September 8th, 2008

La Belle Province? Developments in Alberta Language Rights Cases

By Jennifer Koshan

Cases Considered:

R. v. Caron, 2008 ABPC 232
Caron v. Alberta (Human Rights and Citizenship Commission), 2008 ABCA 272.

On August 18, 2008 the Alberta Provincial Court posted its long awaited decision in the case of Gilles Caron. Caron was charged under an Alberta regulation with making an unsafe left turn, and sought to defend on the basis of a violation of his language rights, arguing that Alberta legislation is invalid because it is not enacted in both English and French. His case was initially fought on the issue of whether he was entitled to an interim costs award to permit him to pursue his constitutional challenge in the absence of funding from the Court Challenges program (see my earlier posts on this issue: Special Enough? Interim Costs and Access to Justice and Stay Of Interim Funding Denied In Language Rights Case). In a 96 page decision written in French, Judge L.J. Wenden of the Alberta Provincial Court found in favour of Caron's language rights claim and accordingly dismissed his traffic offence (2008 ABPC 232).

Ironically, I am unable to comment on the nuances of this decision because of my lack of facility in French. Media reports at the time of the *Caron* decision note the Court's finding that Alberta's Languages Act, R.S.A. 2000, c. L-6, was unconstitutional. Section 2 of the *Languages Act* provides that "all Acts, Ordinances and regulations enacted before July 6, 1988 are declared valid notwithstanding that they were enacted, printed and published in English only." This law is reminiscent of that found to be unconstitutional by the Supreme Court of Canada in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. That case confirmed that the attempt by Manitoba to validate its English-only laws by ordinary statute in 1890 was unconstitutional in light of s. 23 of the *Manitoba Act, 1870*, which requires that Manitoba pass its laws in both English and French. The *Manitoba Act* is the federal Act through which Manitoba joined confederation, and has constitutional force (confirmed by s. 52(2)(*b*) of the *Constitution Act, 1982*). This determination of unconstitutionality had actually been made earlier by the Court in a series of cases, and yet ignored by the province of Manitoba. In spite of this, however, the Court deemed Manitoba laws to be temporarily valid until they could be enacted in both English and French, in order to maintain the rule of law in the province.

Quebecers are also guaranteed the enactment of laws in both French and English (under s. 133 of the *Constitution Act, 1867*), and persons in New Brunswick have a similar guarantee under s. 18

of the *Canadian Charter of Rights and Freedoms*, part of the *Constitution Act, 1982*. What about Alberta? In *R. v. Paquette*, [1990] 2 S.C.R. 1103, the Court followed its earlier ruling in *R. v. Mercure*, [1988] 1 S.C.R. 234. Mercure considered the effect of s. 110 of the *North-West Territories Act*, R.S.C. 1886, c. 50, which provides that "either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; … and all ordinances made under the Act shall be printed in both those languages…." The Court found that, unlike the provisions discussed in the *Reference re Manitoba Language Rights* case, this was a *statutory* rather than constitutional requirement, and could be repealed by legislation in Saskatchewan and Alberta (both provinces having been part of the North-West Territories when it was admitted into Canada in 1870). In other words, Alberta was not *constitutionally* obligated to enact laws in both official languages, and its existing English-only laws could therefore be validated through ordinary legislation. Following *Mercure*, Alberta passed the Languages Act in 1988 to repeal the statutory requirement in the *North-West Territories Act* and declare its English-only laws retroactively valid.

Caron is said to have distinguished *Mercure* and *Paquette* by introducing expert evidence to the effect that the people of what is now Alberta only agreed to join confederation if French language rights were protected (see Karen Kleiss, "Alta. Language law struck down" (Edmonton Journal, July 3, 2008)). Counsel for the Crown, Teresa Haykowsky, advises that the government of Alberta has filed a Notice of Appeal in *Caron*, so the impact of the expert evidence on the earlier precedents will now be reviewed by a higher court. Returning to the access to justice aspect of this case, it is to be hoped that the restoration of the language rights mandate of the Court Challenges Program this summer will mean that Caron is provided with funding to defend his position on appeal (see Funding Restored for Court Challenges Language Rights Programs). If Caron is successful on appeal, the Alberta government would have an obligation to enact its laws in French as well as English, perhaps retroactively. If so, it is also likely that Alberta courts will follow the Supreme Court's decision in *Reference re Manitoba Language Rights* to maintain the validity of the existing body of rules in this province until they can be enacted in French.

