

Lawyers regulating lawyers?

By Alice Woolley

Decision Considered:

Law Society of British Columbia v Laarakker Law Society of British Columbia Disciplinary Hearing Reports, September 21, 2011

Introduction

A disciplinary decision by the Law Society of British Columbia does not fall within the usual mandate of ABlawg. It is not an Alberta decision, nor even a judicial one, and has no direct precedential significance for Alberta lawyers or courts. The decision warrants comment, however, because the threat it creates to the legitimacy of lawyer self-regulation applies to all Canadian law societies. Specifically, the misdirection in regulatory energy reflected by the decision of the Law Society of British Columbia in this case is something to which all Canadian law societies have shown themselves to be susceptible.

This comment is a plea to the law societies to think more carefully about the cases they pursue; to take more seriously conduct by lawyers that undermines the rule of law; and, to allow lawyers to hold each other to account in circumstances where there is a reasonable basis to allege misconduct, even if lawyers sometimes do so with “incivility”. Law societies suggest that the public will lose faith in the legal profession if we do not treat each other with courtesy and civility, perhaps thinking that our own criticisms will make the public critical, and less able to access legal services even if they need them. I want to offer an alternative suggestion: the public will lose faith in us if we silence legitimate criticism and debate, and if we do nothing about lawyers who engage in conduct that could be reasonably characterized as extortion with letterhead.

The Decision

Gerry Laarakker is a sole practitioner in the Okanagan Valley. An Ontario lawyer, M, wrote a demand letter to Laarakker’s client. Laarakker’s client’s teenage daughter had been caught shoplifting at a retail outlet. The letter demanded that the client pay compensation to M’s client in the amount of \$521.97. The claim was based on an allegation that the client had failed to provide reasonable supervision of her daughter. Although not set out in the Law Society of British Columbia’s decision, the amount of \$521.97 likely represents the cost to M’s client of dealing with shoplifting, calculated on a cost per shoplifter basis. That assumption is based on case law dealing with similar claims, discussed in a limited way below.

Laarakker responded to the demand letter in two ways. First, he wrote a letter to M that Laarakker himself has conceded was intemperate, and which I think can reasonably be described as rude. Second, Laarakker participated in an online discussion in which a similar letter to M’s

demand letter was being discussed, although the Law Society's decision does not say whether that the letter was written by M. Laarakker in that blog discussion said the following:

I am a lawyer.

This guy is the kind of lawyer that gives lawyers a bad name. He is relying on intimidation and blackmail to get the lousy \$500. Don't pay him. I hate these sleazy operators.

Speaking as a lawyer, he would have little chance of collecting in court. He would have rto [sic] prove that a chiold [sic] was a habitual criminal. As far as an adult is concerned, he has to prove the loss.

Also remember this, he has to bring the action in a court near to where the incident took place (at least in BC) Gueuss [sic] what – that ain't going to happen (Law Society Decision, para 13)

The Law Society of British Columbia concluded that sending the letter and posting the blog constituted professional misconduct and, in the context of the blog posting, might also constitute conduct unbecoming (i.e., misconduct in the lawyer's personal life) (Law Society Decision, para 32). The Law Society noted the clear direction in the British Columbia Rules of Professional Conduct to treat other lawyers with courtesy and respect, provisions that exist in all Canadian codes of conduct and have been enforced in disciplinary decisions in British Columbia and elsewhere. The Law Society held that it was irrelevant whether M was a "rogue lawyer" as Laarakker argued, and said that the "duty of courtesy and good faith applies to all counsel, regardless of one's feelings about them" (para 43). The Law Society said that if Laarakker had an issue with M's conduct, he should have made a complaint to the Law Society of British Columbia or to the Law Society of Upper Canada:

...Even if the Ontario Lawyer can be considered to be a "rogue", it is not the Respondent's place to pursue some form of vigilante justice against that lawyer by posting intemperate personal remarks or by writing letters that do not promote any possibility of resolution of the client's legal dispute.

Clearly, the appropriate avenue for the Respondent to take would have been to file a complaint either with the Law Society of Upper Canada or the Law Society of British Columbia. Obviously, the Respondent did not take those steps. Thus, by taking actions that he felt were protecting the integrity of the profession, he was achieving the opposite result (paras 45-46)

The sanction to be imposed on Laarakker for this misconduct remains to be determined.

