATED OFFENCES

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Release No. 4, December 2024

This work examines the complexities of criminal fraud together with the full range of related offences, including frauds in relation to the stock market and securities, fraudulent conveyances, fraudulent concealment and welfare fraud. This work will assist defence counsel, Crown prosecutors and trial judges in applying the principles of fraud, and the doctrines of mistake, recklessness and wilful blindness to fraud cases being adjudicated.

This release features updates to Appendix A, "Sentencing Digests".

#### What's New in this Update:

The updates to this service's Sentencing Digests include the following:

**Sentencing Digests—Fraud Over \$5,000**—The accused was convicted after a trial, of defrauding his business partner of \$378,491.60. The fraud arose out of fraudulent invoices and receipts he tendered as legitimate business expenses. He was sentenced to 18 months incarceration followed by three years of probation and a restitution order for the full amount of the fraud. The accused appealed his conviction and sentence. The Court of Appeal [Nordheimer J.A., Tulloch J.A., van Rensburg J.A.] allowed the conviction appeal and stayed the conviction for fraud over. The sentencing appeal was dismissed. Regarding the sentencing appeal, the accused submitted that the trial judge imposed a sentence that effectively doubled the amount of expenses he found to be fabricated or inflated.

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The accused further submitted that the alleged error warranted adjustments to both the custodial sentence imposed and the quantum of restitution ordered. The parties agreed that the trial judge erred by finding that the accused was responsible to pay back the total amount of the fraud of \$378,491.60 and by ordering restitution in that amount. They agreed the correct amount should have been \$189,245.80, representing half of the total fraud. The accused further argued he should have received a conditional sentence rather than the 18-month custodial sentence. At the sentencing hearing both parties had agreed that a conditional sentence was not available based on s. 742.1(c) of the *Code*. They did not yet have the benefit of the Court of Appeal's determination that s. 742.1(c) is unconstitutional and of no force and effect (*R. v. Sharma*). Although the Court agreed that a conditional sentence was available, it deferred to the trial judge's decision not to grant it. The judge had explicitly considered this option and held that it would not sufficiently address the principles of deterrence and denunciation. The trial judge's misapprehension of the amount of the fraud to be paid back did not impact the custodial sentence ordered, in a manner that warranted appellate intervention. The trial judge properly considered the appropriate sentencing range, the principles of deterrence and denunciation, and the aggravating and mitigating factors. *R. v. Charity*, 2022 ONCA 226, 2022 CarswellOnt 3890 (Ont. C.A.), Nordheimer J.A., van Rensburg J.A., Tulloch J.A.

**Sentencing Digests—Fraud Over \$5,000—**The accused, aged 47, was found guilty after a trial of fraud over \$5000. He defrauded his childhood friend and his wife of \$500,000. He was sentenced to 3 years in prison and was given a \$500,000 restitution order. The accused appealed on the basis that the judge erred in principle by finding the fact that he absconded during the trial as an aggravating factor; relying on an improper range of sentence; exercising his discretion unreasonably in weighing or balancing the aggravating and mitigating factors; and imposing a restitution order as an add-on to the sentence. The appeal was allowed only in terms of a reduction in the amount of the restitution order. The accused had worked in investment relations for about ten years but was no longer licensed as a financial advisor when he approached the victims with a fictitious investment scheme. The husband and wife had been successful in their medical and dental practices and had funds available to invest. Relying on their close relationship with the accused and based on his representations they invested a total of \$500,000 in the investment scheme. Instead of investing the funds, the accused used the money to support his lifestyle, including lavish trips to Las Vegas and a cocaine habit. The accused did not have a criminal record prior to the fraud. He had a positive and emotionally supportive family environment growing up. He continued to be close to his family and was living with his parents at the time of the trial. He had used alcohol excessively as an adult and cocaine frequently for about 6 years. The Crown sought a custodial sentence of 3 to 5 years and a restitution order for the full amount. The defence had argued for a conditional sentence. The trial judge noted that deterrence and denunciation were the paramount considerations in large-scale fraud cases. The mitigating factors were the lack of a criminal record and that the accused had lived a law-abiding life for the many years after the crime. Aggravating factors were the breach of the friendship and trust relationship and that he had absconded on the second day of trial. Appellate intervention is justified where a sentence is demonstrably unfit or where the sentencing judge erred in principle, failed to consider a relevant factor, or erred in consideration of an aggravating or mitigating factor; but only where it appears from the judge's reasons that such an error had an impact on the sentence. With respect to the restitution order, the Court found that the trial judge had erred in principle by treating the restitution order as an "add-on" and therefore he had not considered the totality of the sentence. The Court stated that the question was whether the imposition of a restitution order in the full amount of the fraud combined with a three-year custodial sentence was excessive. This focused on the principle of proportionality. Although the ability of the accused to pay was less significant where there had been a breach of trust, that ability should be considered in the context of what happened to the money. The relevant factors to be considered were that the offence involved a serious breach of trust; some of the money was accounted for; it was unlikely that the accused would ever be able to wholly reimburse the victims; and the victims had not actively pursued civil remedies and did

not participate in the sentencing. The Court concluded that a restitution order was appropriate but that it should be reduced to \$250,000, thus balancing the gravity of the offence and the degree of the accused's responsibility, and adequately considered the primary objectives of denunciation and deterrence. The restitution order also addressed the objectives of providing reparations for the harm done to the victims, while promoting a sense of responsibility in the accused. *R. v. Mangat*, 2021 BCCA 450, 2021 CarswellBC 3727 (B.C. C.A.), Butler J.A., Fisher J.A., Newbury J.A.