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Consequences of being an OPCA Litigant?

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Case commented on:

ANB v Hancock, 2013 ABQB 97.

ANB v Hancock is Associate Chief Justice John D. Rooke's second written judgment about an Organized Pseudolegal Commercial Argument (OPCA) litigant. As summarized by Justice Rooke in *ANB* (at para 15), "OPCA concepts are legally incorrect schemes marketed and promoted by a collection of conmen ["OPCA gurus"] that claim to allow a person to avoid or impose legal obligation outside of recognized legal processes." These concepts and schemes are all associated with OPCA indicia, which are "unusual motifs that are unique to or strongly associated with OPCA concepts and schemes" (at para 16). *ANB* builds upon Justice Rooke's ground-breaking decision in *Meads v Meads*, 2012 ABQB 571. Like *Meads*, *ANB* arose in the family law context, although *Meads* arose out of a divorce and matrimonial property action commenced by Mrs. Meads, and *ANB* arose from the seizure of A.N.B.'s two children by Alberta Family Services and a subsequent order granting permanent guardianship of the children to the province. *ANB* both applies and extends *Meads*. It applies it by following through on some principles set out in *Meads*, including the provision of an explanation of court costs, characterized in *Meads* (at paras 637-638) as "a crucial aspect in the 'limited duty' a judge owes to these self-represented litigants." It extends *Meads* by allowing Crown counsel to hide their identities in the face of conduct by A.N.B. which is the subject of criminal charges.

In this comment we do not address all of the issues dealt with in Justice Rooke's judgment. A.N.B's central claim was that he had absolute authority over his children and his consent was required before he was subject to the jurisdiction of Alberta's child welfare system, the police, or the courts. Most of Justice Rooke's decision (at paras 36-99) is taken up with explaining to A.N.B. why the OPCA arguments supporting this claim cannot succeed in a court of law. Instead, after setting the stage with a bit of background, we focus on only four issues:

- the use to which the identification of A.N.B. as an OPCA litigant is put;
- the shielding of the identity of Crown counsel as a security precaution;
- the allegation Justice Rooke was biased because he was the author of *Meads*; and
- the costs awarded against A.N.B.

Background

The seizure of A.N.B.'s two children by Alberta Family Services led to three separate actions. First is the appeal by A.N.B. of an order by Provincial Court Judge Ho granting the province permanent guardianship of the children. Justice Rooke is the case management judge and A.N.B. is represented by an experienced family lawyer on that appeal.

The second matter involves criminal charges. A.N.B. pled guilty in Provincial Court in September 2011 to two counts of intimidating justice system participants (Alberta Children and Youth Services employees) and one count of criminal harassment. He was sentenced to time served (four months) and put on probation for one year. A.N.B. is now facing further criminal charges of a similar nature. The Crown is proceeding with these new charges by way of indictment, with A.N.B. already committed to stand trial in the Court of Queen's Bench following a preliminary inquiry. A.N.B. is represented by an experienced criminal law lawyer in those proceedings.

The third action is this civil action, and A.N.B. was self-represented in these proceedings. He commenced this lawsuit a year ago against a number of government agents, peace officers, Crown counsel, court clerks, judges, and A.R., the mother of A.N.B.'s two children. His lawsuit alleged a variety of illegal conduct by those defendants and demanded $20 million in gold and silver bullion and the return of his two children.

In January 2013, Justice Rooke orally granted an application by a number of the defendants to strike A.N.B.'s civil claim and thus put an end to this lawsuit. Justice Rooke's written reasons were subsequently published for the express purpose of assisting A.N.B. to understand why his lawsuit failed and, because A.N.B. had walked out of the courtroom before Justice Rooke's costs order, to explain to A.N.B. the basis of the costs awards against him (at para 3). The decision was also published because it discusses some novel points. At 27 pages and 109 paragraphs, *ANB* is a fairly lengthy judgment, but considerably shorter than the 736 paragraph, 156 page *Meads* decision.

Identification of an OPCA Litigant

As a preliminary matter, Justice Rooke easily concludes (at para 19) that A.N.B. is an Organized Pseudolegal Commercial Argument (OPCA) litigant. His documents and oral arguments were filled with OPCA indicia and invoked numerous OPCA strategies. For example, in the style of cause for the civil action, A.N.B. identified himself by two different names: [A.-N.] of the [B.] Family and "Trust #983170-321522-19305 otherwise known as the [A.N.B.]™ dba, or the [A.N.B.] HOLDINGS". The "double/split" character of the claim is discussed in *ANB* (at paras 66-71) and *Meads* (at paras 417-446). The Statement of Claim is also irregular in form and includes unconventional language. As examples of irregularities in form, the Statement of Claim includes a red thumb print surrounded by the text "SACRED OFFICE TRUSTEE 983170-321522-193058 SEAL" and is notarized. As examples of the unconventional language, the Statement of Claim claims violations of the U.C.C. (the Uniform Commercial Code of the United States) and "International Property and Copy Rights Law." The unusual motifs are reviewed and quoted at length in *ANB* (at paras 8-14). The OPCA arguments in A.N.B.'s Statement of Claim and other documents are reviewed and addressed at even greater length (at paras 53-94).

