ZEALOUS ADVOCACY OR EXPLOITIVE SHAKEDOWN? THE ETHICS OF SHOPLIFTING CIVIL RECOVERY LETTERS

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INTRODUCTION

Twenty years ago, Canadian retailers adopted the American practice of sending letters to alleged shoplifters and their parents, demanding payment of several hundred dollars as "civil recovery". In the United States, this practice is backed by state legislation that provides retailers with a statutory cause of action against shoplifters. In Canada, however, no similar legislation exists. Instead, Canadian retailers have attempted to justify their "civil recovery" claims in the common law of torts. Many retailers retain lawyers to send "shoplifting civil recovery letters" ("SCRLs") to give their demands an increased sense of authority.

Many in the Canadian legal community have criticized lawyers who send SCRLs, characterizing the practice as "extortion with letterhead,"[1] "bullying and intimidation",[2] a "predatory practice",[3] and "an example of legal strong-arming."[4] These critics argue that SCRLs are unethical, as they advance invalid legal claims, and threaten litigation where retailers do not intend to sue.[5] Despite these repeated criticisms, Canadian law societies have not

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[1] Alice Woolley, "Lawyers Regulating Lawyers?" (3 November 2011), *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (blog), online: <ablawg.ca/2011/11/03/lawyers-regulating-lawyers/>.

[2] "Retailers Demand Shoplifters Pay Security Costs", *CBC News* (30 June 2010), online: <www.cbc.ca/news/retailers-demand-shoplifters-pay-security-costs-1.912834>.

[3] Randi Druzin, "A $379 Tube of Lip Gloss?", *The Globe and Mail* (7 August 2004) M2.

[4] Sherel Purcell, "No Frills' Shoplifting Racket", *Now Magazine* (9 June 2005), online: <nowtoronto.com/news/no-frills-shoplifting-racket/>.

[5] See discussion at 9-11 below. See *infra* note 37.

publicly condemned or disciplined lawyers who send SCRLs. This article supplements existing critiques of this practice, and argues for greater law society regulation through a detailed analysis of the common law claims advanced in SCRLs and whether advancing such claims violates a lawyer's ethical obligations.

Part I begins by exploring several common features of SCRLs. Part II addresses the beginnings of this practice in Canada and the motivations of Canadian retailers who decided to send SCRLs. The final four parts of this article constitute the heart of the analysis, by introducing the concerns to date with SCRLs, weighing the validity of such concerns, and suggesting policy solutions. This article concludes that lawyers who send SCRLs act unethically by advancing legal and factual claims that are without a good faith basis. In order to combat this problem, law societies should take action by publishing practice directions on the topic of SCRLs and by disciplining lawyers who violate their professional obligations when sending these letters.

This analysis is supported by a review of SCRLs sent by Canadian lawyers between September 2013 and March 2014. A total of twelve correspondences prepared by lawyers for retailers and sent to suspected shoplifters or their parents were received following requests to legal aid clinics located at Ontario law schools and Justice for Children and Youth, a non-profit legal aid clinic located in Toronto. Seven of the letters received were initial demand letters, the other five were follow-up correspondence sent to offer a payment plan to the recipient, give notice of a default under the payment plan, or give a final notice to the recipient.

I. Defining the Phenomenon: What are Shoplifting Civil Recovery Letters?

SCRLs can be classified as a type of demand letter. For civil litigators, sending demand letters—that is, "letter[s] written on behalf of a client in which the [lawyer] demands that the recipient take or cease taking a certain action"[6]—is a routine practice. Sending demand letters can benefit both clients and the administration of justice. By providing an opportunity for disputes to

[6] Elizabeth Fajans, Mary R Falk & Helene S Shapo, *Writing for Law Practice* (New York: Foundation Press, 2004) at 232.

be resolved without resort to litigation, demand letters may lead to faster and cheaper resolution of disputes.[7]

The SCRLs at issue here are a particular subset of demand letters: namely, demand letters sent by lawyers acting for retailers to suspected shoplifters or their parents. These letters are sent to individuals after they have been apprehended at a retail location and accused of shoplifting. At the point of apprehension, the retailer collects the personal information of the individual, which is then passed along to the retailers' lawyers to send SCRLs. Given this context, it seems safe to assume that any goods at issue have been returned to the retailer at the point of apprehension and before SCRLs are sent. Indeed, SCRLs do not appear to ever request that goods be returned. Although SCRLs vary in their content, redacted letters provided by Ontario legal clinics reveal three common features: first, a demand for payment; second, a claim that a viable cause of action exists; and third, a claim that if payment is not received, the retailer may commence a civil action against the alleged shoplifter or their parents.

(a) Demand for payment

Of the letters reviewed, the amount demanded varied from $300 to $595. In all the letters, there was no mention of the retail value of the goods alleged to have been stolen. However, given that amounts of $300 to $595 were claimed, one may reasonably conclude that the amount demanded is disproportionate to the retail value of such goods.[8] This is supported by media reports of retailers demanding amounts from SCRL recipients that vastly exceed the value of goods allegedly taken. The chart below provides examples taken from these reports.

To the extent that SCRLs provide an explanation as to the reason behind the demanded payment amount, it is often suggested or directly stated that it is for the aggregate "costs associated with the detection, apprehension,

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[7] For the potential benefits associated with demand letters, see Bret Rappaport, "A Shot Across the Bow: How to Write an Effective Demand Letter" (2008) 5 J of the Assoc of Leg Writing Directors 32.

[8] National Association for Shoplifting Prevention, *Shoplifting Statistics*, online: <www.shopliftingprevention.org/what-we-do/learning-resource-center/statistics/> ("shoplifters commonly steal from $2 to $200 per incident depending upon the type of store and item(s) chosen").

recovery of goods and damages associated with shoplifting".[9] In cases where the recipient fails to make payment after receiving a letter, a further notice is sometimes sent with an increased amount. This increase is attributed to "additional administrative costs incurred."[10]

Item alleged to have been taken	**Amount demanded in SCRL**
Chocolate bars	$325,[11] $125,[12] $475[13]
Make-up (approximately six dollars in value)	$610[14]
Two packages of cheese and half pound of butter	$250[15]
Tube of lip gloss	$379[16]

(b) A claim that a viable civil cause of action exists

In addition to demanding money, the SCRLs reviewed also claim that a viable cause of action exists against the recipient. In cases where the SCRLs are addressed to the parent or guardian of a youth accused of shoplifting, the letters indicate that "the retailer takes the position that it has the right to claim damages" from the parent or guardian on two different bases: first, "theft, damages, and conversion", and second, "for failing to provide reasonable supervision of the young person."[17] SCRLs addressed to the shoplifter directly

[9] See Letter #1; Letter #2 at Appendix A.
[10] See Letter #3 at Appendix A.
[11] Kim Westad, "Bay Wants $325 for 2.25", *Times Colonist* (25 November 1995) 1.
[12] Barbara Turnbull, "Zellers Wants $125 After Boy Caught with Stolen Candy", *Toronto Star* (10 April 1997) A10.
[13] Kelly Sinoski, "Sticky Fingers Lead to $475 Charge for Chocolate Bar; Woman Says the Bay's Civil Damages Claim Does Not Fit Her Crime of Shoplifting", *The Vancouver Sun* (8 January 2008) B1.
[14] Cory Hurley, "Civil Recovery Rarely Leads to Court: Lawyer", *The Western Star* (30 March 2012), online: <www.thewesternstar.com/News/Local/2012-03-30/article-2943091/Civil-recovery-rarely-leads-to-court-lawyer/1>.
[15] Helen Dolik, "Grocery Store Cracks Down on Shoplifters", *Calgary Herald* (10 October 1998) B8.
[16] Druzin, *supra* note 3.
[17] See e.g. Letter #2 at Appendix A.

indicate that the retailer has a viable claim in trespass to goods, trespass to property, and conversion.[18]

(c) A claim that if payment is not received, a civil claim may be initiated

In the SCRLs reviewed, the demanded payment is framed as a settlement in lieu of the retailer commencing a civil action. In several letters reviewed, the amount of money demanded is called "the Settlement Amount."[19] In the event that the recipient does not pay, SCRLs suggest that a civil action is a possible result. For example, the letter may state that "the file may be reviewed for the possibility of a civil action",[20] or that the lawyer "may receive specific instructions" to initiate a civil action.[21] The letters also suggest that, if a civil action is pursued, the recipient may be liable for an increased amount because of additional legal fees and interest incurred, or because the amount demanded is less than the actual recoverable damages incurred by the retailer.[22]

Additional pressure is sometimes placed on recipients who do not initially pay by sending follow-up letters. One such notice states, in part:

> Further to my previous letter to you, I have been advised that the payment requested in the settlement offer I had made on behalf of [the retailer] (the "Plaintiff") with respect to the above noted matter has not been made. As a result, I may now receive specific instructions from the Plaintiff to commence legal proceedings against you before a civil court.
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> **You may stop and/or prevent the commencement of those proceedings by paying the Plaintiff's claim in the amount of $695.00.** You should note that this amount is somewhat greater than the Settlement Amount claimed in my earlier correspondence. The incremental difference represents the additional administration costs incurred by the Plaintiff. These administrative costs will continue to increase until this matter is resolved.[23]

The use of the term "Plaintiff" and the reference to "stopping" or "preventing"

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[18] See e.g. Letter #1 at Appendix A.
[19] See Letter #1; Letter #2 at Appendix A.
[20] See Letter #4 at Appendix A.
[21] See Letter #1; Letter #2 at Appendix A.
[22] See e.g. Letter #1; Letter #2; Letter #4 at Appendix A.
[23] See Letter #3 at Appendix A [emphasis in original].

proceedings are likely to give many recipients the impression that a civil action is imminent unless they make payment.

II. The Origins of SCRLs in Canada

Media reports suggest that major retailers like the Hudson's Bay Company, Zellers, and Safeway initiated significant civil recovery programs in the mid-1990s.[24] As justification, the retailers, and the security companies hired to run their programs, pointed to the billions of dollars lost because of shoplifting.[25] At the time, statements made to the media make clear that retailers viewed their monetary demands as representing a pro-rated portion of overall losses that they incurred because of shoplifting rather than restitution for any damage or lost goods relating to a particular incident.[26] Media reports suggest that in the 1990s, many retailers demanded payment of $325 in their SCRLs.[27]

A review of contemporaneous media reports suggests that retailers were frustrated with what they saw as a lax criminal justice system. Civil recovery programs appealed to retailers, by allowing them to institute their own punishments and deterrents to address a perceived ineffectiveness of the criminal justice system. Brian Lawrie, the president of a private civil recovery company hired by the Hudson's Bay Company to start its civil recovery program, stated in 1994, "[b]y really smacking these people financially, it brings home to them that if you're caught stealing, it's going to cost you a substantial amount of money."[28] Two years later, Lawrie commented, "[o]ne

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[24] Helen Dolik, "Bay Stores Planning to Sue Shoplifters", *Calgary Herald* (23 October 1994) A4; Cathy Lord & Jim Farrell, "Automatic $325 Tab for Shoplifters", *Edmonton Journal* (25 October 1994) B3; Westad, *supra* note 9; Tom Barrett, "Policy Making Shoplifters' Parents Pay Irks City Mom", *Edmonton Journal* (29 February 1996) B1; Dolik, *supra* note 13.

