

The Criminal Side of Debt

Collection By Albert S. Frank, LL.B.

Most people understand that it is illegal to collect a debt by the use of guns and knives. Criminal violence is criminal violence, even if the motivation is to collect a just debt.

But what about the more subtle connections between debt collection and the criminal law? Here are a few of the numerous possible points of contact.

Threatening Criminal Prosecution

Many people get the bright idea of telling a dishonest debtor that there must be prompt payment or the matter will be reported to the police and the debtor will be prosecuted. Unfortunately, although threatening criminal prosecution may seem to be an efficient way to force payment, such threats are illegal. According to section 346 (1) of the *Criminal Code*:

Extortion - Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person... to do anything or cause anything to be done.

There is an exception to this, sub-section

(2), which states "A threat to institute civil proceedings is not a threat for the purposes of this section". Notice that it says civil proceedings, not criminal proceedings. The courts have said section 346 means that to collect a debt it is perfectly acceptable to threaten a lawsuit, but it is a criminal offence to threaten criminal proceedings.

It does not matter in the slightest whether there really is a debt or whether the person doing the threatening honestly believes that there is a right to the thing being demanded. The Supreme Court of Canada made it plain in the case of *R. v. Nattarelli* [1968] 1 C.C.C. 154 that neither a right to the thing being demanded nor an honest belief in such a right would in themselves be a defense.

Compounding

Financial professionals are used to the compounding of interest or the compounding value of an investment. In criminal law, compounding is something quite different.

According to section 141(1) of the *Criminal Code*:

Compounding indictable offence – *Every one who asks for or obtains or agrees to receive or obtain any valuable consideration*

for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence....

The essence of "compounding" is the exchange or attempted exchange of the concealment of a crime in return for valuable consideration. This could be an offer by a creditor to conceal a fraud in exchange for repayment or compensation for the fraud.

The "valuable consideration" does not have to be obtained or received in order for the crime of compounding to exist – it is enough that it was asked for or agreed. So a creditor who tries, unsuccessfully, to collect by offering not to report the debtor's crime, could be guilty of compounding.

As the Ontario Court of Appeal said in one such case, "The criminal law was not enacted for the assistance of persons seeking to collect civil debts."

Reporting First

There is a natural tendency to negotiate with the debtor, and to report the crime only once it is clear that the debtor will not pay back the ill-gotten gains. This approach not only makes the creditor

vulnerable to possible charges under the above-mentioned sections of the *Criminal Code* but also could hinder the prosecution of the debtor. This approach creates the impression that the criminal courts are being used to collect a civil debt, which could lead the prosecution to withdraw the charge against the debtor or could lead a trial judge to dismiss it.

Where the creditor seriously believes that the debtor has committed a crime and should be prosecuted and convicted, the safer approach is to report the matter to the police, and make sure that the charge is underway, before negotiating with the debtor.

Restitution

Our criminal law does have a helpful side for creditors. The *Criminal Code* contains various provisions for ordering someone who has been convicted of a criminal offence to make restitution to the victim.

One such provision is section 738, under which there can be an order requiring payment to the victim. According to Jeffrey Milligan, an experienced criminal defence lawyer and former prosecutor:

a creditor who wishes to benefit from this section should inform the prosecution in writing in advance, long before there is a

guilty verdict or trial.... Prosecutors will not always ask for a restitution order on behalf of a corporate creditor, especially an institutional creditor, unless there is a request in writing.

The creditor can file the restitution order with any civil court in Canada and use the usual judgment enforcement powers of the civil court. Alternatively, the creditor could ignore the restitution order and seek any civil remedies in a civil lawsuit, which could be quite useful if something more is needed than what is in the restitution order.

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Research has NOT been done to see if this article is still good law. Also, this is general information that might not apply to your particular situation.

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