To what purpose is A.N.B. identified as an OPCA litigant? To what purpose are his arguments characterized as OPCA strategies? As we have previously discussed (in "*What has Meads v Meads* wrought?"), courts have used *Meads* for a variety of purposes to date. It is therefore instructive to see what use Justice Rooke makes of his earlier decision in a new matter involving an OPCA litigant.

First, at the same time as he identifies A.N.B. as an OPCA litigant, Justice Rooke is careful to note (at para 19) that A.N.B.'s affiliations have no direct relevance to the validity of his claim. It is the legal substance of what he argues that matters. Of course, to the extent that A.N.B. only makes OPCA arguments already dismissed in numerous court actions across Canada, there is no legal substance to his arguments. Justice Rooke nonetheless explains why the specific claims brought by A.N.B. in this particular action do not have legal validity. Thus, for example, Justice Rooke notes that a claim in the tort of conspiracy that the defendants are denying A.N.B. access to his children cannot be brought in a family law proceeding given governing Supreme Court of Canada jurisprudence (para 53).

While identification of A.N.B. as an OPCA litigant may have no direct relevance to the validity of his claim, it does make certain types of procedural orders against him more readily available. In *ANB*, this point is illustrated by the next three issues we discuss.

Protective Anonymity for Crown Counsel

The first of these issues is another preliminary matter and concerns some unusual security precautions that Justice Rooke had ordered — precautions not specifically mentioned in *Meads*. The lawyer for fifteen of the defendants was allowed to identify herself by a pseudonym and communicate with A.N.B. is a way that shielded her identity. The lawyer for the four RCMP defendants was allowed to be identified only by his or her title, "Justice Canada Counsel." The identity of these two lawyers was shielded not only from A.N.B. but also from his lawyers in the other two actions. The only lawyer identified by name was one appointed to represent A.N.B.'s children in the guardianship matter and apparently mistakenly named by A.N.B. as a defendant — mistakenly because A.N.B. made no allegations or claims against her in his Statement of Claim.

The identities of Crown counsel were shielded because A.N.B. had been convicted in September 2011, after pleading guilty, on two counts of intimidating justice system participants and one count of criminal harassment. However, Justice Rooke suggests (at para 26) that A.N.B.'s status as an OPCA litigant means that security precautions such as the orders shielding the lawyers' identities should be easily available. Such security precautions should be available if a party is able to establish that there is an "air of reality to an actual or potential threat or danger." This "air of reality" test offers a fairly low threshold, as Justice Rooke acknowledges (at para 26). However, he adds a caveat, namely, that the security precautions that can be ordered when this test is met cannot affect the OPCA litigant's ability to make and respond to arguments in court.

In this case, A.N.B's prior admitted guilt to intimidating justice system participants was, by itself, enough to meet the "air of reality" test with its low threshold. Justice Rooke left it open for a future case to determine whether mere affiliation or self-identification by a litigant with an OPCA movement with known violent propensities might be enough, by itself, to warrant security precautions. The groups identified by Justice Rooke in *Meads* as being OPCA movements with known violent propensities are the Freemen-on-the-Land, the Sovereign Man / Sovereign Citizen movement and the Church of the Ecumenical Redemption International [CERI] (*Meads* at paras 172-188, 257-263).

In *ANB*, Justice Rooke notes (at para 14) the basis for the violence in OPCA strategies:

> One unfortunate and highly troubling aspect of persons associated with OPCA litigation and movements is that members of these groups are known to direct

> both harassing and violent activities to the persons they identify as their enemies ... These enemies are typically peace officers, government and court employees, lawyers, and members of the judiciary. This potential aggression flows from the false historical and theoretical constructs within which OPCA concepts are advanced. An OPCA litigant is typically advised (incorrectly) by a guru with whom he is associated, that the state has no hold over the litigant. That is meant to indicate (again incorrectly) that any state action must be unlawful, and, in the result, the OPCA litigant is therefore (improperly) counselled to be free (and often encouraged) to strike back at his 'oppressors'.

