October 30, 2013

Lawyers Who Write Bogus Demand Letters: The Freemen in Our Midst?

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The phenomenon of organized pseudo-legal commercial arguments (OPCA) being used to advance claims not recognized by law has received a great deal of attention in the past year. From last year's judgment of Associate Chief Justice Rooke in *Meads v Meads*, 2012 ABQB 571 [*Meads*], to the recent occupation of a Calgary apartment by a Freeman-of-the-land who claimed it as an "embassy", OPCA litigants have disrupted the functioning of the legal system while attracting public attention and interest. In this column I argue that the defining indicia of OPCA are also present in the activities of some lawyers; specifically, in lawyers sending out demand letters based on spurious claims in the hope of extracting funds because of the fear and ignorance of those who receive them. I will further argue that our failure to address that conduct undermines our moral authority to challenge OPCA litigants and, worse, may contribute to a cultural climate of skepticism about the law's legitimacy and authority, which helps OPCA to flourish.

The OPCA phenomenon have been the subject of analysis by the courts (for a summary, see: "What has *Meads v Meads* Wrought"), the media (see, e.g., "More about the Freeman-on-the-land movement") and online commentary (see, e.g., "The OPCA Litigant Case"), including in an earlier column I wrote for SLAW ("The Human Excellence of Judging"). As set out there, one of the fundamental challenges posed by OPCA is that they manipulate the language and forms of legality to advance arguments and claims that the law does not recognize and that, in some circumstances are "inherently frivolous and vexatious" (*Meads* at para 554). They use arguments of jurisdiction and sovereignty to deny the jurisdiction of the court, and arguments of contract and consent to avoid the imposition of legal obligations. In his judgment in *Meads* Justice Rooke sets out the indicia of OPCA litigants noting for example their reliance on documents with unusual formalities and markings, atypical phrases and language, and reliance on "obsolete, foreign, or typically otherwise irrelevant legislation" (*Meads* at para 228). OPCA commonly deny the authority or jurisdiction of the court, or claim that the court must prove its jurisdiction over them.

These features suggest that the activities of the OPCA litigants are far removed from the work of Canadian lawyers. Lawyers and judges have to respond to the challenge that such litigants present, but they are presumptively unlikely to offer arguments that adopt legal forms while being substantively frivolous and vexatious.

This is, of course, largely the case. Yet when I read about the indicia of OPCA I am reminded of one activity that a small number of Canadian lawyers do engage in, which is sending demand letters to shoplifters or their parents, making legal claims that are substantively unmeritorious, or seeking an amount in damages that would not be sustainable even where liability was demonstrated.

Like OPCA litigants, these lawyers rely on statutes that have nothing to do with the claim that they pursue. Thus the letter referenced in *DCB v Zellers*, [1996] MJ No. 362, 138 DLR (4th) 309 (Man QB), listed statutes and regulations in support of its demand, but they were the rules of court and civil procedure, which do not support a substantive claim.

Like OPCA litigants, these lawyers list a series of causes of action that may only loosely relate to the claim they advance. Thus the letter noted on this website asserts an action based in "trespass to goods, fraud, deceit, breach of fidelity and/or conversion". While a suit arising from shoplifting may relate to trespass to goods, it is difficult to see what "breach of fidelity" would have to do with anything, and fraud and conversion add colour rather than substance, particularly since the shoplifter has been caught and (normally) the goods recovered.

Like OPCA litigants, these lawyers twist the concept of jurisdiction and authority in search of a substantively unmerited result. In their case, they do not deny the jurisdiction of the court in an attempt to avoid its authority. But they do assert claims against others while not bringing those claims to court for adjudication. They seek to obtain financial compensation for their clients, while apparently avoiding application of the case law that does not support that result (as discussed here).

The lawyers who write these letters may fairly be described as a small and marginal part of the legal profession. There are other lawyers who have done their best to discredit and respond to them (see, e.g., here, here and here). It is also the case that not every demand letter sent after a shoplifting incident matches this description. In jurisdictions where strict liability is imposed on parents, for example, claims asserted against them may occasionally have more substance than they do in jurisdictions where parental liability arises only from negligence. It should also be noted, though, that the companies who retain the lawyers are large corporations who certainly have in-house counsel to arrange their legal affairs and to instruct outside counsel. The letters thus cannot be attributed solely to a few professional outliers. And neither the occasional sending of a meritorious letter, or the activism of a few lawyers in response, has had much impact on the general practice.

Further, to the best of my knowledge, law societies do not investigate or discipline lawyers who send these letters. After receiving a complaint last year, the Law Society of Upper Canada declined jurisdiction to act:

> Please be advised that the Law Society has previously addressed the issue of the specific wording of these types of civil recovery letters and we are satisfied that this version of the civil recovery letter does not breach the Rules of Professional Conduct. The amount of civil recovery to which Mr. [name]'s client may or may not be entitled is a legal issue that falls outside of the Law Society's jurisdiction. Consequently, this file has been closed (see: "Lawyers Regulating Lawyers (Redux)").

As I have discussed elsewhere, there is some basis for the law societies' reluctance – they do not want to be placed in the position of adjudicating the legitimacy of legal claims ("Lawyers Regulating Lawyers (Redux)"). Yet that generally legitimate concern is misplaced and unfortunate when it leads the law societies to do nothing about lawyers whose behaviour distorts the law in the way these demand letters do.

It is unfortunate in terms of the actual matter of the letters, since what these lawyers do is

uncomfortably close to extortion, using their legal skills and authority to obtain funds for their clients to which those clients have no *bona fide* legal claim. But it is even more unfortunate in a world where OPCA litigants present a significant challenge to the functioning and legitimacy of our legal system. If lawyers engage in conduct not in essentials different from that of OPCA litigants, and legal regulators do nothing to sanction it, then how do we unambiguously condemn OPCA? How do we maintain the absolute separation from that behaviour that, as lawyers, we ought to enjoy?

Lawyers play a pivotal role in ensuring the rule of law. We help clients to access the law's entitlements, and to avoid its improper application. We ensure that its adjudicative system functions fairly. When we do so, we offer by example the counter-argument in favour of the authority and legitimacy of the legal system, and against the distortions and absurdities put forward by OPCA gurus and their adherents. But the lawyers who send these letters demonstrate the opposite. In abandonment of their fundamental professional obligation– an obligation that the OPCA litigants do not share – they treat the law as nothing more than an instrument for manipulation by the powerful. They act as if the law is not legitimate and authoritative, but is rather a tool to help you get what you want, whether or not you deserve it.

This stance on law taken by the few, when coupled with the complicity of the many, deprives us of our moral authority to object to the conduct of the OPCA litigants. As we resist what they do, our own membership engages in conduct that is in substance identical. Further, we show that their strategy is effective: with the skills to put a bogus argument in the proper form you will indeed get the result you want, even when you do not deserve it.

This has to change. As a profession we cannot allow the improper actions of a few to undermine the message that lawyers help to sustain the rule of law, in their own actions and when resisting the strategies employed by OPCA gurus and their adherents.

This post originally appeared on Slaw.