[25] For example, in a 1996 article in the Edmonton Journal, the president of a security management firm who was at the time marketing his services to smaller Alberta retailers was reported as saying that "Canadian retailers lose about $3 billion a year to shoplifters and have a right to demand that some costs be paid by those they catch", Florence Loyie, "Shoplifters Will Pay if LINX Gets Its Way; How it Works", *Edmonton Journal* (26 March 1996) B5.

[26] See e.g. Barrett, *supra* note 24 ("The $325 demand is part of The Bay's two-year-old nationwide policy to recover some of the overall cost of fighting shoplifting. The money reflects the cost of providing security staff and equipment, plus shoplifting losses").

[27] See e.g. Westad, *supra* note 9; Lord & Farrell, *supra* note 24; Barrett, *supra* note 24; Charles Saunders, "Double Your Punishment: Shoplifters Aren't Asking for Sympathy–Just Fairness", *The [Halifax] Daily News* (11 April 1996) 19.

[28] Dolik, *supra* note 24.

kid's parents get hit with a demand letter and the word gets around school fast that there are consequences if you steal from our stores."[29] In 1996, Brian Thomson, then Director of Operations for Zellers, similarly emphasized the potential deterrent impact of SCRLs, commenting, "[w]e are bringing to the forefront the awareness that if you are caught shoplifting at Zellers you are going to be asked to pay us back. This is a deterrent to make people think twice."[30]

There is also evidence that Canadian retailers were influenced in the mid-1990s by several American states' civil recovery statutes that provide retailers a statutory cause of action to claim damages against shoplifters. For example, since 1985, Wisconsin law allows retailers to bring a civil action against a shoplifter for a variety of damages, including:

> (1) (a) the retail value of the merchandise taken (unless it is returned undamaged or unused) and (b) any additional "actual damages"; and
> (2) exemplary damages in not more than three times the amount under (1) with a cap of $500 for each violation (in cases involving actions against minors or their parents, these amounts reduce to two times the amount under (1) with a $300 cap).[31]

North Carolina's statute, enacted in 1987, similarly provides for a civil action against the shoplifter for recovery of the value of the merchandise, if it is destroyed or otherwise diminished in value as well as "any consequential damages, and punitive damages, together with reasonable attorneys' fees." The legislation also mandates that damages not be less than $150 or more than $1000.[32] Of interest in the context of this analysis is that the North Carolina statute also mandates particular wording for any demand letter sent pursuant to the statute.[33]

A review of media articles from the early 1990s reveals positive Canadian media coverage of the efforts undertaken by American retailers to recover money from shoplifters under these types of statutory regimes. One article, published in 1991, reported that American retailers had observed theft

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[29] Barrett, *supra* note 24.
[30] Kevin Cox, "Stores' Billing of Shoplifters Draw Protests: Zellers and Bay in Nova Scotia Go After Offenders For Money, in Addition to Criminal Prosecution", *The Globe and Mail* (4 April 1996) A10.
[31] Wisconsin, *Crimes Against Property*, Ch 943, s 943.51.
[32] North Carolina, Gen Stat 2013, Ch 1, Art 43, s 1-538.2.
[33] *Ibid.*

losses in some stores falling as much as eighty percent in states where civil recovery statutes were in place.[34] A 1997 article in *Retail Week,* a British trade publication for retailers, reported a direct link between the positive media coverage of American civil recovery statutes and the institution of Canadian civil recovery programs:

> Some years ago, the chief executive of Canada's largest retailer, the Can$6 billion The Hudson Bay Company, idly leafing through the pages of the *Financial Times,* spotted an article on civil recovery in the US. The growing practice of many US states has been to pass state laws allowing retailers to collect civil restitution from shop thieves. He decided that The Bay, as it is called in Canada, would try to bring civil recovery to the aid of Canadian retailers.[35]

However, the Canadian adoption of civil recovery programs lacked one important element: a statutory basis. Indeed, it appears that Canadian retailers were unsuccessful in lobbying for such legislation to be passed in the 1990s.[36] That Canadian civil recovery programs lack a statutory foundation and instead rely on common law torts is of consequence: a close analysis suggests that, as a general matter, these tort claims lack any reasonable or good faith legal foundation.

III. Why Be Concerned About SCRLs?

At first glance, the practice of sending SCRLs might not seem overly problematic. There is an underlying logic: shoplifting results in significant costs for retailers and it is rational that retailers would want to try to recoup those costs from the very people that cause them. A closer look, however, reveals significant concerns about this practice in Canada. There is good reason to believe that many SCRLs contain unfair and misleading representations. These potential misrepresentations generally relate to two different issues: first, the viability of the legal claims advanced in the SCRLs;

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[34] Stephanie Strom, "New Laws Aim to Deter Shoplifters: Stores Get Power to Levy Fines on Thieves", *The Vancouver Sun* (20 September 1991) D4.

[35] Joshua Bamfield, "If the Price is Right", *Retail Week* (9 May 1997) 12.

[36] *Ibid* ("The Retail Council of Canada is now calling for specific legislation to be passed in every Canadian province to enable stores to use civil recovery. Canadian retailers and their political allies have started lobbying for specific civil recovery legislation in Canada and wish to persuade all 10 Canadian provinces to bring in civil recovery laws on the US model").

and second, the claim that a legal action may be pursued if the recipient does not pay the amount demanded.

Although extended scholarly analysis of the contents of SCRLs has not been conducted, several Canadian lawyers have pointed to problems with SCRLs.[37] Professor Alice Woolley observes:

> [T]here 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.[38]

Other lawyers have been equally critical. On a blog, one Toronto criminal defence lawyer characterizes SCRLs as "a brazen attempt to gouge the offender and extract a further pound of flesh for [his or her] wrongdoing."[39] Another lawyer who worked at a legal aid clinic and dealt with SCRL recipients is quoted in a media report as saying that "it breaks my heart to see people being taken advantage of."[40]

Notwithstanding these criticisms, a review of publicly available disciplinary records suggests that no Canadian law society has ever disciplined a lawyer for sending a SCRL. The one disciplinary case that does address SCRLs considered whether a British Columbia lawyer who made very critical comments about an Ontario lawyer who had sent his client a SCRL should be disciplined for his own "incivility".[41] Ultimately, the Law Society of British Columbia found that the British Columbia lawyer had committed professional

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[37] For media articles containing commentary by lawyers, see e.g. Dolik, *supra* note 24; Lord & Farrell, *supra* note 24; Druzin, *supra* note 3; Hurley, *supra* note 12; Purcell, *supra* note 4; CBC News, *supra* note 2. For online commentary by lawyers, see e.g. Woolley, *supra* note 1; Alice Woolley, "Lawyers Regulating Lawyers (Redux)?" (11 June 2012), *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (blog), online: <ablawg.ca/2012/06/11/lawyers-regulating-lawyers-redux/>; Micah B Rankin, "Gerry Laarakker: From Rustic Rambo to Rebel with a Cause" in Adam Dodek & Alice Woolley, eds, *Canadian Legal Ethics Stories* (UBC Press, forthcoming); Edward Prutschi, *Civil Recovery*, online: Adler, Bytensky, Prutschi, Shikhman Criminal Litigation <crimlawcanada.com/civil-recovery/>.

[38] Woolley, *supra* note 1. See also CBC News, *supra* note 2; Druzin, *supra* note 3; Purcell, *supra* note 4.

[39] Prutschi, *supra* note 37.

[40] Druzin, *supra* note 3.

[41] *Laarakker (Re)*, 2011 LSBC 29, [2011] LSDD no 175. For further discussion of this case, see Rankin, *supra* note 37.

misconduct by criticizing the Ontario lawyer, and ordered that he pay a $1,500 fine and $3,000 in costs.[42] The Ontario lawyer who wrote the SCRL does not appear to have been subject to any discipline.

In response to a March 2014 request to the Law Society of Upper Canada ("LSUC") for their position on the practice of sending SCRLs, and for information on complaints about this practice, LSUC provided the following statement:

> The confidentiality requirements of the Law Society Act (section 49.12) do not permit us to comment on specific cases unless the proceedings are public (in discipline) and there have been no public proceedings involving this issue. We do receive complaints about this issue from time to time, usually about lawyers who practise in the area of collections.
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> The validity of a claim for civil recovery from parents of shoplifters is a legal issue for the Court to determine. The Court has found that retailers can seek nominal damages from shoplifters. The *Parental Responsibility Act* says that parents are liable for their children's actions. The Small Claims Court provides a pamphlet on the *Act* which specifically says that it includes shoplifting, and this is attached.
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> In order to investigate a complaint, there must be a reasonable suspicion that the lawyer or paralegal engaged in professional misconduct (section 49.3 of the *Law Society Act*). The Law Society would look at the conduct of the lawyer or paralegal who sent a demand letter if the evidence suggested that the licensee engaged in an ethical breach, for example, misstating the law on this issue or misrepresenting his client's intentions to commence an action. In those circumstances, we would look into the matter as we would any other complaint with those allegations.[43]

The current state of affairs in Canada regarding SCRLs appears to be a tension between public accusations by the legal community that SCRLs contain unethical misrepresentations, and no public action or statements by Canadian law societies curbing or condemning this practice.[44] Although critics

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[42] *Laarakker (Re),* 2012 LSBC 2, [2012] LSDD no 8.

[43] Email from Law Society of Upper Canada to Amy Salyzyn (2 April 2014).

[44] Because law societies may take a number of informal and private steps to address complaints, it is possible that there has been regulatory action relating to SCRLs that is not apparent to members of the public. For discussion of the complaints process, see e.g. Law

of the practice have suggested there is no legal validity to the torts claimed and no factual validity to the claims contained in the SCRLs regarding the possibility of litigation being commenced, an extended analysis of these issues against the actual wording of SCRLs has yet to be conducted.

IV. ARE SCRLS MISLEADING?

(a) Validity of Tort Claims in SCRLs

A review of the relevant case law and legal principles confirms that SCRLs advance invalid claims. There are, however, some important qualifications to this conclusion. Most significantly, the analysis differs when one is dealing with SCRLs addressed to parents or guardians[45] of alleged shoplifters as opposed to shoplifters directly.

