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What does *Fearn v Canada Customs* add to OPCA jurisprudence?

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Case commented on: *Fearn v Canada Customs*, 2014 ABQB 114 (CanLII)

The leading case on Organized Pseudolegal Commercial Argument (OPCA) litigation is the Alberta Court of Queen's Bench decision of Justice John Rooke in *Meads v Meads*, 2013 ABQB 571 (CanLII) (summarized here). In *Fearn v Canada Customs*, Justice W A Tilleman very deliberately builds on *Meads* and develops the court's responses to OPCA litigants in two ways. First, *Fearn* sets out guidelines for awarding costs against OPCA defendants in criminal proceedings, a context in which costs are very rarely awarded (at paras 113-139). Second, *Fearn* adds to what *Meads* had to say about when OPCA concepts and litigation strategies might amount to contempt of court, whether civil or criminal contempt (at paras 140-256). In this regard, Justice Tilleman identifies some OPCA strategies which, in and of themselves, are *prima facie* civil contempt. He also urges the use of criminal contempt prosecutions against some of the activities of OPCA "gurus", i.e., those who sell instructional material and training in OPCA schemes.

Costs in Criminal Proceedings

The petition before the Court of Queen's Bench in *Fearn* was an application to halt Provincial Court criminal proceedings. As a proceeding associated with a criminal trial, Justice Tilleman concluded the matter before him was better characterized as a criminal, rather than a civil, matter (at para 118). This characterization is relevant to the costs discussion because an award of costs is exceptional in the criminal context, especially against a defendant (at para 119, citing *R v 974649 Ontario Inc*, 2001 SCC 81 at para 85).

The *Charter* right of an accused to make a full answer and defence constrains courts' evaluations of defence conduct (at para 122). Nevertheless, superior courts have the inherent jurisdiction to order costs in criminal proceedings (at paras 120, 123). Justice Tilleman relies on an oft-cited Quebec Court of Appeal description of what type of conduct justifies a cost order (at para 123):

> A superior court has the power to maintain its authority and to control its procedure so as to put justice in order and efficiently. That this implies sometimes ordering one of the parties and even lawyers to pay the costs of a proceeding in cases of the abuse or the frivolity of proceedings, of misconduct or dishonesty or of taken [sic] for some other ulterior motive, is a recognized principle.

> In the absence of reprehensible conduct by the appellants, or a serious affront to the authority of the Court or of a serious interference with the administration of justice … the imposition of costs on appellants … is in no way justified. (*A-G Quebec v Cronier* (1981), 63 CCC (2d) 437 at 449, 451).

Justice Tilleman reviews the increasing incidence of the use of OPCA strategies in criminal proceedings across Canada (at para 128). By definition, the OPCA arguments used in those proceedings were frivolous and vexatious and an abuse of process and, as such, they met the criteria set out in *A-G Quebec v Cronier*. Justice Tilleman therefore concludes that costs may be awarded against an accused "who employs OPCA strategies to cause illegitimate and unnecessary steps in a criminal proceeding" (at para 133). He suggests that an award of costs may be made where the following four criteria are met:

1. The accused is the one who initiates a hearing, application, or process;
2. The accused's position relies on a clearly illegal or incorrect basis, such as a known, identified, and rejected OPCA strategy;
3. The accused is entirely unsuccessful; and
4. The hearing, application, or process is not a direct component of the criminal trial or sentencing process, but instead is ancillary to the criminal proceeding itself, for example:
   a) a meaningless application to a different court to challenge the criminal proceeding or court jurisdiction;
   b) an application to deny trial court jurisdiction;
   c) an attempt to enter irrelevant evidence or witnesses;
   d) an application for representation of the accused by an inappropriate representative, such as an OPCA guru; and
   e) an application for release of the accused from pre-trial detention outside the judicial interim release process, such as a frivolous *habeus corpus* application. (at para 133)

Note that Justice Tilleman restricts these criteria to matters that are separate from the main criminal trial process itself, due to an accused's *Charter* right to make full answer and defence (at para 135). He does suggest that an appeal of a conviction that has no legitimate basis might also attract a cost award, but leaves that question to be dealt with in the context of such an appeal or leave to appeal application (at para 134).

Contempt of Court

As Justice Tilleman notes (at para 140), the possibility that use of OPCA litigation strategies might result in a contempt of court finding was discussed in *Meads* (*Meads* at paras 567-87), but a more substantial analysis was left for more appropriate proceedings. And although Justice Tilleman concluded the petitioner was not in contempt in this particular case, he explores in some detail three topics:

1. What kind of speech or communication attracts civil contempt?
2. What, if any, OPCA schemes inherently represent contempt of court?
3. Whether commercial promotion of strategies intended to disrupt or impede court operation are criminal contempt of court?

The power of superior courts to punish for contempt of court is part of their inherent jurisdiction, used to regulate the courts' practices and prevent abuse of their processes (at para 143, quoting I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23). Contempt has both a civil and a criminal form. A person who disobeys a court order or is otherwise disrespectful of the court commits civil contempt. Criminal contempt requires an additional public element, arising when "public defiance of the court's process in a way that is calculated to lessen societal respect for the courts" (at para 148, quoting *United Nurses of Alberta v Alberta (Attorney General)*, [1992)] 1 SCR 902 at 931). Civil contempt can be punished by incarceration, fines, costs, and restrictions on pleadings, applications and evidence (at para 154, citing *Alberta Rules of Court* 10.52 and 10.53 as further authority for the court's power).

