To Sue Or Not To Sue? –

Collection Of Accounts Receivable

by Elliott Goldstein, BA., LL.B.

"To sue or not to sue: that is the question:
Whether 'tis wiser to write off the debt
and suffer a loss of fortune,
Or to take to court the debtor who will not pay,
And by litigating; get judgment and perchance, collect?"

(with apologies to William Shakespeare)

Imagine this situation. You contracted with a customer/client to perform certain services and/or deliver certain product. You performed and delivered as agreed and expected full payment within a reasonable period of time. Unfortunately, you did not get paid the agreed upon amount. Months have gone by and the customer/client has ignored your numerous invoices, statements of account, final demand letters, and phone calls for full payment. Sound familiar? It has happened to all of us. What do you do?

The solution is simple: you call a lawyer, explain the facts, give the lawyer all the relevant documents (contracts, invoices, demand letters, *etc.*) and seek advice on whether or not to sue. Your lawyer should review everything, check all calculations including interest, locate the customer/client, and determine whether there has been an insolvency or bankruptcy. If the customer/client is solvent, the assets should be located.

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The lawyer then prepares a formal, legal, demand letter which is sent to all known addresses of the customer/client.

Before issuing a statement of claim against the customer/client, the lawyer should advise you on whether to sue in Small Claims Court (maximum claim in Ontario is $6,000 but this differs in other provinces) or a superior court (for example, Ontario Court of Justice General Division, or Supreme Court of British Columbia) and in which jurisdiction (*i.e.*, Toronto, Vancouver).

Assuming no payment is received, you instruct your lawyer to issue the claim naming the customer/client as the defendant. Be careful to use the correct, legal name of the customer/client, not simply the business name or style. The actual customer/client may be a company, partnership, or individual who operates, trades, or carries on business under the name found on the invoice.)

Once issued, the claim is served on the customer/client, now called a defendant, who then has a certain period of time (usually 20 - 30 days) to respond by filing a defence. If defended, the action is either placed on a list of cases to be tried (by a small claims court judge), or discoveries take place (in the superior court system). If the defence is just a stalling and delaying tactic and lacks merit (*i.e.*, discloses no triable issue), instruct your lawyer to bring a motion for summary (quick) judgment.

If no defence is received then your lawyer will requisition a default judgment and advise you on how best to collect on it.

If the case does not settle, goes to trial, and you are awarded judgment you can recover your legal costs (lawyers' fees and disbursements). Some small claims courts may allow up to $300 as a counsel fee at trial or up to $300 as compensation for inconvenience and expense. Superior courts have a discretion to award solicitor-client costs (approximately 75% of legal costs) or party-party costs (approximately 25%) to the successful party.

Once you have a judgment for the payment or recovery of money, you must enforce it. The easiest way is simply send a copy of it to the defendant (now called the "judgment debtor") and demand payment. The demand letter should set out the amount of the judgment debt, including prejudgment interest, court costs, and, if any, counsel fee or compensation for inconvenience and expense. The letter should contain a clear warning to the judgment debtor that unless you, the judgment creditor, receive payment in full within one week, you will take further steps to enforce the judgment without further notice. Any court costs (*e.g.*, fees for issuing, serving, or filing documents) are added to the judgment together with post-judgment interest.

Unfortunately, a judgment debtor rarely pays in response to a demand let-

ter. So, it is very often necessary to conduct an examination of the judgment debtor, and then, using the information obtained, do a garnishment (attachment) of money or debts owed to the judgment debtor by third parties (banks, employer, customers, *etc.*) and/or file a writ of seizure and sale with the sheriff and land registry (or titles) office.

At the examination the judgment debtor is put under oath and is asked questions about his assets, what property he owns, who owes money to him, where are his bank accounts, *etc.* If the judgment debtor is a corporation, then you can examine its officer or director. If a partnership, then you can examine any partner.

In Ontario – and the procedure is similar in other provinces, except Quebec – you can requisition a Notice of Garnishment directed to the garnishee (employer, bank, or third party). This notice is served upon the garnishee who then has usually 10 days to respond by paying all or part of the judgment debt, or explaining why no funds will be remitted. If the garnishee ignores the garnishment notice and fails to respond with money or an explanation, that garnishee may be held personally liable for the debt.

Garnishment of wages, salary, and commissions is limited to 20% of net income (gross income minus source deductions). In other words, 80% is exempt from garnishment. However, no such limitation applies to bank accounts or other bank funds, accounts receivable, such as book debts, and other debts, which are subject to garnishment in their entirety. Exempt from garnishment are joint bank accounts, unless both account holders are debtors.

Some assets can be seized and sold using a writ of seizure and sale. However, before seizing any asset, your lawyer should conduct a search under the *Personal Property Security Act* (as it is known in Ontario and in some other provinces) using the name of the judgment debtor. The search will reveal if any of the judgment debtor's assets have been given as security in favor of another creditor. For example, office equipment and vehicles are often leased from third parties. Just because the judgment debtor has possession of them does not mean that he is their legal owner. It is pointless to seize assets that do not belong to the judgment debtor and legal liability to third parties may result.

Perhaps the wisest course is to age accounts receivable and monitor them carefully. If you haven't been paid in 60 days – do not wait 90 days – then extend no more credit to that debtor and immediately consult a lawyer.

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