(i) SCRLs addressed to parents

In cases where a SCRL is addressed to the parent of an alleged shoplifter, the letters indicate that "the retailer takes the position that it has the right to claim damages" from the parent or guardian on two different bases: first, "theft, damages, and conversion", and second, "for failing to provide reasonable supervision of the young person."[46] To analyze the validity of these claims, one must look at several potential legal avenues of recovery: (a) are parents vicariously responsible for the torts of their children?; (b) is there a valid common law claim in negligence for failing to reasonably supervise?; and (c) is there a valid statutory claim for failing to reasonably supervise pursuant to parental responsibility legislation? The issue of what, if any, damages are recoverable must also be assessed.

Society of Upper Canada, *FAQs about the Complaints Process*, online: <www.lsuc.on.ca/faq.aspx?id=2147486745>.

[45] For ease of reference, this article will simply use the term "parents" when referring to "parents or guardians".

[46] See e.g. Letter #2 at Appendix A.

(a) Vicarious responsibility

With respect to demands that parents pay damages for "theft, damages, and conversion", a review of tort principles and case law reveals that there is no legal basis for such demands. This claim relies on an assertion of vicarious responsibility on the part of the parent. However, in Canadian law, parents "are not vicariously responsible for the torts of their children on the grounds of their family relationship alone" in the same way that, for example, employers are vicariously responsible for the torts of their employees on the basis of the employment relationship.[47] Indeed, the question of whether a parent could be vicariously responsible for damages arising from a child's shoplifting was directly addressed and rejected by the Manitoba Court of Queen's Bench in *B (DC) v Arkin*—the only reported case addressing the potential liability of parents in relation to their children's shoplifting in tort.[48]

There is no reasonable or good faith basis to advance a claim against a parent in a SCRL for "theft, damages, and conversion"; to borrow Justice Jewers' words in *Arkin*, "it would be futile to pursue" such a claim in court."[49]

(b) Common law claim for failure to reasonably supervise

Perhaps in response to the decision in *Arkin,* some current SCRLs additionally claim that parents are liable to pay damages to retailers because of a failure to provide reasonable supervision. *Arkin* did not address the viability of a claim for failure to supervise, and there does not appear to be any reported case directly on point to date. A review of the case law on parental responsibly generally, however, reveals that there is virtually no chance that a claim grounded in failure to reasonably supervise would allow the retailers to recover the $300 to $595 demanded in SCRLs, except perhaps in rare circumstances.

As a general matter, courts have recognized a parental duty "to supervise and control the activities of the child and, in doing so, to use reasonable care to prevent foreseeable damage to others."[50] Courts have been clear, however, that the duty to supervise only requires reasonable supervision

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[47] *Nagel v Campbell*, [1983] OJ no 3345 at para 7 (Co Ct), 23 ACWS (2d) 52. See also *Noack & Hanmer Ltd v Sadler*, [1995] OJ no 4019 , 60 ACWS (3d) 20 (Gen Div).
[48] *B (DC) v Arkin* (1996), 111 Man R (2d) 198, 138 DLR (4th) 309 [*Arkin*, cited to Man R].
[49] *Ibid* at para 18.
[50] *Lelarge v Blakney* (1978), 23 NBR (2d) 669 at 677-78, 92 DLR (3d) 440 (CA). See also *Taylor v King*, 82 BCLR (2d) 108, [1993] 8 WWR 92 (CA) [cited to BCLR].

and not perfect or fail-safe supervision.[51] It is implausible to suggest that prevailing community standards require that parents accompany teenaged children when they visit retailers and monitor their every move to guarantee that they are not stealing. Indeed, courts have recognized that "[t]he extent of the duty [to supervise] varies with the age of the child....[and] [a]s the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish."[52] Even for younger children, it is doubtful that courts would hold parents responsible for covert shoplifting that occurs while they are present with a child at a retail location. The Ontario Superior Court observed in *Bartosek (Litigation Guardian of) v Turret Realties Inc.*, a case involving a six-year-old boy who was injured while riding his bicycle on a parking ramp and in his father's care, "[a] parent cannot be held to a standard of 100 per cent supervision and immediate proximate control."[53]

Moreover, in cases involving deliberately wrongful or criminal activity on the part of a child, courts have generally declined to hold parents civilly liable for a failure to supervise, unless the parent was aware of a propensity on the part of the child to engage in such behaviour.[54] Even in cases where a parent is aware of a child's propensity for deliberately wrongful or criminal behaviour, the courts are wary of holding parents liable. For example, in *Trevison v Springman*,[55] the Supreme Court of British Columbia declined to find the parents of a seventeen-year-old boy liable for damages caused when he set fire to the plaintiffs' house, even though they knew their son had a propensity for criminal activity, on the grounds that arson "was entirely different in type" from the known tendencies of their son towards theft and breaking-and-entering.[56]

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[51] *Taylor v King*, *ibid* at 117; *Gu (Litigation Guardian of) v Friesen*, 2013 BCSC 607 at para 29, 46 BCLR (5th) 337.

[52] *Taylor v King*, *ibid*, citing *Lelarge v Blakney*, *supra* note 50.

[53] 109 ACWS (3d) 907, [2001] OTC 856, aff'd (2004), 129 ACWS (3d) 1249, 185 OAC 90 (CA), leave to appeal to SCC refused (2004), 201 OAC 200 (note), 335 NR 196 (note).

[54] See e.g. *Wood v Kennedy* (1998), 165 DLR (4th) 542, 82 ACWS (3d) 1039 (ONCJ).

[55] *Trevison v Springman* (1995), 16 BCLR (3d) 138, 28 CCLT (2d) 292 [cited to BCLR].

[56] *Ibid* at para 30. See also *Smith v British Columbia*, 73 ACWS (3d) 372, 1997 CarswellBC 1775 (parents of 19 year old who set a fire not liable because, *inter alia,* there was no evidence that he had a propensity to start fires and that such a propensity was known to his parents). But see *Segstro (Guardian ad litem of) v McLean (Guardian ad litem of)*, [1990] BCJ no 2477, 24 ACWS (3d) 102 (Sup Ct) [cited to QL] (finding liability where parents knew of the child's history of unprovoked assaults on vulnerable children and animals and where the injury in question resulted after the child, when unsupervised, had intentionally pushed another child off

In light of this case law, it is unlikely a Canadian court would find a parent liable for damages resulting from a child's shoplifting on the basis that the parent breached his or her duty to supervise, except perhaps in cases involving very young children attending retail locations by themselves, or in cases involving children with known shoplifting propensities allowed to attend retail locations without close parental monitoring. There is no evidence that lawyers sending SCRLs limit the letters to cases that meet these exceptional circumstances, or that such lawyers conduct any factual investigation to determine if a particular case falls within this category.

Further, any potential viability of a common law claim against parents is extinguished when one considers the issue of damages. As noted by Professor Waddams, "[i]n the case of torts not actionable *per se*, as, for example, negligence, if the plaintiff fails to establish a loss, the action will be dismissed."[57] In shoplifting cases where the stolen goods are recovered, there is no legally recognizable loss. Although SCRLs often reference general expenses incurred by retailers to establish loss prevention programs, the Canadian courts have, on at least three occasions, rejected attempts by retailers to recover a pro-rated portion of such costs from individual shoplifters.[58] As observed by Justice Hess in *Southland Canada Inc v Zylik*, in rejecting such a claim:

> the damages claimed are not as a result of any wrong committed by the defendants, but rather in anticipation that they would be members of a group of then undetermined individuals who might do something wrong. I know of no instance where a plaintiff has succeeded in a claim for damages suffered before the occurrence or in anticipation of a tortuous act. The argument of the plaintiff, as I understand it, is analogous to seeking reimbursement from a trespasser for the cost of constructing a fence designed to keep him out.[59]

In a more recent English decision, *A Retailer v Ms B and Ms K*, the Oxford County Court rejected a retailer's claim that it should be compensated

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of an apartment balcony and finding that the parents should have "consult[ed] with parents of children with whom [their son] was likely to associate with" at 11).

[57] SM Waddams, *The Law of Damages* (Toronto: Thomson Reuters Canada, 2014) (loose-leaf 2014 supplement), ch 10 at 1.

[58] *Hudson's Bay Co v White* (1997), 32 CCLT (2d) 163, 22 OTC 366 [cited to CCLT], var'd [1998] OJ no 2383 (QL), 1 CPC (5th) 333 (Div Ct) [*Hudson's Bay Co v White* 1998, cited to QL]; *Southland Canada Inc v Zylic*, 1999 ABPC 107, 256 AR 55 [*Southland*]; *Canada Safeway Ltd v Guay*, 2003 ABPC 49, 121 ACWS (3d) 66 [*Canada Safeway*].

[59] *Southland*, *ibid* at para 14.

for "staff and/or management time investigating and/or dealing with the tort", noting that the personnel in question were doing "exactly what they were paid...to do". [60] The court further noted that "it seems to me difficult to establish that the defendants caused any identifiable loss...Security staff would have been paid and present whether or not the defendants were shoplifting."[61] On similar grounds, the court also rejected claims for damages relating to administrative and security equipment costs, noting that "[t]he amounts spent by the claimant would have been identical had the defendants stayed at home or limited their shoplifting to other establishments."[62]

It should be noted that Canadian courts have acknowledged that retailers may recover compensatory damages in shoplifting cases, if such damages are directly attributable to the specific shoplifting incident. In *Canada Safeway Ltd v Quay,* the Alberta Provincial Court allowed $146 in costs for writing reports and for attending criminal court in relation the case.[63] In *A Retailer,* the court considered a hypothetical scenario where a security guard was required to take a taxi to pursue a fleeing shoplifter and commented that the taxi fare would be recoverable, given it would be a "directly referable cost" in apprehending a defendant.[64] There is nothing to suggest that the amounts claimed against parents in SCRLs represent directly attributable costs in relation to their children's shoplifting. That the letters often claim the same amount in different cases belies a claim that the damages claimed represent actual costs incurred.