1. What kind of speech or communication attracts civil contempt?

When allegedly contemptuous behavior is speech, as it was in this case, a court must find there is a "clear and present" or "real and imminent" danger that the speech would bring the administration of justice into disrepute, a threshold that Justice Tilleman characterizes as "very high" (at para 168). Critical speech, in and of itself, cannot be the basis for a finding of contempt. Justice Tilleman's review of the cases and secondary literature considering contempt by derogatory or insulting speech (at paras 163-183) leads him to the conclusion (at para 184) that the content of the speech is less important than its impact or intended impact, and that it is only when insulting, derogatory or obnoxious statements disrupt the court process itself that speech is contemptuous and punishable.

2. What, if any, OPCA schemes inherently represent contempt of court?

Justice Tilleman's determination that the courts' contempt powers protect against active disruption of the court system and access to justice, leads him to consider whether OPCA schemes, by their very nature, can be a basis for finding civil contempt. He concludes that they can be (at paras 190-191). He examines a variety of OPCA strategies, reviewed in *Meads*, that are clearly intended to disrupt court proceedings or intimidate the judiciary when directed at the judiciary, including:

- A type of "foisted unilateral agreement", i.e., a demand that a judge rebut certain statements within a certain time period with failure to do so meaning that the judge has accepted the truth of certain statements or outcomes (at paras 195-96, citing *Meads* at 447-528)
- "Fee schedules", a sub-type of foisted unilateral agreements, which threaten to impose an agreement on the recipient — judges — to pay certain amounts if certain events — such as testifying or incarceration — occur (at paras 197-200, citing *Meads* at 505-523)
- Threats of extrajudicial prosecution or sanctions on a judge, based on fictitious authority, the OPCA litigant's own court, notaries as "true" judges, or fictional international courts (at paras 201-210)
- The use of, or threats to use, liens or other property or financial registrations against a judge (at para 211)

Justice Tilleman's conclusion that these four OPCA strategies (and perhaps others) are inherently contemptuous when directed at the judiciary and court processes leads him to consider the

activities of gurus as criminal contempt (at paras 215-256).

3. Whether commercial promotion of strategies intended to disrupt or impede court operation are criminal contempt of court?

A unique characteristic of OPCA litigation is the existence of OPCA "gurus", people sell OPCA strategies, documents and training as commercial products (at para 217, citing *Meads* at paras 85-158). Justice Tilleman explores the availability of the contempt power against these "Typhoid Marys" of the OPCA phenomenon (at para 219), even though their contemptuous conduct occurs outside the courtroom and the proceedings.

In other cases, public statements by people who were not involved in the court proceedings have resulted in findings of contempt (at para 224). In *United Nurses of Alberta v Alberta (Attorney General)*, [1992)] 1 SCR 902, public statements made by a union when defying a court order were held to be criminal contempt due to the impact of the statements on the authority of the court. Justice Tilleman distinguishes "between speech that potentially attacks the function of the court as a whole by subverting its public authority, and a very distinct and different scenario, what is essentially training for 'paper terrorism' then conducted by a limited number of litigants and potential litigants" (at para 230). The former is what has, to date, been recognized as criminal contempt. The latter scenario is what Justice Tilleman would add to the categories of conduct attracting criminal contempt sanctions.

In his opinion, OPCA "gurus" may in certain instances reach the "serious public injury" threshold for a finding of criminal contempt (at para 235, quoting *R v Glasner* (1994) 19 OR (2d) 739 (CA)). Not all ideas promoted by OPCA gurus are a potential basis for criminal contempt charges. The judgment is vague on exactly what type of ideas will attract those charges, preferring to leave the specifics to a case raising the guru misconduct issue (at para 250), but they seem to be ideas that result in what the courts are calling "paper terrorism" that impedes the courts' function (at paras 232-46). Intent to disrupt the administration of justice will be a critical factor (at para 251).

In summarizing why OPCA gurus are appropriate targets of exceptional uses of the criminal contempt power against conduct that occurs outside of court, Justice Tilleman lists the following reasons (at para 247):

- Their ideas harm their customers, innocent litigants, the court and the state
- They are usually behind the scenes, invisible to the court and thus unlikely to attract civil contempt sanctions
- Two decades of in-court failures has not deterred the gurus nor their customers
- They make victims of the court and their customers for their own profit
- Their activity parallels the *actus reus* and the *mens rea* of criminal counselling offences
- To date their misconduct has had no consequences

Justice Tilleman sees courts' failure to target OPCA gurus with criminal contempt charges and sanctions as a large gap in the response of courts and the state to the OPCA phenomenon (at para 248). Thus, he identifies the "[c]ommercial promotion of OPCA concepts intended to frustrate and impede court processes" as a new basis for criminal contempt prosecutions (at para 249).