A significant challenge for courts will be to distinguish between those OPCA litigants who merely associate with ideas that could be used in an attempt to justify violence but do not themselves have violent tendencies or intentions, and those OPCA litigants who do. As discussed in our previous blog on judicial treatment of OPCA litigants post-*Meads*, some courts have used the fact of a litigant's status as an OPCA litigant to assume that the litigant's legal position is unmeritorious and that the litigant poses a danger. If applied unthinkingly, the air of reality test may reinforce this tendency and require OPCA litigants to proceed under distrust and suspicion, and without the normal ability to discuss a matter with opposing counsel. Those constraints can be justified where they are necessary, but we would suggest that merely espousing OPCA concepts, even the more extreme ideas of the "freemen of the land," is not sufficient justification and should not provide the air of reality to concerns that the individual is a danger to other participants in the system.

We would further note that the approach adopted by Justice Rooke will present some practical challenges. How does one effectively shield the identity of lawyers and at the same time not interfere with the OPCA litigant's ability to make arguments and respond in court? Will lawyers make submissions in court under pseudonyms? Will they make their submissions behind a screen? In the world of the Internet it may prove challenging to achieve both these goals simultaneously. This suggests another source of caution for the courts. Where the restrictions are being imposed for less tangible reasons than existed in this case, the courts ought to adopt restrictions at the moderate end of the spectrum.

Allegation of Bias against Justice Rooke as the author of *Meads v. Meads*

The final preliminary matter Justice Rooke dealt with was A.N.B.'s motion that Justice Rooke recuse himself for bias. A.N.B. argued that Justice Rooke ought to recuse himself because he is the judge who wrote the *Meads* decision, and "... since you made the decision you have a sort of personal stake in upholding that decision, correct, and that I feel you might not be totally objective ..." (at para 32).

A judge must recuse him- or herself if "an informed person, viewing the matter realistically and practically, and having thought through the matter, would conclude that it is more likely than not that a judge, whether consciously or unconsciously, would not decide it fairly": *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60.

Justice Rooke declined to recuse himself for two reasons. First, he noted (at para 34) that because *Meads* has not been appealed, whether he or a different judge of the Court of Queen's Bench of Alberta heard A.N.B.'s matter, "the principles of *stare decisis* means we would each apply the same law." This is a bit of an over-statement. *Stare decisis* literally means "to stand by decided matters." As Gerald Gall puts it in *The Canadian Legal System*, 4th edition, (Scarborough, Ont:

Carswell, 1995) at page 343, "the decision of a *higher* court within the same jurisdiction acts as binding authority on a *lower* court within that same jurisdiction" [emphasis added]. *Meads* may not have been appealed but it is still a decision of the Court of Queen's Bench, and not that of a higher court. The question is whether a judge is bound by a previous decision of a different judge of co-ordinate jurisdiction in the same province, i.e., by another Court of Queen's Bench of Alberta justice in this case. Gall characterizes the issue as one of "comity" among judges in the same jurisdiction (at 356). Such a judge would be expected to come to a decision in accord with other decisions made by other judges of the Court of Queen's Bench of Alberta on the same issue. But another judge would not be bound to follow *Meads*, which s/he would be if *Meads* had been a decision of the Court of Appeal of Alberta or the Supreme Court of Canada. A more serious problem for the binding nature of the decision in *Meads* is the fact that much of *Meads* is simply not binding because it is *obiter dicta*, i.e., not necessary to the decision about whether to appoint a case management judge, which was the issue in that case.

Second, Justice Rooke analogized his position to that of Justice Myers in *R v Lawson*, 2012 BCSC 356, where Justice Myers rejected an allegation of bias for his role in the conviction and sentencing of the OPCA guru Russell Porisky, noting (at para 7) that . . . "no reasonably informed member of the public would conclude that a judge was biased because he had decided a prior case involving similar issues. That is something that occurs on a regular basis." But, again, that analogy does not fully apply given that Justice Rooke did more than simply issue a decision in *Meads* addressing the particular circumstances of that OPCA litigant. Rather, he wrote an extensive analysis of the OPCA litigant phenomenon and drew various conclusions about the nature, quality and significance of that phenomenon. That analysis may give an OPCA litigant appearing before him a better reason to perceive Justice Rooke as pre-committed to a particular point of view on how OPCA litigation ought to be dealt with.

We do not agree that Justice Rooke ought to recuse himself from cases such as this one merely because he decided *Meads*, given that his decisions shows a sensitivity and fairness in dealing with OPCA litigants and a willingness to engage with their arguments that not all post-*Meads* decisions have shown. He has been clear that in each case a judge is obligated to consider the merits of the OPCA litigant's actual claims and arguments, and to decide each case consistently on its own merits. That seems to ensure that any OPCA litigant may reasonably expect that, on the actual issues to be adjudicated, he will have a fair and impartial hearing.