(c) Statutory liability for failing to reasonably supervise

In Ontario, section 2 of the *Parental Responsibility Act* allows an action in Small Claims Court against a parent in cases where his or her child "takes, damages or destroys property" and provides that the parent is liable for any "loss of or damage to the property suffered as a result of the activity of the child" or "economic loss suffered as a consequence of that loss of or damage to property", unless the parent can satisfy the court that he or she exercised reasonable supervision, made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that resulted in the loss or damage,

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[60] *A Retailer v Ms B and Ms K* (2012), No UC 71244 at para 10 [*A Retailer*].
[61] *Ibid.*
[62] *Ibid* at para 16.
[63] *Supra* note 58 at para 11.
[64] *Supra* note 60 at para 9.

or that the activity that caused the loss or damage was not intentional.[65] Manitoba and British Columbia have similar legislation.[66]

Under the Ontario legislation, in determining whether a parent exercised reasonable supervision over a child or made reasonable efforts to prevent or discourage the child from engaging in the kind of activity that resulted in the loss or damage, the statute directs the court to consider, *inter alia*, the age of the child, prior conduct, potential danger of the activity, whether the child was in direct supervision at the time of the activity and if not, did the parent act unreasonably in failing to make reasonable arrangements for the supervision of the child. [67]

There appear to be only two reported cases interpreting section 2 of the *Parental Responsibility Act.* In *Shannon v Westman (Litigation Guardian of)*, the plaintiffs sued the parents of two boys, aged ten and fourteen, after they broke into the plaintiff's home and stole property.[68] The damages sought represented the value of the stolen property. The court declined to hold the parents liable under the legislation, finding it was reasonable in the circumstances to have left the fourteen-year-old without any direct supervision and to have left the ten-year-old under the supervision of the fourteen-year-old. In reaching this conclusion, the court observed that "the standard imposed by the *Parental Responsibility Act* is one of reasonableness, not perfection."[69]

The subsequent case of *Cinnirella v C (C) (Litigation Guardian of)* involved a fifteen-year-old who unlawfully took the keys to a car and caused an accident that destroyed the car he was driving, another car and a house.[70] The incident occurred while the fifteen-year-old was left in the care of his seventeen-year-old sister. After reviewing the factual circumstances of the case—including the fact that the boy had not previously engaged in such behaviour—the Ontario Superior Court dismissed the actions against the parents, finding that they exercised reasonable supervision over their son and that their efforts to prevent or discourage him from engaging in the activity that resulted in the loss and damage to the plaintiffs were reasonable. Similarly, a

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[65] *Parental Responsibility Act, 2000*, SO 2000, c 4.
[66] See *The Parental Responsibility Act*, CCSM c P8; *Parental Liability Act*, SBC 2001, c 45.
[67] *Parental Responsibility Act,* 2000, *supra* note 65, s 2(3).
[68] (2002), 12 CCLT (3d) 46, 54 WCB (2d) 498 [cited to CCLT].
[69] *Ibid* at para 37.
[70] (2004), [2006] WDFL 1862, [2006] WDFL 1863.

British Columbia court declined to impose liability on parents for damages resulting from a break-in that their fifteen-year-old son committed.[71]

This case law suggests that courts will be reluctant to impose statutory liability on parents in cases where a child has engaged in criminal activity. It should also be noted that the Ontario legislation limits recoverable damages to two categories: first, damages for "loss of or damage to the property suffered as a result of the activity of the child"; and second, "economic loss suffered as a consequence of that loss of or damage to property."[72] Accordingly, a prerequisite to recovering under the legislation is property damage or loss—a requirement that does not seem to be met in the context of SCRLs.

(d) Conclusion on Parental Liability

In view of the case law detailed above, there is no reasonable or good faith basis for routinely sending SCRLs to parents of alleged shoplifters as a matter of course. The claims against parents currently advanced in SCRLs are not valid claims insofar as they: (1) advance claims based on vicarious liability, which has been clearly rejected in Canadian law; and (2) advance claims on the basis of a failure to reasonably supervise which attempt to root damages in overall security costs, which has also been clearly rejected in Canadian law. The claims advanced in relation to the failure to reasonably supervise are also very misleading as they suggest that there generally exists a viable claim against parents on this basis in the shoplifting context when, in fact, such claims would only be potentially viable in extremely particular cases involving the following two factors: first, very young children who have attended retail locations by themselves or children with known propensities to shoplift being allowed to attend retailer locations without close parental monitoring. Second, a compensable loss directly related to the shoplifting incident (like, for example, taxi fare incurred after a security guard had to take a taxi to catch a fleeing shoplifter).

In short, in sending SCRLs to parents, lawyers for retailers advance claims on bases that courts have repeatedly rejected and, in so doing, mislead the public.

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[71] *T(S) v H(S)*, 2008 BCPC 226, [2009] BCWLD 2473.

[72] *Parental Responsibility Act, 2000*, *supra* note 65, s 2(1).

(ii) SCRLs addressed to shoplifters

The claims made in SCRLs to shoplifters directly—rooted in conversion, trespass to goods, and trespass to land—are distinct from those advanced against parents and require a separate analysis.

(a) Conversion and Trespass to Goods

As explained by the Supreme Court of Canada in *Boma Manufacturing Ltd v Canadian Imperial Bank of Commerce*: "the tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession."[73] The essential elements of the tort of conversion are:

> 1. The plaintiff has a possessory interest in personal property;
> 2. The personal property is identifiable or specific; and
> 3. The defendant intentionally committed a wrongful act in respect of the property inconsistent with the plaintiff's right of possession.[74]

The tort of trespass to goods[75] also addresses interference with property. Recent appellate case law describes the tort as covering circumstances "where there is a direct, intentional interference with a person's possession of a chattel without consent."[76] As noted by Justice Chapnik in *Aylmer Meat Packers Inc v Ontario*: "[t]he main difference between the tort of trespass to chattels and conversion is the distinction between simple interference and the exercise of rights of ownership."[77]

The generic facts that underlie most shoplifting cases—an individual has taken possession of a retailer's goods with the intention of stealing it—seem adequate to make out a case in trespass to goods and conversion. Indeed, in *Hudson's Bay Co v White,* the court concluded:

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[73] [1996] 3 SCR 727 at para 31, 140 DLR (4th) 463.
[74] *2934752 Canada Inc v W Pickett & Bros Customs Brokers Inc*, [1999] OJ no 5435 at para 30, 97 ACWS (3d).
[75] Also known as trespass to chattels.
[76] *Michaud v Manitoba*, 2012 MBCA 21 at para 18, 280 Man R (2d) 1. See also *North King Lodge Ltd v Gowlland Towing Ltd*, 2005 BCCA 557 at para 14, 47 BCLR (4th) 20.
[77] 2011 ONSC 4470 at para 18, 205 ACWS (3d) 943.

> Prima facie, theft would seem to qualify as being a direct and immediate interference with The Bay's possession. The defendant physically removed the goods in question from the display counter, placed them in his bag, and left the store without making any attempt at payment.[78]

(b) Trespass to Land

The tort of trespass to land "consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so."[79] One recognized defence to a claim of trespass to land is consent.[80] However, this defence operates to protect a defendant only to the extent that the scope and extent of the license granted is not exceeded.[81]

In view of this law, a retailer may have a viable case in trespass against a shoplifter who entered its property and attempts to steal. This was Justice Lederman's holding in *Hudson's Bay.* In concluding that the plaintiff's claim to trespass was made out, he commented:

> Given this rather sweeping definition of trespass to property, it is certainly arguable that an individual coming onto property for the purpose of committing theft is engaging in an unauthorized use of the land. The Bay submits that the public is invited into its retail stores for the purpose of shopping, browsing and purchasing items that are offered for sale. Regarding the downtown store involved in the case at bar, it may also be contended that as it is part of the system of underground pedestrian tunnels, the public is invited to walk through the premises on their way elsewhere provided they do not disrupt the operation of the store. In any case, entry for the purposes of theft would be inconsistent with any of these authorized purposes.[82]

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[78] *Hudson's Bay Co v White, supra* note 58 at para 8.
[79] GHL Fridman, *The Law of Torts in Canada*, 2nd ed (Toronto: Carswell, 2002) at 37.
[80] *Ibid* at 57.
[81] *Ibid* at 57-58. So, for example, in *Forbes v Griffin*, the defendant, who had been given permission to trim trees on the plaintiff's land, to was found to have trespassed given that his act of cutting 30 foot trees down to 3 feet "went well beyond any authorization which he had with respect to trimming these trees", (1989), 99 NBR (2d) 156 at para 15, 15 ACWS (3d) 314.
[82] *Supra* note 58 at para 9.

(c) Damages

Thus, retailers appear to have a good faith *prima facie* claim to actions brought in conversion, trespass to goods, or trespass to land when writing directly to those accused of shoplifting. The issue of damages, however, also arises with respect to these claims. However, for the reasons discussed in relation to SCRLs addressed to parents, it is unlikely that the retailer would be able to recover any compensatory damages against a shoplifter except for very specific, limited costs that can be directly tied to the individual case of shoplifting.

The likely absence of recoverable compensatory damages does not, however, end the question of whether retailers can obtain monetary relief against shoplifters in a civil action. The availability of nominal and punitive damages must also be considered. Unlike negligence, trespass to land, trespass to goods, and conversion are actionable *per se*.[83] One consequence of this is that in the case of trespass to land, trespass to goods, and conversion, it would be open to a retailer to claim nominal and punitive damages even if no compensatory damages could be established. Indeed, in *Hudson's Bay*, the

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[83] I.e. actionable without proof of actual damage having been suffered. It should be noted that there is some controversy about this issue. Traditionally, all three torts at issue—trespass to land, trespass to chattels and conversion—have been considered to be actionable *per se*. More recently, some commentators have questioned whether trespass to chattels and conversion should still be treated as torts actionable *per se*. For example, with respect to trespass to chattels, Philip Osborne writes:

"It is not clear if trespass to chattels continues to be actionable without proof of damage. One view is that the traditional rule plays a useful role in preventing people from touching valuable art and museum pieces and in providing a remedy for the unauthorized moving or temporary use of chattels. The other view is that unless goods are taken, damage should be an essential element of liability since there is no pressing policy need to protect a dignitary interest in the inviolability of chattels", Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 306. On conversion, Solomon et al write: "The modern tort of conversion is derived from the *action on the case*. As a general rule, an action on the case requires proof of loss. For that reason, some authorities have held that conversion is not actionable unless the plaintiff establishes existence of a loss", Robert M Solomon et al, *Cases and Materials on the Law of Torts*, 8th ed (Toronto: Thomson Reuters Canada, 2011) at 126. There is no dispute, however, that an action brought in trespass to land requires no proof of loss. For a recent case confirming this, see *Ontario Consumers Home Services Inc v EnerCare Inc*, 2014 ONSC 4154 at para 56, 243 ACWS (3d) 569. In view of this, both nominal and punitive damages would appear to be available to a retailer who bought an action against a shoplifter claiming trespass to land, trespass to chattel and conversion, either on the basis that all three torts are actionable *per se* or, alternatively, on the basis of the trespass to land claim alone.

court awarded nominal and punitive damages to the retailer and, in *Canada Safeway,* punitive damages were awarded.