Comment

My general objection to disciplining lawyers for incivility are well known ([Does Civility Matter](#)), and I am neither going to repeat those objections here, nor try to convince anyone of the general point. Rather, I want to suggest that at the very least law societies should be more careful, and in particular they should be careful about regulating civility in a way that makes the profession look self-protective and self-interested, and unconcerned about the welfare of the public over whom lawyers can exercise real and sometimes illegitimate power. In particular, I will defend the following propositions:

1. In some circumstances, demand letters sent by lawyers on behalf of retailers seeking recovery of losses associated with shoplifting either may not rest on a legitimate cause of action, or may claim losses that courts do not recognize.
2. When lawyers send demand letters that they have a reasonable basis to know are not based on a cause of action, that seek losses that are not legally recoverable, and which the lawyers have a reasonable basis for knowing that their clients will not pursue in court, they act unethically.
3. Law societies do not discipline lawyers for sending demand letters that are not based on a cause of action, or that seek losses that are not legally recoverable. The negative consequences for such letters are likely to be judicial, or informal regulatory control by other lawyers through mechanisms of “shaming” or “shunning”.
4. Unless the law societies are going to exert regulatory control themselves, they should not discipline lawyers who engage in shaming and shunning of other lawyers who have at least arguably acted unethically, even if the shaming and shunning is not polite.
5. Any other approach undermines the legitimacy of self-regulation, reinforcing the perception that law societies want to suppress criticism rather than engaging with their only justifiable mandate: protecting clients and the legal system from the harms that can be done by unethical lawyers.

Demand Letters from Retailers

Demand letters from retailers to shoplifters or their families may make several claims. Notably for our purposes they may, first, claim from the shoplifter losses associated with preventing and prosecution shoplifting, and may also claim punitive damages. They may additionally claim damages arising from loss or damage to the goods stolen. Second, they may claim recovery from the parents of the shoplifter, as well as (or rather than) from the shoplifter himself.

These are claims with which courts have had some difficulty. I have not researched this question in detail, but one or two cases do indicate the problem. With respect to the losses, for example, in its decision in *Hudson’s Bay Co. v White* (1997) 32 CCLT (2d) 163 (Ont Gen Div), the Court was only willing to allow the Bay to recover \$100 in nominal damages from a shoplifter rather than \$1,167 per shoplifter security costs as the Bay had claimed (para 17). The Court noted that the Bay had immediately recovered the stolen goods, and so could make no claim for loss or damaged property. And with respect to trespass, the Court held that the shoplifter had committed trespass to chattels and may well have committed trespass to property, but that this did not give rise to a claim of any more than nominal damages. The Court had significant difficulty in characterizing a claim for loss prevention as compensatory, since the Court thought it was a reasonable possibility that those costs were passed on to consumers in the cost of goods. If the loss was the consumer’s, not the Bay’s, then “why should the Bay recover?” (para 19). The Court noted that allowing recovery might amount to double compensation (para 27). Further, the Court was not convinced that the burden to the civil justice system of allowing prosecution of these claims was warranted by the size of the Bay’s “loss” which, in the overall context of the Bay’s business, may be inconsequential (para 20). The Court also thought the basis for claiming or calculating these damages was doubtful – it would be the equivalent of the state pursuing from a criminal offender “who is also a tortfeasor, the costs of the police, administrative, judicial and prison resources necessary to investigate, apprehend, prosecute and imprison the individual” (para 24). Thus the Court only allowed recovery of nominal damages of \$100. On appeal the Court of Appeal varied to the extent of allowing punitive damages of \$300, although they did not question or comment on any of the reasons offered in the court below on the recoverability of damages otherwise (1 C.P.C. (5th) 333). (See also, *Southland*

Canada Inc. v Bradley Zylak, 1999 ABPC 107, declining to allow a judgment in debt for shoplifting associated losses).

The courts have also expressed concern about the substantive validity of claims against the parents of shoplifters. In *DCB v. Zellers Inc.* [1996] MJ No 362 (QB) (leave to appeal denied: (1996) 131 WAC 198), the Court invalidated a “settlement” between a retailer and a parent on the basis that the retailer had no discernible cause of action, such that the retailer’s “settlement” of that case was not good consideration. In the course of the judgment the court noted this about the conduct of the lawyer in writing the demand letter:

Whatever legal opinion or opinions Zellers might have had regarding their claims generally, I cannot believe that they seriously thought that this claim could succeed or that they seriously intended to pursue it to court if it was not paid. Mr. Arkin was not called as a witness at the trial and so we do not have the benefit of what his opinion of the claim was. But I assume that as a competent and responsible lawyer, he knew or ought to have known that the claim had no prospect whatsoever of succeeding in court and that it would be futile to pursue it (para 18).