It is the case, however, that an unusual judgment like *Meads*, which is closer to an academic article on the OPCA phenomenon than to a traditional judicial decision, poses certain conceptual problems. It involves a judge taking a position on general concepts with application across a variety of cases without that position being necessary to the case that was decided. That gives a litigant some reason to perceive Justice Rooke as committed to that position in a way that a judge might not be if only having issued a more usual and restricted judgment. On the other hand, it is also the case that academics who become judges do not generally have to refrain from deciding cases which raise issues on which they have previously taken an academic position. That is, presumably, because general positions are not seen as necessarily pre-determining the consideration of specific matters of fact or law arising in an individual case (see, e.g., *Re Great Atlantic & Pacific Co of Canada Ltd and Ontario Human Rights Commission et Al*, (1993) 13 OR (3d) 824). Justice Rooke's judgment in *Meads*, while a judgment, may be analogous to that sort of academic analysis.

Ultimately the key point is this: the OPCA positions advanced by a litigant are not, in fact, the issue before the court. The issue is whatever the issue in the specific case is — e.g., that the

government has interfered in the parent-child relationship — and the OPCA positions are generally a means for a litigant to talk about those substantive issues or the process through which they are to be adjudicated. Therefore, where a judge has been clear that those substantive positions are to be adjudicated on their merits through a fair process, we suggest that judge does not create a reasonable apprehension of bias even if he has taken a position on the merits of OPCA and the litigants who use them.

Costs awarded against A.N.B.

The final issue in *ANB* that we want to discuss was not a preliminary matter, but a consequential one. A.N.B. left the courtroom after Justice Rooke had struck his action and therefore did not make any submissions about costs or hear Justice Rooke's order about the costs A.N.B. would be required to pay as a result of his lack of success. The defendants argued that they should receive solicitor-and-own-client indemnity costs for being dragged into an entirely frivolous and vexatious action that flowed from OPCA strategies. Justice Rooke agreed (at para 101) that, because A.N.B.'s action was fatally flawed and without any basis in law, it would be unjust for the defendants to be out-of-pocket.

Justice Moen, in *Brown v Silvera*, 2010 ABQB 224 at paras 29‑35, surveyed numerous cases in which indemnity costs had been found to be appropriate, cases in which the conduct of a party has been "reprehensible, scandalous or outrageous" and where indemnity costs would satisfy the objectives of deterrence and punishment. And in connection with OPCA litigation in general, in *Meads* (at para 631) Justice Rooke had formulated the following general principle:

> [I]nnocent parties [should] be indemnified for the legal costs associated with OPCA litigation. No, or little, cost should flow to a litigant who is abused by OPCA strategies.

In applying this principle in *ANB*, Justice Rooke awarded the defendants the costs that they asked for, costs that covered the expense of responding to A.N.B.'s Statement of Claim. In the case of the self-represented lawyer who had been appointed to represent A.N.B.'s children — the lawyer apparently named by mistake as no claim was made against her — the indemnity costs were what she calculated she would have earned had she not spent her time responding to A.N.B.'s lawsuit. Costs against A.N.B. totalled $20,000.

The indemnification nature of the cost award in *ANB* illustrates another point that Justice Rooke made in *Meads* (at para 638):

> It has been this Court's experience that OPCA gurus do not educate their customers on the purpose and operation of court cost awards. An OPCA litigant may perceive explanation of this mechanism as a threat, but this explanation is a crucial aspect in the "limited duty" a judge owes to these self-represented litigants. OPCA litigants seem to often believe there are no potential negative consequences to their adopting OPCA techniques and strategies. Evidence to the contrary is a challenge to that indoctrination.

Cost awards against OPCA litigants therefore appear to serve at least one purpose that is specific to the OPCA litigation context and that is that they are intended to shake litigants' confidence in their gurus. Justice Rooke's quoted comment from *Meads* also explains why he goes to great lengths in *ANB* to explain the costs award to A.N.B. even though he had walked out of the hearing. In *ANB* we see an illustration of an explanation of a costs award as "a crucial aspect in the 'limited duty' a judge owes to these self-represented litigants." Cost awards — and especially large ones — also serve a purpose specific to the vexatious litigant context. "[P]ersistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings" is listed in section 23(2)(e) of the *Judicature Act*, RSA 2000, c J-2 as one of the types of conduct that make proceedings vexatious. Unpaid costs awards allow defendants to apply to the courts to have OPCA litigants declared to be vexatious litigants. And, if they are declared to be vexatious litigants, then they cannot commence or continue legal proceedings without the permission of the court.