Although it seems clear that nominal damages would be available in a case against a shoplifter, the appropriate amount is less clear. The purpose of nominal damages is not compensation, but rather "to vindicate the plaintiff's rights,"[84] and there is no objective basis grounding the quantum of such an award. In practice, this has resulted in considerable variance in the quantum of damage awards to plaintiffs.[85] Professor Waddams observes that Canadian courts have generally awarded amounts ranging from $0.20 to $250. To the extent that amounts larger than $250 have been awarded, this has mostly occurred in cases where the plaintiff is found to suffer a loss caused by the defendant's wrong, but the loss is difficult to quantify.[86] Waddams suggests that the standard figure set for nominal damages awards should be one dollar, as this represents the figure appearing to have "the most authoritative support" in Canadian cases.[87] The amounts routinely claimed in SCRLs—often between $300 and $600—are clearly disproportionate to this suggested amount, and greatly in excess of the $140 inflation-adjusted nominal damage award in *Hudson's Bay Co v White*.

The issue of punitive damages must also be considered. It is worth noting the circumstances in which punitive damages were awarded in *Hudson's Bay Co v White* and *Canada Safeway*. In *Hudson's Bay Co v White*, Justice Lederman, at first instance, declined to award punitive damages against the shoplifter. Justice Lederman noted that the defendant's conduct be "exceptional" to justify an award of punitive damages:

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[84] Jamie Cassels & Elizabeth Adkin-Tettey, *Remedies: The Law of Damages*, 3rd ed (Toronto: Irwin Law, 2014) at 354.
[85] For further discussion, see e.g. *ibid* at 356; Waddams, *supra* note 57, c 10 at 10.20.
[86] *Ibid.*
[87] *Ibid*, c 10 at 10.30.

> [O]ne may conclude that a single incident of shoplifting, despite being a wilful infringement of the rights of another, is not sufficiently exceptional to warrant an award of exemplary damages. For the courts to hold that all thefts, be they trespass to chattels or to land, by their nature attract exemplary damages would seem to defeat the requirement that the conduct be exceptional. To hold otherwise would seem to require that any tort which is also a crime will attract exemplary damages. This would seem to constitute a significantly greater intermingling of the civil and criminal justice systems than exists at present.[88]

In view of this, Justice Lederman suggested that only "chronic offenders" should be liable for punitive damages, in cases involving a tort that also amounts to a crime.[89] In *Hudson's Bay*, punitive damages of $300 were ultimately awarded on appeal by the Divisional Court.[90] The court did not provide reasons for awarding punitive damages beyond the assertion that the "case cries out for an award of punitive damages."[91]

In the subsequent case of *Canada Safeway*, the Alberta Provincial Court awarded punitive damages of $1,000 on the basis that the defendant was a repeat offender who had stolen a considerable amount of merchandise: on one occasion, he stole twenty-five CDs and one DVD with a retail value of $595, and on a separate occasion he stole five CDs, three DVDs and four videos with a retail value of $249.[92]

Justice Lederman's argument in *Hudson's Bay* that punitive damages should only be awarded in shoplifting cases that involve "exceptional" conduct is consistent with the jurisprudence of the Supreme Court of Canada, which provides that punitive damages are appropriate only in exceptional cases involving "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency."[93] The threshold for awarding punitive damages is high. The mere fact that a defendant's tortious behaviour also amounted to a crime is not sufficient to meet this threshold.

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[88] *Supra* note 58 at para 33.
[89] *Ibid* at para 34.
[90] *Hudson's Bay Co v White* 1998, *supra* note 58.
[91] *Ibid* at para 1.
[92] *Canada Safeway, supra* note 58 at para 9.
[93] *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 36, [2002] 1 SCR 595, citing *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196, 24 OR (3d) 865.

For example, in *Universal ATM Services Inc v Bruni*, the court declined to award punitive damages in a case involving fraudulent activity by the defendant. Justice Sproat noted:

> Bruni is before the criminal court. If he is convicted I think that it would be a disservice to the criminal court and the interests of justice if I imposed punitive damages which are essentially a civil fine. Put differently, a criminal court is in the best position to determine the punishment for this type of conduct and it would complicate matters, and arguably restrict or mitigate any criminal sentence, if I imposed punitive damages.[94]

There is reason to believe that Justice Sproat's concern about a punitive damage award interfering with criminal proceedings is relevant in the context of shoplifting cases as well. In 2009, a judge in Australia discharged a woman who had stolen a bottle of nail polish from a retailer, citing the fact that she had already paid $290 to the retailer as a "civil recovery fee".[95] Similarly, a 1994 media article reported a London, Ontario judge commented in a criminal proceeding that a shoplifter who had paid $380 to a retailer "had been given a stiffer sentence by the store....than the conditional discharge that we would have handed out."[96]

The Supreme Court of Canada in *de Montigny v Brossard (Succession)* recently addressed the appropriateness of awarding punitive damages in cases involving criminal conduct.[97] The facts of this case involved an individual, Martin Brossard, who murdered his former spouse and their two children before committing suicide. Civil proceedings were initiated by family members of the former spouse against Brossard's estate. At issue before the Supreme Court of Canada was whether punitive damages could be awarded notwithstanding the fact that the person responsible for the conduct under review was dead. Although the court considered this issue in the context of the availability of exemplary damages pursuant to the *Civil Code of Québec,* Justice LeBel's adoption of the following passage from a 1991 Ontario Law Reform Commission report on the availability of punitive damages at common law supports the conclusion that punitive damages should only be awarded in exceptional cases involving criminal conduct:

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[94] 245 DLR (4th) 365 at para 9, [2004] OTC 849.
[95] Jody O'Callaghan, "Shoplifters Slapped with Civil Fee", *Fairfax New Zealand* (9 October 2009).
[96] "Store Theft: A Different Approach", *The Windsor Star* (1 October 1994) A12.
[97] 2010 SCC 51, [2010] 3 SCR 64.

> care must be taken not to give exemplary damages a subsidiary criminal justice role....[A]s explained by the Ontario Law Reform Commission in a report on such damages:
> . . . it would be incorrect to view punitive damages as a systematic response to the shortcomings of criminal law. The law of punitive damages is applicable to a limited range of criminal conduct only, and it is applicable only in a limited way. The limits are not always consistent with a general theory of tort as a supplement to criminal law. **The law of punitive damages intrudes not on to the general criminal law, but only on to its exceptionally objectionable breaches.** It is a requirement for punitive damages not only that the defendant commit a tort advertently, but that the conduct be exceptional. **Moreover, punitive damages are not an inducement to the general citizenry to enforce the criminal law for profit.** The claim may be brought only by the victim of a tort, and damages may be awarded only in reference to the conduct that affected the victim.[98]

Ultimately, the court found that exemplary damages were appropriate in the circumstances, given the "particularly serious and horrific nature of the acts" committed by Brossard.[99]

The court's approval of the Ontario Law Commission's comments that punitive damages should attach to only "exceptionally objectionable breaches" and should not operate as "an inducement to the general citizenry to enforce the criminal law for profit" support Justice Lederman's position in *Hudson's Bay* that punitive damages should not be ordinarily awarded in shoplifting cases.

Thus, unlike in the case of parental liability, retailers may have generally viable *prima facie* claims against shoplifters directly in conversion, trespass to goods, and trespass to land. However, the issue of damages generates difficulties for claims against shoplifters as it did in the case of SCRLs sent to parents. As noted above, insofar as SCRLs contain claims to compensatory damages that are intended to reflect a pro-rated portion of overall security costs incurred by retailers, these claims are invalid: Canadian courts have considered and rejected such claims. In order to be recoverable, any compensatory damages claimed must reflect costs directly attributable to the specific alleged shoplifting incident.

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[98] *Ibid* at para 54 [emphasis added].
[99] *Ibid* at para 55.

Because the torts involved are actionable *per se*, it is possible that a retailer may also have recourse to nominal and punitive damages when bringing an action against a shoplifter directly. However, the case law and commentary suggests that any award of nominal damages would be small, and punitive damages should only be awarded in exceptional shoplifting cases like, for example, those involving repeat offenders or particularly egregious first-time thefts.

In short, there is no reasonable or good faith basis for retailers to be claiming, as a matter of course, in SCRLs addressed to shoplifters, that there is a viable claim for a set amount of damages (take, for example, the amounts of $325 or $595 that appear repeatedly in these letters). The only amount that appears to be potentially available, as a matter of course, in a civil case where a retailer can prove that an individual stole goods, is a small amount for nominal damages (assuming that the goods were returned). A claim for punitive damages would only be supportable if backed by specific facts that demonstrated exceptional wrongdoing beyond the simple fact that the shoplifter's conduct also amounted to a crime.

(b) Claims about litigation contained in SCRLs

Assessing the factual validity of claims in SCRLs about the possibility of litigation is less straightforward than an analysis of the legal validity of the torts claims. As a general rule, SCRLs imply that litigation is a real possibility by stating, for example, that "the file may be reviewed for the possibility of a civil action"[100] or that the lawyer "may receive specific instructions" to take steps to initiate a civil action.[101] One follow-up letter contained even stronger language—referring to the retailer as a "plaintiff" (even though no litigation had been commenced) and advising the recipient that the lawyer "may now receive specific instructions from the Plaintiff to commence legal proceedings against you before a civil court...[and that] [y]ou may stop and/or prevent the commencement of those proceedings by paying the Plaintiff's claim in the amount of $695."[102]

These types of statements in SCRLs are likely to lead recipients to conclude that there is a real possibility that the retailer will initiate litigation if the recipient does not pay the money demanded. As a factual matter, this

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[100] See Letter #4 at Appendix A.
[101] See Letter #1; Letter #2 at Appendix A.
[102] See e.g. Letter #3 at Appendix A.

appears untrue. In their information for the public about SCRLs, Justice for Children and Youth state that "[o]ur experience is that it is rare for the lawyer or store to follow up with a lawsuit if someone does not pay."[103] Although there are three reported cases in which retailers sought civil recovery in courts: *Hudson's Bay, Southland Canada Inc v Zylik*, and *Canada Safeway*, these cases are all more than a decade old. Further, it is not clear if, in these cases, the retailers sent SCRLs to the alleged shoplifters before proceeding with litigation.

