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Giving a Rogue Notice of a Criminal Complaint is Not Extortion

On November 9, 2017, I co-chaired a panel at a Law Society of Upper Canada Continuing Legal Education Conference on Fraud Recovery Law. The panel members were Justice Todd Archibald, criminal defence lawyer Brian Greenspan, and my co-chair bankruptcy lawyer Frank Bennett.

The question posed to the panel that resulted in the most discussion between the panel members and inquiries from the audience pertained to whether reference to filing a criminal complaint in a demand letter to a rogue can be considered a form of extortion. In other words, can a fraud victim, or his or her lawyer, be subjected to a criminal extortion prosecution for giving notice of a criminal complaint in a letter demanding recovery for a fraud loss.

Back in 2013, I published a blog post on this issue entitled *A Fraud Victim's Response to a Fraudster's Allegations of Extortion.* As a result of the controversy over this issue at the conference, our firm has conducted additional research. We were unable to find any cases in which a lawyer or fraud victim was charged criminally with extortion for making reference to filing criminal proceedings in a demand letter.

What we did come across were cases where criminal fraud defendants brought motions to stay criminal proceedings against them on the grounds that threats of filing a criminal complaint in the context of a demand letter constituted an abuse of process. Some of the decisions contained a finding of abuse of process, and in other cases the applications for declarations of abuse of process was dismissed. As in most cases, the facts determined the outcome.

This blog post explains why fraud victims should not be deterred from giving notice to a rogue that a criminal complaint may be filed if the rogue refuses to pay a fraud loss. The bottom line is that fraud victims should be wary of the use of "demand" letters. It is our view that there is nothing criminal or unprofessional about giving a rogue notice that a criminal or regulatory

complaint will be made if the rogue does not explain his conduct by a fixed date. A notice letter is quite different in character and content than a demand letter.

The criminal charge of extortion, found at section 346 of the Criminal Code of Canada, provides that:

> Everyone commits an offence who, without reasonable justification, and with intent to obtain anything by threat or accusation, induces or attempts to induce any person to do anything or cause anything to be done.

What is important for fraud victims is that section 346 specifically provides that the threat to commence civil proceedings is not a threat for the purposes of this section. The concern we are addressing here is whether giving notice of making a criminal complaint is extortion for the purposes of the Criminal Code. The focus is on the phrase 'without reasonable justification.'

The Law Society Rules of Professional Conduct and Demand Letters

As discussed in our 2013 blog post, the Law Society of Upper Canada has opined on this subject. It is their view that a threat of criminal prosecution prior to the actual laying of charges for the purpose of inducing a settlement of a financial dispute is prohibited.

However, the Law Society of Upper Canada has also opined that a plaintiff lawyer may negotiate with a defendant lawyer in a civil action the withdrawal of criminal charges in exchange for payment, recognizing that the decision to withdraw a charge or reduce sentence is ultimately that of the Crown: see *Criminal Law May Not Be Used to Collect Debts*, The Law Society Gazette, Vol. 2, No. 1-3 (Toronto, Law Society of Upper Canada, May – Dec 1967).

The issue addressed in this blog post, being the issuing of notice letters to rogues, has not been the subject of an opinion by the Law Society of Upper Canada. For the reasons that follow, we are of the view the issuing of notice letters to rogues should not be prohibited. Rather, for public policy reasons the use of notice letters should actually be encouraged.

Extortion Generally

In a December 22, 2017, decision of Justice Gorman in the case of *R. v. Hunt*, reported at 2017 Carswell Nfld 503, the accused Hunt was charged with extortion for threatening to post nude photographs of his former girlfriend on Facebook. Mr. Hunt plead guilty.

The reported decision pertained to the sentencing phase of the case. The Court canvassed numerous cases of extortion to determine an appropriate sentence. Ultimately the Court held that the extortion engaged in by Mr. Hunt required judicial denunciation and a message of general deterrence. Mr. Hunt was sentenced to nine months in jail despite being a first time offender.