This is not a comprehensive study of the issue and, as noted, I have not exhaustively researched this point. With that cautionary note, these judgments do provide some reason to posit that in some circumstances there is no legal basis for the demands that retailers make either in terms of the quantum of damages, or in terms of the actual claim being made. Further, at least in the case of the *Zellers* judgment, there is some reason to believe that lawyers who send these letters are aware that their clients do not have a legal basis for the demands that they are making, have no intention of proceeding to court, and send the letters anyway. They do so, presumably, because sometimes the recipient will pay, because of fear, ignorance and the absence of legal advice.

The Ethics of Demand Letters

Lawyers are under relatively few constraints with respect to the pursuit of frivolous claims. Both case law, and codes of conduct, focus on bad faith or maliciousness by the lawyer, rather than on a lawsuit’s substantive validity in restricting what lawyers may do (see in general, Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Toronto: LexisNexis, 2011) pp 75-81). Thus, a lawyer acting for a client may pursue in court claims of the nature described against shoplifters and their parents, even if those cases are most unlikely to succeed. Further, a lawyer may even send a demand letter in anticipation of commencing such an action, provided that the lawyer has a good faith and reasonable belief that the client does intend to pursue action against the shoplifter or his parents if the demand is not met. In those circumstances the ethical issue for that lawyer is one of competence, of placing unnecessary risk on his client who may end up with losses arising from cost-shifting, perhaps even solicitor-client costs, when a frivolous case proceeds to court. There is no meaningful ethical prohibition on lawyers pursuing dubious claims in court provided they are acting on instructions, and they and their clients are not acting with bad faith or malice.

Where, however, the lawyer knows that the case has no reasonable chance of succeeding in court *and*, further, where the lawyer knows that the client does not intend to pursue the claim in court, sending a demand letter is unethical. Codes of conduct do not expressly speak to this behaviour, but the fundamentals of lawyer ethics – the principles that justify what lawyers do – clearly indicate why the behaviour is unethical.

Why do we have lawyers? We have lawyers because of the function and nature of a system of laws in a democratic society. Laws exist as a solution to the problem of pluralism, to the fact that we have deeply competing and often irreconcilable conceptions of the right or best way to live, and we need to have ways of settling our disputes about those things without committing violence against each other. A system of laws creates a substantive resolution of our disagreements; it establishes the rules by which we agree to live no matter what we personally believe. It also sets out a system and procedure for settling our disputes about the application of those rules. Lawyers exist because the system of rules, and the procedure to enforce them, is complex and sometimes impenetrable, and without lawyers there is no way for the citizenry to access the social compromise that the law creates (for a more detailed explication of this view, see *Understanding Lawyers Ethics in Canada*, chapter 2).

When you think about it like that, the problem with lawyers sending demand letters that are not based on a cause of action, that seek damages that are not recoverable and that are sent with no intention of litigating either the claim or the quantum of recovery, becomes clear. Because the lawyer who sends that letter does not help her client access the compromise of law. She does not allow the processes of law to determine her client's rights and interests. Rather, the lawyer who sends that letter helps her client obtain money to which that client has no legal right or claim, and to do so outside the process of adjudication that the law creates. Doing that does not fulfill the lawyer's role as a conduit to the system of laws. Rather, it violates that role, undermining law's function as a source of social compromise, and facilitating the exercise of power without legitimacy or authority, the very thing a system of laws is designed to prevent.

Law society response to demand letters

To my knowledge, law societies do not discipline lawyers for sending unauthorized demand letters. I do not know of any specific decision with that result. Further, that sort of discipline is inconsistent with how law societies normally exercise their regulatory authority. Harry Arthurs once described law societies as engaging in an "ethical economy", in which they prosecute cases that are easy to prove, against lawyers who are more likely to submit to law society authority (see, e.g., Arthurs, Harry W. "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Eonomides et al, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) pp 105 et seq.). Empirical evidence suggests that law societies tend to discipline lawyers for morally unambiguous offences or ungovernability, and that the lawyers disciplined tend to practice alone or in small firms (Arthurs, *supra* and also Alice Woolley, Regulation in Practice, forthcoming and available on request). Prosecuting lawyers who write unsubstantiated demand letters does not fit within that regulatory scope.