In the meantime, Gilles Caron has another case making its way through the courts. Caron filed a complaint with the Alberta Human Rights and Citizenship Commission alleging language-based discrimination in his employment with the City of Edmonton. His complaint was dismissed by the Chief Commissioner without sending the matter to a panel hearing, and Caron sought judicial review of this decision. A dispute then arose as to the obligation to pay for an interpreter for the judicial review proceedings. In 2007, Justice Joanne Veit of the Alberta Court of Queen's Bench ordered the Alberta government (represented by the Director of the Human Rights Commission) to pay such costs (2007 ABQB 525). Her decision rested on provisions of the *Charter* and the *Constitution Act 1867*, as well as Alberta's *Languages Act*, which provides in section 4 that "any person may use English or French in oral communication" in proceedings before the Court of Queen's Bench (amongst other courts). The Chief Commissioner and City of Calgary appealed this ruling to the Alberta Court of Appeal, and Caron sought an order dismissing the appeals without a hearing.

In a Memorandum of Judgment signed by Justices Constance Hunt, Keith Ritter and Patricia Rowbotham, and written in English and French, the Court of Appeal allowed Caron's application with respect to the City (2008 ABCA 272). The Court held that since the costs order was not directed against the City, and it had "little or nothing to add to an appeal" (at para. 4), its appeal should be summarily dismissed. However, the Court denied Caron's application with respect to the Chief Commissioner, finding that its interest in the appeal was substantive in light of the decision that the Director should bear the costs of interpretation for the hearing. Caron's concerns about delay were said to be open to a request for an expedited appeal, and the Court confirmed that it would hear the appeal in French. The Commission's appeal on the issue of responsibility for interpretation costs will thus proceed, providing yet another opportunity for Alberta courts to address the scope of language rights in the province.

Caron thus has at least two more hurdles to jump over in the human rights forum. He must win his claim for funded interpretation, as he does not have the resources to pay for interpretation himself, and he must win the judicial review before his human rights complaint is finally heard in substance. If Caron is successful, and his complaint is sent to a human rights panel for hearing, the next hurdle would be the language of the human rights hearing itself. Is there an obligation for those proceedings to be conducted in French or for funded interpretation services to be provided by the government?

Section 4 of the *Languages Act*, mentioned above, only applies to Alberta courts and not tribunals. Section 14 of the *Charter* is worded broadly, stating that "a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted … has the right to the assistance of an interpreter", but there is some disagreement about whether this section applies outside the context of criminal proceedings. Similarly, section 7 of the *Charter* guarantees fair trial rights, but not necessarily in all proceedings. Section 133 of the *Constitution Act 1867* may be interpreted more broadly, as it permits use of either English or French "by any Person or in any Pleading or Process in or issuing from any Court of Canada." In her decision in *Caron*, Justice Veit was careful to restrict her ruling to the obligation to pay for interpretation for the judicial review hearing in the Court of Queen's Bench (at para. 9). In light of this uncertainty, it is not unreasonable to predict that the issue of whether there is a right to funded interpretation will continue to have a life once the appeal and judicial review hearing in *Caron* conclude. Given that human rights panels do not have jurisdiction to decide questions of constitutional law arising under the Charter (see *Designation of Constitutional Decision Makers Regulation*, Alta. Reg. 69/2006, Schedule 1), the matter would likely end up before Alberta courts once again. That is, unless the government sees fit to amend the *Languages Act* to extend section 4 to proceedings before administrative tribunals.

Questions remain about whether interpretation is even a sufficient response to Caron's language rights, as opposed to the right to be heard by a judge who actually speaks French. For an excellent commentary on this question, see Yves Godin's post on The Court: "Should Supreme Court judges be required to be bilingual?".