One of the cases reviewed in the *Hunt* decision was that of *R. v. Fattore*, 2017 ONSC 2410. In this case the accused had threatened a paralegal that he would make a complaint to the Law Society of Upper Canada that the paralegal had used unlicensed third parties to attend court if the paralegal did not pay him $10,000. Mr. Fattore suggested to the paralegal that the Law Society would disbar him if the complaint was made. The Court in the *Fattore* case issued a suspended

sentence primarily on the basis that the paralegal did not suffer a loss and reported the matter to police immediately. Key to this decision was that Mr. Fattore had not suffered any loss.

As mentioned above, none of the cases reviewed in the *Hunt* or *Fattore* decisions pertained to fraud victims or their lawyers sending letters to rogues demanding payment and advising that a criminal complaint would be made if payment was not received. That said, the Courts in *Hunt* and *Fattore* state that extortion is a serious criminal offence for which denunciation and general deterrence are the primary sentencing factors. Fraud victims should therefore be careful with the wording used in a letter wherein they seek payment by a rogue.

Abuse of Process Generally

A classic scenario of a fraud victim using criminal proceedings to collect a private debt was reported in *R. v. Bristow*, 1990 CanLII 1117 (BCSC). In this case, the accused Bristow obtained over $100,000 from an investor named Bandhar on the condition that the funds be used to register a company on the BC Stock Exchange in which they both had an interest. Rather than use all of the money for the purpose for which it was provided, Bristow used some of it for his own personal purposes. A criminal complaint of theft was laid and the Court convicted Bristow on the basis that he used Bandhar's funds for purposes for which he did not have permission.

Bristow, however, brought a motion to stay the proceedings (sentencing) on the basis that Bandhar used the criminal proceedings for an improper purpose – that is to collect a civil debt. The facts are important to support Bristow's application. The Court found that:

1. Bristow was told by Bandhar and his other business partners in a private meeting that they knew of his theft and that if he did not resign his role in the company, they would file a criminal complaint with the police;
2. even after Bristow resigned his interest in the company, Bandhar went to the police and registered a theft complaint against Bristow for the purposes of dissuading him from seeking redress against him and his other business partners;
3. the plan of Bandhar and his business associates was deliberate;
4. the police were never informed by Bandhar and his business partners of the threat made to Bristow;
5. the police conducted no independent investigation, but rather relied on the investigation presented to them by Brandhar and his business associates; and
6. upon obtaining the concessions they wanted from Bristow, Bandhar and his business associates wrote the police and asked them to discontinue their investigation.

The Court concluded that the conduct of Bandhar and his business associates amounted to a private prosecution, the sole purpose of which was to obtain a civil remedy and to prevent Bristow from taking civil action against them. The Court reviewed a number of decisions where the criminal process had been used by complainants for the sole purpose of obtaining a civil remedy, and then stated:

> *It is important that the Courts remain vigilant and set a very high standard for the use of the criminal process, as the potential for abuse is great.*

> *The mere laying of a charge can cause great harm to a person's reputation, occupation and family even if it later turns out that the accused was innocent.*
>
> *The fear of being charged may induce a person to do things he would not otherwise do. No person should be permitted to use such a threat for any personal purpose or gain.*
>
> *The policy of the criminal law is to protect the public interest in seeing that justice is done. Any attempts to use the criminal law for personal purposes must be stopped without hesitation.*
>
> *The Criminal Code contains a provision regarding extortion...It can be inferred that a wrongful threat to institute criminal proceedings for the purpose of obtaining something could be extortion...Threats of criminal proceedings in certain circumstances can themselves be a crime.*
>
> *The Court must balance the public interest in convicting people who have committed an offence against allowing people to use the criminal process as a way of wrongly extracting civil remedies.*

Based on these reasons, the Court stayed the proceeding against Bristow as an abuse of process. No conviction was entered. But surprisingly, after staying the action, the Court went on to say:

> I do not, however, conclude that the threats by the complainants in this case amount to extortion.