Additional evidence that retailers have virtually no intention to sue recipients of SCRLs can be found in information about American practices. In a 2008 news article, it was reported that Palmer, Reifler & Associates, P.A., a civil recovery firm in Florida, sent between 80,000 and 120,000 demand letters a month on behalf of various retailers across the United States, but only filed about 80 court cases the same year. This proportion, the author noted, "would calculate to be about 0.1 of a percent of all the letters sent at most."[104]

Why would retailers choose not to commence litigation against SCRL recipients who do not pay? One reason is likely that the practice of sending SCRLs is already lucrative without resorting to litigation. In the case of Canadian retailers, there is some evidence that sending SCRLs is widespread and that this practice has been successful. One legal aid clinic in Toronto reported that in the first six months of 2014 it had received fifty calls from individuals who had received SCRLs.[105] There is good reason to believe this represents only the tip of the iceberg in terms of the prevalence of the practice, as this is a sample from a single clinic, and many individuals who receive SCRLs probably do not contact lawyers. Although retailers who use SCRLs do not publicize their recovery rates, court documents indicate that the Hudson's Bay Company and Zellers recovered more than $1 million in the first three years of using this technique.[106] In 2001, a Shoppers Drug Mart spokesperson indicated that a pilot project performed in Calgary saw forty percent of SCRL recipients pay the amounts demanded.[107]

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[103] Justice for Children and Youth, "Legal Rights Wiki: Shoplifting Demand Letters", online: <jfcy.org/en/rights/shoplifting-demand-letters/>.

[104] Note that this figure is taken from an August 2008 news article, John Pacenti, "Law Firm Accused of Shaking Down Shoppers", *Broward Daily Business Review* (7 August 2008) A1.

[105] Letter from Justice for Children and Youth to Amy Salyzyn (26 June 2014).

[106] David Roberts, "Stores Can't Fine Thieves, Court Says: Zellers' Practice Illegal, Judge Rules", *The Globe and Mail* (17 July 1996) A1.

[107] "Stores Suing Shoplifters: Critics Pan 'Cash Cow'", *Halifax Daily News* (2 April 2001).

Another reason that litigation is not pursued may be that retailers have a vested interest in not proceeding to litigation. Given the above analysis regarding the legal validity of the torts claims contained in SCRLs, going to court brings a significant risk of generating unfavourable precedents.

V. The Legal Ethics of SCRLs

There is a strong case that lawyers who send SCRLs that include false and misleading statements about the law, intended to induce the recipient to pay money to retailers, and that make disingenuous threats about the factual likelihood of litigation, are acting unethically. From a positive law perspective, this conduct appears to run afoul of several rules of professional conduct that govern lawyer behaviour. The ethical questionability of this conduct is further reinforced when considered through a normative approach.

Starting with the rules of professional conduct, the LSUC's *Rules of Professional Conduct* contains rules that require lawyers act with integrity,[108] refrain from knowingly assisting in or encouraging any dishonesty,[109] "act in good faith...with all persons with whom the lawyer has dealings",[110] and "encourage public respect for...the administration of justice".[111] If a lawyer breaches these rules, they may be subject to discipline by LSUC for professional misconduct.[112] A lawyer may also be disciplined for "conduct unbecoming a barrister or solicitor" if he or she "tak[es] improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or

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[108] See Law Society of Upper Canada, *Rules of Professional* Conduct, Toronto: LSUC, 2013 ("A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity", r 2.1-1. The commentary to this Rule further elaborates, in part: "Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety", commentary 2). See also Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa: FLSC, 2014, r 2.1-1.

[109] See LSUC, *ibid* ("A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment", r 3.2-7). See also FLSC, *ibid*, r 7.2-1.

[110] See LSUC, *ibid* ("A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings", r 5.1-5). (The Law Society of Upper Canada, *Rules of Professional Conduct,* r 5.1-5). See also FLSC, r 3.2-7.

[111] See LSUC, *ibid* ("A lawyer shall encourage public respect for and try to improve the administration of justice", r 5.6-1). See also FLSC, *ibid*, r 3.2-7.

[112] LSUC, *ibid,* rr 1.1-1 "professional misconduct", 7.8.2-2.

unbusinesslike habits of another", or "engag[es] in conduct involving dishonesty or conduct which undermines the administration of justice."[113]

Arguably, lawyers who send SCRLs do not act in accordance with these duties and prohibitions. For lawyers who send SCRLs that mislead the public as to their legal obligations, there is a strong case that they are knowingly assisting their clients in dishonest conduct contrary to Rule 3.2-7,[114] and are violating their obligations to act in good faith and practice law with integrity. This includes, according to the Commentary to Rule 2.1, a mandate that one's conduct as a lawyer should "inspire the confidence, respect and trust...of the community."[115] The strategy of sending a large volume of SCRLs, in the hope that a sizable portion of recipients will pay because they did not consult a lawyer about their legal rights, and who may believe that SCRLs contain valid legal claims, arguably amounts to "conduct unbecoming a barrister or solicitor". Such a strategy may often amount to "taking improper advantage of the youth, inexperience, lack of education, unsophistication...habits of another". This strategy further involves conduct that is dishonest and "undermines the administration of justice."[116]

To be sure, several legal ethics scholars have compellingly observed that part of the lawyering role necessarily involves engaging in conduct that would otherwise be viewed as immoral by ordinary community standards.[117] The "hidden bodies" case, discussed by Professor Bradley Wendel in his book, *Lawyers and Fidelity to Law,* is an example of this tension at work. The facts here involve a lawyer who "learns from his client the location of the hidden bodies of two teenagers who had disappeared on a camping trip, murdered, as it turns out, by the lawyer's client."[118] Although the lawyer is required by law to keep his client's disclosure confidential, Wendel observes that "a decent person" would be compelled as a matter of ordinary morality to disclose the

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[113] LSUC, *ibid,* rr 1.1-1 "conduct unbecoming a barrister or solicitor", 7.8.2-3.

[114] As Professor Stephen Pitel has pointed out, the fact that this rule expressly includes "dishonest" conduct in addition to "fraud, crime, or illegal conduct" suggests that the meaning of dishonesty in this context cannot be considered to be reducible to illegal or criminal conduct.

[115] LSUC, *supra* note 108, r 2.1-1.

[116] LSUC, *ibid*, rr 1.1-1 "conduct unbecoming a barrister or solicitor", 7.8.2-3.

[117] For a strong articulation of this position, see e.g. Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton, Princeton University Press, 2008), contending, *inter alia*, that lawyers' professional obligations require them to lie and to cheat.

[118] W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) at 30.

location of the bodies and the fact that his client was the murderer.[119] In compliance with the law, the lawyers in the "hidden bodies" case kept their client's disclosure confidential.[120]

Does the behaviour of lawyers who send SCRLs present as an analogous case? While many may view the practice of sending SCRLs as distasteful, can it be seen as part-and-parcel of the professional role that mandates lawyers act as zealous and loyal advocates in their client's cause? In other words, should we interpret the *Rules of Professional Conduct* as permitting, if not requiring, lawyers to engage in misleading conduct, such as SCRLs? After all, the *Rules of Professional Conduct* also mandate that lawyers represent their clients resolutely,[121] and observe that client loyalty is necessary "to maintain public confidence in the integrity of the legal profession and the administration of justice."[122]

In order to answer these questions it is necessary to consider what normative principles govern and bind the lawyering role. One of the most prolific pronouncements of the role of the lawyer underscores the need for client loyalty and zealous advocacy. In his address to the House of Lord's while defending Queen Caroline on a charge of adultery made by her husband King George IV, Henry Brougham famously declared:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences[123]

The concept of zealous and resolute advocacy reflected in this address continues to significantly influence how we think about the ethical behaviour of lawyers.[124]

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[119] *Ibid.*
[120] *Ibid.*
[121] See e.g. LSUC, *supra* note 108, r 5.1-1; FLSC, *supra* note 108, r 5.1-1.
[122] See e.g. LSUC, *ibid*, r 3.4-1; FLSC, *ibid*, r 3.4-1.
[123] Monroe H Freedman, "Henry Lord Brougham and Zeal" (2006) 34 Hofstra L Rev 1319 at 1322.
[124] See e.g. FLSC, *supra* note 108 ("In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law", r 5.1-1 Commentary).

However, the concept of zealous advocacy has limits. It does not permit lawyers to advance any and all claims on behalf of their clients, but instead directs the advancement of "any *non-frivolous* interpretation of the law's application to their client's circumstances."[125] The Supreme Court of Canada recently confirmed that a lawyer's "duty of commitment to the client's cause must not be confused with being the client's dupe or accomplice," and that "[c]ommitted representation does not...permit let alone require a lawyer to assert claims that he or she knows are unfounded."[126]

The legal claims advanced in SCRLs are unfounded in several respects and thus fall outside a lawyer's ethical representation of his or her client. First, SCRLs addressed to parents make claims rooted in vicarious liability and damages based on pro-rated overall security costs. Canadian courts have repeatedly rejected these types of claims. Second, SCRLs addressed to shoplifters directly also claim damages based on pro-rated overall security costs, which have no reasonable basis in law. It is possible for a retailer to have a viable common law claim against a shoplifter or their parent. However, only in narrow and exceptional circumstances would such a claim result in anything more than a small amount of nominal damages. In cases against shoplifters directly, a retailer may have a valid claim to a small amount of nominal damages, and potentially greater damages if the retailer can point to a direct compensable loss, or extraordinary circumstances that would ground punitive damages. In cases against parents, the following two elements must both be present: first, the child must be very young and have attended the retail location by him or herself or be a child with known propensities to shoplift being allowed to attend retailer locations without close parental monitoring; second, the retailer must be able to point to a compensable loss directly related to the shoplifting incident (like, for example, the taxi fare incurred after a security guard had to take a taxi to catch a fleeing shoplifter).

Nothing in my research suggests that the current SCRLs practice is intended to capture these limited circumstances, or that the due diligence necessary to determine if these limited circumstances are present is ever conducted. To the extent that a lawyer is willfully blind or indifferent to

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[125] Alice Woolley, "The Lawyer as Advisor and the Practice of the Rule of Law" (2014) 47:2 UBC L Rev 743 at 745 [emphasis added].

[126] *Canada (Attorney General) v Federation of Law Societies of Canada,* 2015 SCC 7 at para 93, [2015] BCWLD 1248. Thanks are owed to Adam Dodek who pointed out this language in the decision and its potential relevance to the issue of SCRLs.

whether SCRLs contain a viable claim, the lawyer is arguably off-side his or her ethical obligation to only advance founded claims on behalf of clients.

Another important qualification to the concept of zealous advocacy is that it is underwritten by the presence of an adversarial system, complete with third party decision-makers and public proceedings.[127] As a general rule, when lawyers advance claims in SCRLs which are not intended to be adjudicated by an independent third party, they are acting more like lawyers in an advisory, rather than litigation, capacity. The advisory context, Professor Woolley has compellingly argued, requires lawyers to advance legal position that are "objectively reasonable," and have their analysis "reflect what would be expected of a lawyer in her interpretive community."[128] This standard is not met by lawyers who send SCRLs without regard for whether the circumstances amount to an extraordinary case where punitive damages may be warranted.

