

## Case In Point

# Court Orders Employee Who Breached Fiduciary Duty to Pay Former Employer \$20 Million

**Date:** April 4, 2018

An Ontario Court recently awarded damages of \$20 million for breach of fiduciary duty to Atlas Copco Canada Inc. (Atlas), from a former employee, in [Atlas Copco Canada Inc. v. Hillier](#). The employee (Defendant) had been employed with Atlas as a general manager of one of its divisions and later as a vice-president.

The fraudulent scheme in which the Defendant was alleged to have been involved, with other (now former) employees, included misappropriating funds through false advances and bonuses, the reimbursement of illegitimate expenses and inflated and/or false invoices. In criminal proceedings, the scheme was proven to have commenced in the 1990s and the Defendant became involved due to his dissatisfaction with his pension arrangements. He was convicted of defrauding Atlas and was sentenced to five years in prison. A restitution order was also made in favour of Atlas in respect of \$77,930, plus annuities purchased at a cost of \$1,400,000, both being “fraudulently received funds”.

In this case, Atlas brought a motion for summary judgment against the Defendant relying upon the guilty verdict and findings made at the criminal trial. The Court found that the Defendant was precluded by the doctrine of abuse of process from re-litigating findings made in the criminal proceedings, and accorded them significant weight.

The Court held that the Defendant was a fiduciary of Atlas and then considered the requirements needed to establish a breach of fiduciary duty: “(i) proof of the existence of a fiduciary relationship; and (ii) an act of the fiduciary that betrays the beneficiary’s trust, whether or not the fiduciary gains a benefit.”

It referred to the sentencing decision, which found that the Defendant knew of the fraud scheme, how it worked and was in the “best position to put a stop to it ... his passive acquiescence allowed the fraud to continue.” The Court concluded that the Defendant had breached his fiduciary duty to Atlas, noting that:

A fiduciary does not have the option of remaining mute in the presence of an identified, known scheme that is actively harming his employer. Still less is he entitled to accept benefits and payments that I have inferred were in whole or in part made in return for his silence.



Claims of civil conspiracy and civil fraud were dismissed.

The Defendant was found liable for all the damages he failed to put an end to, extending up until the time the employment of the employees involved in the fraudulent scheme was terminated.

The net overbilling amounted to approximately \$22.3 million and the claim was for \$20 million, which was what the Court awarded. Atlas was ordered to account to the Defendant and credit against the award for any future net recoveries received from other co-defendants or participants in the same fraud.