No Abuse of Process if the Police Conduct their Own Independent Investigation

In a 2008 case reported as *R. v. Turcott*, 2008 BCPC 386, the Court rejected the accused's request for a stay of proceedings on the basis of an abuse of process relating to a demand letter issued by the complainant. In *Turcott* the Court found as fact that:

1. the accused committed an assault on the complainant;
2. after committing the assault, the accused was involved in an motor vehicle accident with the complainant as his passenger;
3. police attended the accident scene, investigated the accident, but were not aware of the assault;
4. four days later the complainant sent a letter to the accused seeking a "fair and equitable settlement" failing which a criminal complaint and a civil action may be filed;
5. the letter of the complainant was drafted without legal representation or advice;
6. the accused did not respond to the letter;
7. a week later the complainant filed a criminal complaint of assault;
8. no civil action was filed;
9. the complainant disclosed her settlement letter to police after giving her statement;
10. the police were concerned about the complainant's motives and disclosed the letter to the Crown;
11. the complainant testified that her settlement letter had no bearing on the purpose of her criminal complaint, and that her reason for making her criminal complaint was because she knew that she had been wronged;
12. the accused did not respond to the letter or make any payment of any kind.

On these facts, the Court found that no abuse of process had occurred. Central to the Court's findings was the fact that the police conducted their own independent investigation, and that the Crown conducted its own independent assessment of reasonable prospect of conviction. To state otherwise, neither the police nor the Crown demonstrated any interest in assisting the complainant with obtaining a civil settlement or judgment as against the accused.

The Court referred to the criminal text of the Honourable Justice Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd edition, under the heading *Collection of Debt*, where the author opined:

> Where a prosecution is used solely for the purpose of collecting a civil debt, the courts have regarded the prosecution as, in effect, a private prosecution and have stayed proceedings as an abuse of process. But this jurisdiction ought to be exercised very sparingly and only in exceptional circumstances.

The Court held in *Turcott* that it was clear that, while the complainant was of the view that a criminal conviction might assist her civil case if she were to bring one, the complainant's sole purpose in making the criminal case was not to obtain a civil remedy. Rather, one of the reasons the complainant made her complaint was to address the fact that she had been wronged (implying that the complainant also had other reasons).

In any event, the Court in *Turcott* held that the accused had not been prejudiced by MacDonald's letter, and that society's sense of decency and fair play would not be offended if the criminal prosecution were permitted to continue. Rather, the Court was of the view that the public's confidence in the criminal justice system would be impaired if the case did not proceed. In other words, for the public to have confidence in criminal justice system, cases should be permitted to proceed unless the complainant engaged in serious misconduct in the process.

The Sole Purpose Test & Reasonable Justification

What is clear from the foregoing discussion is that a criminal charge of extortion should not be commenced against a fraud victim, or their lawyer, if the victim's purpose in filing a criminal complaint includes the victim's interest in addressing a wrong done to him or her.

It is the victim's interest of reporting to public authorities the wrong done to him or her that is the "reasonable justification" as referred to in the extortion provision of the Criminal Code:

> Everyone commits an offence who, <u>without reasonable justification</u>, and with intent to obtain anything by threat or accusation, induces or attempts to induce any person to do anything or cause anything to be done.

To state otherwise, no one commits a criminal offence who, with reasonable justification, gives notice of the intention to file a criminal or regulatory complaint, and/or file a civil action. In order to have reasonable justification, in certain circumstances it is in both the victim and the rogue's best interest that the fraud victim set out the particulars of the facts to be alleged, and allow the rogue to explain his or her conduct, before making the complaint a public record.

Notice versus Demand

In any fraud recovery action it is good practice to first determine if the victim's money can be traced into an asset that can be frozen pending any civil and/or criminal action prior to putting the rogue on notice that he or she is being investigated. This strategy also is applicable to preserving evidence. We have published various blogs on these issues previously.

In those cases where it is not practical to attempt to freeze assets or to preserve evidence before giving notice to the rogue, it may be prudent to give the rogue the opportunity to explain his or her conduct prior to filing a civil action and/or making a criminal and regulatory complaint.

For example, often in fraud actions, like the *Bristow* case described above, the rogue may have a defence to the allegations of fraud which may have a bearing on the decision of whether or not to file a civil action and/or make a criminal and regulatory complaint. It is surprisingly common for complainants to have well-intended but mistaken beliefs in their own version of the facts.

For this reason, one direct and express purpose of sending a notice letter to a rogue is to give the rogue the opportunity to respond to the facts as the victim intends to file them. While an express and other purpose of the notice letter may be to discuss settlement, there is nothing mischievous or unlawful about giving a rogue an opportunity to correct any facts the victim may have erroneously particularized, and there is nothing mischievous or unlawful about giving a rogue an opportunity to settle the potential dispute with the victim.