The normative case against lawyers who send SCRLs is further bolstered by a consideration of the rule of law values that undergird the lawyering role. One way to understand the value of law to society is to view the law as providing a helpful common framework for acting in a world of moral disagreement and coordination problems.[129] Viewing the law in this way can help us explore the ethical boundaries of the lawyering role. Based on this understanding of the law's role, Professor Wendel argues that "fidelity to law" and the pursuit of a client's legal entitlements, as opposed to interests or preferences, lie at the heart of the lawyering role.[130] He elaborates:

> Law deserves respect because of its capacity to underwrite a distinction between raw power and lawful power, so that it becomes possible for the proverbial little guy to stand up to the big guy, and say, "Hey—you can't do that to me!" Law enables a particular kind of reason-giving, one that is independent of power or preferences. Citizens can appeal to legal entitlements, which are different from mere interests or desires, because they have been conferred by the society as a whole in some fair manner, collectively, in the name of the political community.[131]

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[127] Indeed, Rule 5.1-1, which mandates "resolute" advocacy is explicitly qualified as applying in circumstances in which a lawyer is acting as an advocate before a tribunal.
[128] Woolley, *supra* note 125 at 778.
[129] *Ibid.*
[130] Wendel, *supra* note 118 at 7.
[131] *Ibid* at 2.

It is these legal entitlements, distinct from "assertions of interest and from the ability to obtain something using power, trickery, or influence,"[132] Wendel argues, that empower the lawyer, as agent for her client, to act. He notes that although "[a] client may have extra-legal interests...these do not convey authority upon an agent to act in a distinctively legal manner on behalf of the client."[133]

To the extent that they sell their letterhead to give authority to legally invalid claims, lawyers who send SCRLs are arguably exercising the "raw power", rather than the "lawful power" that binds their job as lawyers. When lawyers send SCRLs with the goal that recipients will be duped into thinking the retailer has a valid claim, and will pay to resolve the claim, this is the type of "power, trickery, or influence" that Wendel notes as improper behaviour for a lawyer. Professor Woolley has made this very point in a previous blog about lawyers who send SCRLs:

> [T]he 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.[134]

To the extent that SCRLs operate as form letters with no investigation by the lawyer to ascertain whether the particular circumstances amount to an extraordinary case where compensatory or punitive damages might be warranted, it is difficult to see how lawyers who perform this task are acting to further their clients' legal interests. The upshot to this behaviour is that such lawyers cannot reasonably be seen as performing a lawyerly activity by facilitating their clients' access to legal entitlements. Indeed, by failing to investigate the circumstances behind any individual cases, such lawyers act with an indifference to their clients' legal entitlements. The practical impact of such behaviour is that many SCRL recipients will receive letters that reflect no valid claim.

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[132] *Ibid* at 8.
[133] *Ibid.*
[134] Woolley, *supra* note 1.

VI. What Are Potential Solutions?

Sending SCRLs which advance misleading claims is problematic for the profession and the public. One solution to this problem could be for Canadian law societies to pass a new rule of professional conduct expressly addressing SCRLs or, perhaps more likely, a new rule that more generally restricts lawyers from sending demand letters for claims without strong legal foundation. Although such an amendment would provide authoritative guidance on the issue, the current *Rules of Professional Conduct* already prohibit such behaviour, and the addition would be redundant.

Moreover, a new rule risks generating more problems than it would solve. For good reason, law societies would not want to institute a general ban on demand letters. When used properly, demand letters can be valuable tools to facilitate justice. Even the alternative to a ban—a discretionary rule, such as a prohibition on demand letters that advance questionable claims—risks sanctioning or creating a chilling effect on behaviour that should be encouraged. Similar concerns have manifested in relation to other rules aimed at preventing lawyers from advancing improper claims. Several commentators have, for example, argued that American federal court rules meant to discourage frivolous claims have tended to be used as weapons against plaintiffs seeking to bring novel civil rights claims.[135]

While a rule change may not be an effective policy response, law societies have other viable options. Law societies could, for example, publish practice directions specifically on the topic of SCRLs, clarifying appropriate behaviour in sending these types of demand letters. A precedent for this approach can be found with an advisory published in 2010 by the Solicitors Regulation Authority ("SRA"), the regulator for solicitors in England and Wales. This advisory was issued in response to a report published in 2009 by Citizens Advice Bureau, a consumer advocacy group, which raised concerns

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[135] See Charles Alan Wright & Arthur R Miller, *Federal Practice and Procedure: Federal Rules of Civil Procedure Rules 11 to 12—Sections 1331 to 1400* (St. Paul: West Publishing, 1990) at 33 (asserting that Rule 11 of the Federal Court Rules has a chilling effect on vigorous advocacy especially for public interest and civil rights plaintiffs). See also Byron C Keeling, "Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions" (1994) 21:4 Pepp L Rev 1067; Georgene M Vairo, "Rule 11: Where We Are and Where We Are Going" (1991) 60:3 Fordham L Rev 475 at 484-86 (arguing that Rule 11 has a chilling effect on zealous advocacy, particularly in civil rights, employment).

about the use of SCRLs by British retailers.[136] The report argued that the use of SCRLs by retailers constitutes deceitful, unfair, and improper business practice, as SCRLs routinely contain claims for compensation "in the absence of clear evidence that the civil courts have consistently supported—at contested trials—the recoverability of the[se] sort of sums."[137] The report recommended that the Minister of Justice review the law related to civil recovery, and that it ensure through legislative amendment that "civil recovery is limited to cases involving serious, determined or persistent criminal activity."[138] The report also recommended in the interim, the SRA "consider whether it needs to issue specific guidance to solicitors on ensuring that any action taken in relation to civil recovery is consistent with the Solicitors Code of Conduct."[139]

In 2010, the Citizens Advice Bureau published an additional report, providing more information on this issue and reiterating its recommendations.[140] On the legislative side, in England and Wales, the practice of SCRLs was addressed as part of a 2012 Law Commission Report on Consumer Redress for Misleading and Aggressive Practices.[141] Following the Report's recommendation, legislative changes effective October 2014 provide that SCRLs are "clearly covered" under the English consumer protection regime, meaning "that misleading and aggressive practices in respect of such demands would now clearly lead to both criminal [and civil] sanctions."[142]

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[136] Citizens Advice Bureau, "Unreasonable Demands? Threatened Civil Recovery Against Those Accused of Shoplifting or Employee Theft" (9 December 2009), online: <www.citizensadvice.org.uk/index/policy/policy_publications/er_employment/unreasonable_demands.htm>.

[137] *Ibid* at 17.

[138] *Ibid* at 20.

[139] *Ibid* at 21.

[140] Citizens Advice Bureau, "Uncivil Recovery: Major Retailers' Use of Threatened Civil Recovery Against Those Accused of Shoplifting or Employee Theft" (6 December 2010), online: <www.citizensadvice.org.uk/index/policy/policy_publications/er_legal/uncivil_recovery.htm>.

[141] The Law Commission and The Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (28 March 2012), online: <lawcommission.justice.gov.uk/docs/lc332_consumer_redress.pdf>.

[142] Department for Business Innovation & Skills, *Misleading and Aggressive Commercial Practices – New Private Rights for Consumers: Guidance on the Consumer Protection (Amendment) Regulations 2014* (August 2014) at 7. For further discussion of this legislative change and impact on civil recovery in the UK, see e.g. Richard Dunstan, "The End of the

A number of American ethics opinions provide guidance on appropriate lawyer conduct in relation to demand letters. For example, the Nevada State Bar's Formal Opinion No. 2 responds to the question: "May an attorney write to a person who a client says owes the client money, demand payment, and threaten to sue if the person does not pay?" The answer states, in part:

> [C]ollection letters are proper as long as certain principles of honesty and fairness are observed. Collection letters must be accurate and truthful....Demand letters must be sent in good faith and for the purpose of reaching a settlement. A lawyer must not send a collection letter whose only purpose is to harass or burden the recipient...Accordingly, before sending a collection letter on behalf of a client, the lawyer should examine the pertinent documents and otherwise investigate sufficiently to satisfy him—or herself that the purported debt is in fact owed.
>
> Generally, collection letters may threaten litigation if the debt is not paid. But this general statement must be tempered by the requirements of truth and accuracy. If litigation is not reasonably likely or the attorney knows suit will not be brought, either because the claim is so small as to make litigation economically unfeasible or for any other reason, it would be untruthful for the attorney to state that suit will be brought if payment is not made.[143]

A Virginia State Bar Ethics Opinion advises that it would be improper for an attorney to threaten litigation where they know the client has forwarded the account for the sole purpose of a demand letter; such conduct would result in knowingly making a false statement of fact in violation of the rules.[144]

Canadian law societies should consider publishing a practice direction on the topic of SCRLs. Drawing from the above SRA warning and American ethics opinions, a model direction for Canadian lawyers could be:

Road for Civil Recovery?", *The Justice Gap* (19 August 2014), online: <thejusticegap.com/2014/08/end-road-civil-recovery/>.

[143] State Bar of Nevada Standing Committee on Ethics and Professional Responsibility, Formal Opinion No 2 (23 May 1986), online: <nvbar.org/sites/default/files/opinion_02.pdf>.

[144] Virginia State Bar, "Creditor Demand Letters", Legal Ethics Opinion 1121 (1 September 1988), online: <www.vsb.org/docs/LEO/1121.pdf>.

If you act for a retailer who is considering taking, or threatening to take, an action against alleged shoplifters and/or their parents and/or guardians, you must ensure that any correspondence sent to such individuals is consistent with your professional obligations, including your obligations:

- to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other members of the profession honourably and with integrity (Rule 2.1-1)
- to refrain from knowingly assisting in or encouraging any dishonesty (Rule 3.2-7)
- to act in good faith with all persons with whom you have dealings (Rule 5.1-5)
- to encourage public respect for and try to improve the administration of justice (Rule 5.6-1)

Correspondence sent to members of the public under a lawyer's letterhead that contains materially misleading statements of law or fact can amount to a violation of these obligations. We advise lawyers to refrain from:

- Suggesting that litigation is a possibility if payment is not made, if the lawyer knows (or ought to know) that there is little or no chance litigation will in fact be commenced;
- Including in the correspondence a claim for compensation that represents a pro-rated amount of the overall security costs incurred by the retailer. A review of relevant case law indicates that there is no good faith legal basis for such a claim;
- Claiming or suggesting that a parent and/or guardian might be vicariously responsible for the tortious behavior of a child. A review of relevant case law indicates that there is no good faith legal basis for such a claim;
- Claiming or suggesting that a parent and/or guardian might be responsible for damages resulting from a shoplifting incident committed by a child on the grounds that the parent failed to supervise their child, unless the lawyer has conducted an investigation of the facts of the particular case and has determined that such a claim is potentially viable in the circumstances. As a general matter, such damages would likely only be awarded in cases involving very young children attending retail locations by themselves, or in cases involving children with known propensities to shoplift allowed to attend retail locations without close parental monitoring. The retailer would only be in a position to recover damages that represent losses directly related to the shoplifting incident; or
- Claiming or suggesting that punitive damages could be awarded by a court against an alleged shoplifter, unless the lawyer has conducted the necessary investigation to determine that the alleged shoplifter's conduct was exceptional, such that the court might award punitive damages. Notably, the fact that conduct could also constitute a criminal offence is not sufficient, in and of itself, to attract a punitive damage award.