What exists to stop lawyers from sending unwarranted demand letters? For most lawyers it is likely their own normative and moral commitments to being an ethical lawyer, and their understanding of the function that they discharge. For some lawyers it may be additionally the concern about developing a negative reputation with the courts to the extent the letter ends up considered judicially – few lawyers want to have the statements made about them that were made about Arkin in the *Zellers* decision. And for some lawyers the concern may be the perception and response of other lawyers. Extensive literature demonstrates that in society in general, and in the legal profession in particular, compliance with ethical norms is shaped and encouraged by informal regulatory structures, by the interactions and communications lawyers have with each other, and the way in which they demonstrate disapproval or approval of behaviour. Lawyers create ethical conduct in each other by the social messages they deliver, by the "shaming" and "shunning" that they engage in with lawyers who behave badly, and the message that sends to other lawyers who are considering violating professional norms. (see, for

example, Bernstein, Lisa, “Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry” (1992) 21 J Legal Stud 115; Kilpatrick, Judith, “Specialty Lawyers Associations: Their Role in the Socialization Process” (1997-98) 33 Gonz L Rev 501; Levin, Leslie “Specialty Bars as a Site of Professionalism: The Immigration Bar Example” (2011) University of St. Thomas Law Journal (forthcoming); Wendel, Bradley W. “Regulation of Lawyers Without the Code, the Rules, or the Restatement: or, What do Honor and Shame have to do with Civil Discovery Practice” (2003) 71 Fordham L Rev 1567)

The problem with the *Laarakker* decision

As hopefully the cautious nature of my analysis above indicates, I am not claiming that M acted unethically when he sent the demand letter to Laarakker’s client. I do not have enough facts to judge M’s conduct, to know whether there is some other case law or legislation that might support his demand, to know whether there is something particular about Laarakker’s client and her child that make the claim valid, or to know whether M and his client had a *bona fide* intention to go to court that might make sending the demand letter advance warning rather than something more insidious.

What I am claiming is that the circumstances are sufficient for Laarakker to reasonably believe that M was acting unethically. They are also sufficient to suggest that any complaint that Laarakker had brought to either the Law Society of British Columbia or the Law Society of Upper Canada would have resulted in no action, even if M were acting improperly. Further, I am suggesting that the form of social control likely to prevent lawyers from sending unethical demand letters is peer condemnation of lawyers who appear to have done so. Such peer condemnation communicates ethical norms – that sending these letters is bad – and imposes consequences, albeit relatively soft ones, on lawyers who skirt close to violating those norms. Remember that the letter sent by Laarakker wasn’t public until M made it so. And the comment he made on the blog does not appear to have been directed at M necessarily. In the circumstances M has simply received a peer message, one that it is good for lawyers to receive when they may be coming close to an ethical line.

It may be of course that Laarakker could have delivered the message in more polite terms. It may not be, however, that a more polite message would have been as effective as a form of informal regulation, as a way of disciplining conduct that may be veering towards the ethically doubtful, if not already there.

The self-regulatory concern

The Law Society of BC is unconvinced by this analysis, or so it seems. They are of the view that even if M was a rogue, then Laarakker’s only option is to complain to the law society. They valorize civility and claim that incivility is inconsistent with the best interests of justice (para 35, citing *Law Society of BC v Greene* 2003 LSBC 30). But what is the logical conclusion of this analysis given the broader circumstances? The logical conclusion is that lawyers who do things that are unethical will not be held to account. They will not be held to account by the law societies who exercise their disciplinary authority so sparingly. They will not be held to account by other lawyers, since even when said politely, accusing someone of unethical conduct is neither civil nor courteous. They will be left to take advantage of the power that their status as lawyers gives to them, regardless of the effect of that exercise of power on the proper functioning of the system of laws.

Do the law societies really believe that this will give the public faith in self-regulation as a way to protect the public interest? Surely it is not just to me that this looks self-protecting and self-serving? It may be that law societies do believe in the virtues of civility regulation in cases like this. But I am suggesting that it bears greater reflection, certainly greater reflection than was offered by the Law Society in disciplining Mr. Laarakker.