In circumstances where it is appropriate, our practice is to write the rogue a notice letter and serve it by personal or alternative means with a draft Statement of Claim that advises the rogue of the complaint our law firm has received and the facts as we know them (as set out in the draft claim). It is further our practice to give the rogue a specific time period in which to advise of any errors in the facts as we intend to allege them, or to attend our office for a without prejudice settlement meeting. We expressly state in our notice letter that the document is not a "demand" for anything.

In other words, in our notice letters there is no demand for payment of a specified quantum of funds under threat of filing a criminal and/or regulatory complaint. If the rogue responds to the notice letter, we are open to without prejudice discussions. We do not make promises to accept the rogue's version of the facts or not to file a criminal and/or regulatory complaint based on a without prejudice discussion. We simply provide the rogue the opportunity to convince us why we should not issue a civil action and/or file a criminal and/or regulatory complaint.

As stated in the *Bristow* judgment:

> *The mere laying of a charge can cause great harm to a person's reputation, occupation and family even if it later turns out that the accused was innocent.*

The service of a notice letter reduces the risk of a wrongful accusation and potentially protects the victim from allegations or costs sanctions to which he or she may otherwise be exposed. This is the public policy reason for encouraging the use of notice letters in fraud cases.

Extortion and the Contempt Process

We draw support for the practice of issuing notice letters from the decision of *Doobay v. Diamond*, 2011 ONSC 4457. *Doobay* was a civil contempt proceeding. Civil contempt proceedings are deemed to be quasi-criminal in nature and afford a defendant accused *Charter* remedies if warranted. The defendant contemptor in *Doobay* sought to have the contempt motion dismissed on the ground the motion was improper and being employed by the plaintiffs to gain an advantage in a civil matter – in particular to gain an advantage in a settlement

The plaintiffs cited cases that distinguish a warning by an aggrieved party that civil penalties allowed under an administrative scheme or statute could be pursued from a threat to use the criminal process to obtain an advantage. The Court cited [*R*]. *v. 3 for 1 Pizza & Wings Inc.*, 2006 ONCJ 143 (CanLII), [2006] O.J. No. 1623 (Ont. C.J.), at para. 24:

> *...[I]n regulatory regimes similar to the one found in this application, courts have decided that an intimation to a person about harsh consequences, about potential prosecution, or about measures that could be used under a particular statute in the event the statute is not complied with, is no more than a reminder to that person of the types of penalties and enforcement measures that are available to the regulators for dealing with non-compliance, and is not necessarily a threat or extortion when viewed in that context.*
>
> *This principle has been recognized in some cases where the issue of threatened prosecution to achieve compliance was addressed and the statute contained various measures for regulators to use for obtaining compliance.*

In this context the Court held that the plaintiffs were clearly not using a criminal proceeding to gain an advantage over the defendant. Rather, the plaintiffs were simply asserting their right in the context of this litigation to call on the Court's authority to order the defendant to do what the Court had previously ordered him to do.

Extortion and Cost Consequences

Fraud victims should also be aware that they could face cost consequences if they make threats of criminal prosecution if a demand for payment is not made. In the 2009 case of *Scherf v. Nesbitt,* 2009 ABQB 658:

> *Not every situation of bullying conduct outside of, but related to, court process is amenable to sanction by way of costs: before imposing punitive costs for conduct which is not directly part of the court process, the court must be satisfied about not only the external circumstances of the conduct but also that there was no reasonable justification or excuse for the conduct.*
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> *In all litigation, but especially in domestic litigation, a court must be sensitive to the fact that emotions may run high and that litigants may say or write inappropriate things in the heat of the moment. Moreover, when weighing the consequences of statements which appear to be extortionate, it is both appropriate and necessary to take into account the possible good faith of the person making them, i.e. the possibility that the person making them was not doing so with the deliberate intention of applying wrongful pressure.*
>
> *Despite the latitude which must be granted in relation to emotional statements in emotion-charged circumstances, there is a line which a litigant cannot cross. That line is drawn at extortion. Extortion is illegitimate pressure; in the litigation context, that*