A practice direction of this nature would provide guidance to lawyers as to what constitutes appropriate conduct in sending SCRLs. In order to be effective, it would also be necessary that law societies pursue and discipline lawyers who violate professional rules of conduct in sending SCRLs.

In the alternative, Canadian law societies could consider publishing a more general practice direction on the topic of demand letters. The concerns raised here can also arise in other contexts. One increasingly prominent example is that of "copyright trolls". As defined by Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic ("CIPPIC"), "[t]he phrase 'copyright troll' refers to the emerging business practice among copyright owners of sending aggressive letters to individuals and businesses claiming copyright infringement and threatening to sue if the recipient does not pay an expensive 'retroactive license' fee."[145]

Concerns about the content of demand letters in the copyright context have recently led a Canadian court to require a party seeking the names and addresses of subscribers to an Internet Service Provider to have any correspondence sent "clearly state in bold type that no Court has yet made a determination that such Subscriber has infringed or is liable in any way for payment of damages", and be reviewed and approved by the court before being sent to any subscriber.[146]

A practice advisory that could serve to combat inappropriate demand letters in a wider variety of contexts, might read as follows:

> When sending a demand letter, you must ensure that the contents of the letter are consistent with your professional obligations, including your obligations:
>
> - to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity (Rule 2.1-1)
> - to refrain from knowingly assisting in or encourage any dishonesty (Rule 3.2-7)
> - to act in good faith with all persons with whom you have dealings (Rule 5.1-5)
> - to encourage public respect for and try to improve the administration of justice (Rule 5.6-1)

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[145] Samuelson-Glushko, *Copyright Trolls*, online: Canadian Internet Policy and Public Interest Clinic <cippic.ca/index.php?q=FAQ/Copyright_Trolls#resources>.

[146] *Voltage Pictures LLC v John Doe,* 2014 FC 161, 240 ACWS (3d) 964.

> Correspondence sent to members of the public under a lawyer's letterhead that contains materially misleading statements of law or fact can amount to a violation of these obligations. We advise lawyers to refrain from:
>
> - Suggesting that litigation is a possibility if payment is not made, if the lawyer knows (or ought to know) that there is little or no chance litigation will in fact be commenced;
> - Including in the correspondence an unfounded demand for compensation; or
> - Including in the correspondence materially inaccurate or misleading statements of law.

CONCLUSION

For about two decades, Canadian retailers have sent SCRLs to accused shoplifters and their parents. For approximately the same amount of time, this practice has been criticized by members of the public and legal community as being unethical. Although non-profit organizations have attempted to inform members of the public about the misleading nature of some of the claims in these letters,[147] retailers continue to retain lawyers to send SCRLs on their behalf. The longevity of this practice and the little information available about its success suggest that sending SCRLs is a profitable activity for retailers. To date, Canadian lawyers have shared in this profit, with very little regulatory scrutiny. Many of the claims advanced in the SCRLs lack factual and legal validity. Measuring this activity against the formal rules that govern the legal profession, as well as broader normative constraints, the inevitable conclusion is that unethical behaviour is taking place. Canadian law societies should act publicly to condemn and constrain the practice.

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[147] See e.g. Justice for Children and Youth, *supra* note 103.

APPENDIX A: TEXT EXCERPTED FROM REDACTED SCRLS

Letter #1

[Lawyer Letterhead]

Without Prejudice [Date]
Private and Confidential

Dear [Mr. X]

Re: [Retailer] and the Recovery of Civil Damages
I am legal counsel for [Retailer]. You were apprehended on [date] for allegedly taking unlawful possession of merchandise from the Retailer's premises located at [location]. The Retailer takes the position that it has the right to claim damages from you as a result of such action based on trespass to goods, trespass to the Retailer's premises and conversion. The Retailer's right of civil recovery is separate and distinct from any criminal proceedings instituted by the police.

The Retailer is prepared to settle its claim for civil damages against you in retain for a payment of $595.00 (the "Settlement Amount"), received on or before [date]. If this amount is not paid, I may receive specific instructions to arrange for a law firm in your jurisdiction to commence legal proceedings against you before a civil court, for all damages, plus interest, legal expenses, and other administrative costs incurred by the Retailer in connection with this matter. These latter amounts will increase if payment is not made by the noted date. You have the right to be represented by a lawyer with respect to this claim.

Should you choose to settle the Retailer's claim by payment of the Settlement Amount, payment should be made by cheque or money order, made payable to "CIVIL RECOVERY" on behalf of the Retailer, with your name and the above case number noted thereon. The payment should be sent in the enclosed postage paid envelope or to the following address [P.O. Box Address].

I have been advised that Canadian retailers estimate shoplifting amounts to an annual expense exceeding $4.0 billion. The cost incurred by retailers includes the cost of apprehension, documentation and inventory control, and loss of sales opportunities. Experience indicates that pursuing shoplifters for such losses reduces the number of shoplifting incidents, resulting in savings which can then be passed on to consumers. The claiming of civil damages was affirmed by the Divisional Court in *Hudson's Bay v White.*

Any questions in regard to this matter are to be made in writing, and addressed to the undersigned.

Yours truly,

[Lawyer]

Letter #2

[Lawyer Letterhead]

Without Prejudice [Date]
Private and Confidential

Dear [Mr. X]

Re: [Retailer] and the Recovery of Civil Damages

I am legal counsel for [Retailer]. It is alleged that on [date], a young person under your care and custody, [name], took unlawful possession of merchandise from the Retailer's premises located at [location]. The Retailer takes the position that it has the right to claim damages from the said young person and/or you as a result of such action based on theft, damages and conversion. The Retailer's right of civil recovery and payments made to the Retailer are separate and distinct from any criminal proceedings which may be instituted by the police.

The Retailer also takes the position that it has the right to claim damages from you as parent or guardian of the young person for failing to provide reasonable supervision of the young person. You have a right to be represented by a lawyer with respect to this claim.

The Retailer is prepared to settle its claim for damages in return for a payment of $595.00 (the "Settlement Amount"), received on or before [date]. If this amount is not paid, I may receive specific instructions whether or not to arrange for a law firm in your jurisdiction to commence legal proceeding [sic] before a civil court for all damages, plus interest, legal expenses, and other administrative costs incurred by the Retailer in connection with this matter. These latter amounts may increase if payment is not made by the noted date. This settlement amount is based on the costs associated with the detection, apprehension, recovery of goods and damages associated with shoplifting, hereafter referred to as Recovery Costs. Retailers have calculated the average Recovery Costs to be approximately $900.00. The settlement amount is significantly lower than the Recovery Costs, however, should the retailer be compelled to prove costs in Court, they would rely on the higher or actual amount of Recovery Costs in any Civil Action commenced.

Should you choose to settle the Retailer's claim by payment of the Settlement Amount, payment should be made by cheque or money order, made payable to "CIVIL RECOVERY" on behalf of the Retailer, with your name and the above case number noted thereon. The payment should be sent in the enclosed postage paid envelope or to the following address [P.O. Box Address].

I have been advised that Canadian retailers estimate shoplifting amounts to an annual expense exceeding $4.0 billion. Experience indicates that pursuing shoplifters for such losses reduces the number of shoplifting incidents, resulting in savings which can then be passed on to consumers. *The Hudson's Bay v. White* support the position that shoplifters in certain cases are liable for punitive damages.

Any questions in regard to this matter are to be made in writing, and addressed to the undersigned.
Yours truly,

[Lawyer]

Letter #3

[Lawyer Letterhead]
Without Prejudice [Date]
Private and Confidential

Dear [Mr. X]

FINAL NOTICE

Re: Case number [number], Recovery of Civil Damages

Further to my previous letter to you, I have been advised that the payment requested in the settlement offer I had made on behalf of the [retailer] (the "Plaintiff") with respect to the above noted matter has not been made. As a result, I may now receive specific instructions from the Plaintiff to commence legal proceedings against you before a civil court.

You may stop and/or prevent the commencement of those proceedings by paying the Plaintiff's claim in the amount of $695.00. You should note that this amount is somewhat greater than the Settlement Amount claimed in my earlier correspondence. The incremental difference represents additional administration costs incurred by the Plaintiff. These administration costs will continue to increase until this matter is resolved.

Please submit payment by [date]. Should you not do so, the Plaintiff reserves the right to proceed to court and to the extent available, commence such additional collections procedures as are permitted by law. You have a right to be represented by a lawyer with respect to this claim.

Payment of the total amount demanded should be by cheque or money order, made payable to **"CIVIL RECOVERY"** on behalf of the Plaintiff with your name and the above case number noted thereon. The payment should be sent in the enclosed postage paid envelope or to the following address: [P.O. Box].

Any questions with regard to this matter are to be made in writing and addressed to the undersigned. Please disregard this correspondence if you have paid or a lawyer acting on your behalf has already contacted me by the time you receive this letter.

Yours truly,

[Lawyer]

Letter #4

[Letterhead of American Firm] [Date]

Dear [Mr. X] WITHOUT PREJUDICE

We are legal counsel for [retailer] concerning its civil claim against you in connect with an incident in their store [number] on [date]. Theft costs Canadian retailers and their customers billions of dollars each year. Based on your actions, [retailer] takes the position that they have an action in civil court against you for trespass to goods, trespass to property and conversion.

However, prior to our client exploring the option to proceed with such a claim, you may settle this civil matter by making payment to us in the amount of $300.00 within thirty (30) days of the date of this letter. Upon receipt of your full payment and clearance of funds, you will receive a written release of the civil claim. The payment of any damages demanded of you does not prevent criminal prosecution under a related criminal provision.

Payment should be made payable and mailed to [American law firm via Toronto P.O. Box]. Please include the file number shown above on your payment. MasterCar, Visa, Discover and American Express are accepted. You may also pay online through our secure website: [website]. If you wish to discuss alternative payment arrangements, you may call us toll free at [phone number].

Should payment fail to be made, the file may be reviewed for the possibility of civil action and, if so, we will pursue all legal recourses. In the event our client chooses to proceed with a lawsuit against you, they may be entitled to damages, plus interest, legal fees, and other expenses as determined by the court.

Please make payment according to the terms herein to avoid further action.

Yours very truly,

[Canadian counsel for American firm]