



## NEWSLETTER – MARCH AND APRIL 2008

---

### RECOVERY OF INVESTIGATION AND PROSECUTION COSTS

Employers across this province incur substantial monetary costs in the course of investigating and prosecuting employee misconduct that is criminal or quasi-criminal in nature. Are those investigation and prosecution costs recoverable by way of legal process? That question was addressed to some degree in the recent case of *Canada Safeway Limited v. Brown*, [2007] B.C.J. No. 2400 (S.C.).

#### Facts

Sharon Brown used to be employed at a grocery store operated by Canada Safeway Limited (“Safeway”) in Cranbrook, British Columbia.

She worked as a cashier and customer service representative and also in the cash office. In those capacities, she had access to cash and accounting records.

In and around summer 2005, Safeway was experiencing unexplained cash and inventory shortages at the Cranbrook store.

An investigation was launched into the shortages. Refunds were closely tracked and digital surveillance cameras were installed.

In September 2005, it was determined that Ms. Brown was stealing money from the store. After an investigative interview, she was suspended. She was subsequently dismissed from her employment.

Ms. Brown was criminally charged for theft over \$5,000. She pled guilty to theft under \$5,000 and was sentenced in December 2006.

#### Damages Sought by Safeway

Safeway initiated civil proceedings against Ms. Brown and claimed damages for:

- cash stolen by Ms. Brown from the Cranbrook store; and
- investigation and prosecution costs.

#### Damages in Respect of Stolen Cash

This newsletter does not focus on Safeway’s claim for damages in respect of the stolen cash.

We do note, however, that the claim was allowed by the B.C. Supreme Court in the amount sought by Safeway. After “consider[ing] the whole of the testimony

and material before [him]”, Mr. Justice Cohen found that Safeway had “proven, on a balance of probabilities, that it [was] entitled to an order for damages in the amount of \$6,000 for its loss of cash”.

### **Damages for Investigation and Prosecution Costs**

We now turn to Safeway’s claim for damages for investigation and prosecution costs.

Safeway took the position that it “incurred significant expenses ... with respect to the investigation of the theft of cash and prosecution of Brown for the theft”.

In Safeway’s submission, it was obliged to involve several of its employees in the investigation and prosecution of Ms. Brown’s misconduct, including a security officer, a data analyst, a store manager and an assistant store manager.

Safeway submitted that it incurred considerable expense in relation to:

- “travel time to and from the Cranbrook store”;
- “meetings with Safeway employees and Crown counsel with respect to the investigation and with police and Crown counsel to outline the criminal case against Brown”;
- “setting up its surveillance”; and
- “reviewing surveillance and analyzing documentation to identify and prove its loss”.

Safeway put into evidence “documentation ... setting out the hours expended by

Safeway employees ... to investigate and prosecute the theft with supporting invoices for expenses, as well as copies of invoices for expenses incurred by Safeway with respect to the surveillance”.

Mr. Justice Cohen addressed Safeway’s claim as follows:

“I find that awarding compensation to Safeway for the use of its corporate resources to investigate the theft and assist the Crown and the police in the prosecution of the theft is fair, appropriate and not too remote.”

He proceeded to articulate the law:

“It is settled in law that a party is entitled to be reimbursed for the costs and expenses incurred when it is a victim of theft.”

Mr. Justice Cohen awarded Safeway damages in the amount of \$24,512.26 for investigation and prosecution costs.

It is noteworthy that Mr. Justice Cohen declined to award damages for “items relating to the civil litigation” (such as “[p]reparation of documents and video for civil litigation”). The judge drew a distinction between such items and “consequential damages for the expenditure of [Safeway’s] corporate resources on the criminal investigation and prosecution of Brown’s conduct”.

### **Conclusion**

*Canada Safeway Limited v. Brown* is a significant case. It confirms that employers have some ability to recover investigation and prosecution costs.



The question is whether Mr. Justice Cohen's decision would only have application in cases involving employee theft or whether the decision could have some wider application.

After all, the judge spoke of the entitlement of "a party ... to be reimbursed for the costs and expenses incurred when it is a victim of theft" [emphasis added]. Moreover, in support of his decision, he cited textbook authority relating to damages for conversion of a chattel, i.e. for unlawful appropriation of another's moveable personal property.

In our view, it is improbable that Mr. Justice Cohen's decision would be strictly limited in terms of application to cases of employee theft.

We say that for two reasons. First, the judge referred with approval to an earlier B.C. Court of Appeal case in which Madam Justice Southin held, among other things, that the Insurance Corporation of British Columbia was "entitled to recover ... its expenses of ... investigating" certain fraudulent insurance claims.

Second, Mr. Justice Cohen appears to have accepted that "expenditure of ... corporate resources on ... criminal investigation and prosecution" is compensable [emphasis added]. The use of the word "criminal" by the judge appears to signal that Mr. Justice Cohen's decision will apply to more than just cases of employee theft.

*If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.*

*Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at [www.ropergreyell.com](http://www.ropergreyell.com).*

\*\*\*\*\*

\* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. \*