> *illegitimate pressure can be either the threat of institution of legal proceedings or the threat of harm unless existing proceedings are withdrawn.*
>
> *In either case, the extorter has abused the court process. Where the court is satisfied that an abuse of process has occurred, costs is an appropriate sanction for the abuse; the level of costs imposed is within the court's discretion and will vary according to the court's assessment of all pertinent circumstances.*
>
> *Here the court is satisfied that Mr. Nesbitt's e-mails were extortionate: Mr. Nesbitt knowingly applied illegitimate pressure on Dr. Scherf by threatening to publicly disclose material which Mr. Nesbitt knew that Dr. Scherf wished to keep private. Obviously, the extortion was unsuccessful; that is not a reason to withhold sanction for the conduct.*

In the *Scherf* case the court held that an appropriate sanction was to have the Plaintiff pay double the cost tariff rather than impose a full indemnity of costs.

Reasonable Justification or Excuse

In *R. v H.A.* [2005] O.J. No. 3777 the Ontario Court of Appeal discussed the concept of "reasonable justification or excuse" as a defence to an allegation of criminal extortion as follows:

> *83 I think the phrase "reasonable justification or excuse", used in the context of the crime of extortion where the accused seeks to collect a debt, exists to distinguish between situations where individuals use what could reasonably be regarded as warranted or legitimate - albeit perhaps harsh - tactics to collect debts, and situations where the means used to attempt to collect those debts goes beyond what could reasonably be regarded as warranted or legitimate.*
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> *The "reasonable justification or excuse" defence seeks to draw the line, for criminal purposes, between hard bargaining and criminal blackmail. That line may be difficult to draw in any given case. Like any factual issue in a criminal trial, the dividing line between guilt and innocence will turn on the trier of fact's assessment of the evidence and the application of the burden of proof to that assessment.*
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> *In this regard, the defence of "reasonable justification or excuse" to an extortion charge is no more uncertain than other contextual defences that depend in part at least on an assessment of the reasonableness of the conduct of the accused in the circumstances measured against a necessarily general standard.*
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> *84 When an accused charged with extortion has used threats in an attempt to collect a legitimate debt, the trier of fact must consider all of the circumstances, including the nature of the threat and the nature of the demand, to determine whether the Crown has proved beyond a reasonable doubt that there was no reasonable justification or excuse for the threat.*
>
> *In jury cases, trial judges will instruct juries that it is not every distasteful threat used to support a legitimate demand for repayment of a debt that will constitute extortion. The jury will be told that the threat must go beyond that which a reasonable person in the circumstances of the accused would view as a legitimate or warranted means of attempting to collect the debt.*

The essence of extortion is that an advantage is sought to be obtained by illegitimate pressure, or to state otherwise, to seek an advantage "not by violence, but by inspiring fear".

The Consequence of Extortion by a Plaintiff in the Civil Context

The Court in *Scherf v. Nesbitt,* 2009 ABQB 658 summed up well the consequence to a plaintiff in the civil context if he or she crosses the line of what the Court considers extortion:

> *In summary, despite the latitude which must be granted in relation to emotional statements in emotion-charged circumstances, there is a line which a litigant cannot cross. That line is drawn at extortion.*
>
> *Extortion is illegitimate pressure; in the litigation context, that illegitimate pressure can be either the threat of institution of legal proceedings or the threat of harm unless existing proceedings are withdrawn. In either case, the extorter has abused court process.*
>
> *The fact that the illegitimate pressure has not been successful in modifying a party's conduct is, of course, irrelevant; it is the application of the pressure which is the wrongdoing, not the result.*
>
> *Where the court is satisfied that an abuse of process has occurred, costs is an appropriate sanction for the abuse; the level of costs imposed is within the court's discretion and will vary according to the court's assessment of all pertinent circumstances.*

Inquiries

At Investigation Counsel, we investigate and litigate fraud recovery cases. If you discover you are a victim of fraud, contact us to have your case assessed and a strategy for recovery mapped out before contacting police or alerting the fraudster. We also promote victim advocacy and academic discussion through various private and public professional associations and organizations. If you have an interest in the topics discussed herein, we welcome your inquiries.

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