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February 10th, 2009

Interim Costs Order Upheld in Language Rights Case

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Cases Considered:

R. v. Caron, 2009 ABCA 34.

Gilles Caron was awarded interim costs in relation to expert and legal fees for a language rights claim that was eventually allowed by the Alberta Provincial Court (see my previous posts La Belle Province? Developments in Alberta Language Rights Cases, Special Enough? Interim Costs and Access to Justice). Caron's language rights claim is now before the Alberta Court of Appeal, but in the meantime the Court upheld the interim costs order to Caron and clarified the jurisdiction of superior courts to grant such orders in quasi-criminal proceedings in provincial court.

Caron's claim that Alberta statutes are invalid because they are not enacted in both English and French arose in the context of proceedings for a highway traffic violation. Caron admitted the facts of the offence, and argued that the ticket was invalid because it was in English only. His trial in the Alberta Provincial Court lasted over 80 days. Caron's claim was originally funded by the Court Challenges Program (CCP), but after the CCP was cancelled in September 2005 he sought, and was granted an interim costs order on the basis of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (*Okanagan*). The Crown appealed this order on several grounds: (1) that interim costs orders are not available in quasi-criminal proceedings, (2) that the Court of Queen's Bench did not have jurisdiction to order interim costs for a Provincial Court trial, and (3) that the test in *Okanagan* was not properly applied by the judge who granted interim costs to Caron. In a decision written in English and French, the Alberta Court of Appeal (per Justice Keith Ritter, Justices Constance Hunt and Patricia Rowbotham concurring) dismissed all three of the Crown's grounds for appeal.

On the first issue, the Court noted that there are no Canadian decisions where an *Okanagan* interim costs order has been made in criminal proceedings. While legal aid may be available in some of these cases, it may be insufficient to cover the costs of a complex constitutional challenge. Further, in a quasi-criminal proceeding such as that for a highway traffic offence, legal aid would likely not be available in any event, as there is only a right to state-funded counsel where the offence is serious and complex, and where the accused person's liberty is at stake (*R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.); *R. v. Rain* (1998), 223 A.R. 359, 68 Alta. L.R. (3d) 371 (C.A.), as cited in *Caron* at para. 13).

In *Okanagan*, interim costs were awarded in the context of civil proceedings. The Crown took the position in Caron that the constitutional challenge should have been initiated directly by a notice of motion seeking a declaratory judgment rather than in a quasi-criminal trial. The Crown found some support for its argument in *R. v. Lefthand*, 2007 ABCA 206, where Justice Frans Slatter questioned the practice of raising constitutional challenges as defences to quasi-criminal charges. However, the Court of Appeal in *Caron* rejected this argument, noting that the Supreme Court of Canada had heard several constitutional challenges that arose as defences to quasi-criminal charges in cases such as *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 and *Forest v. Manitoba (Attorney General)*, [1979] 2 S.C.R. 1032. One could also add several Aboriginal rights cases to this list, including *R. v. Sparrow*, [1990] 1 S.C.R. 1075, and most recently, *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 and *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915. Indeed, the Court of Appeal noted that *Okanagan* could also have arisen in this manner if the Crown had decided to charge members of that First Nation for breaching the tree cutting licensing enactment that it challenged in civil proceedings.

This is a most welcome holding. By clarifying that quasi-criminal proceedings continue to be an important way in which unconstitutional laws can be challenged, the Court of Appeal maintained the broad approach to standing from *R. v. Big M Drug Mart Ltd.* that was threatened by decisions such as Slatter, J.'s in *Lefthand*. And, by finding that interim costs orders are not precluded in such proceedings, the Court also recognized that constitutional challenges may be just as expensive and beyond the means of constitutional litigants in this context. Further, the Court's decision means that the Crown cannot avoid a constitutional challenge and a potential interim costs order simply by deciding to lay quasi-criminal charges in a matter that would otherwise be initiated in a civil proceeding.

The second ground of appeal turned on the inherent jurisdiction of the Court of Queen's Bench to grant an interim costs order for a Provincial Court trial. In an earlier decision in *Caron*, it was held that provincial court judges do not have the jurisdiction to grant such orders (see *R. v. Caron*, 2007 ABQB 262). The Court of Appeal noted that there are no other examples of superior courts granting interim costs orders in similar circumstances, and speculated that this may be because such orders are a relatively new legal development. Nevertheless, it held that superior courts can grant interim costs orders for provincial court trials. The Court rejected all of the Crown's arguments seeking to limit the inherent jurisdiction of the Court of Queen's Bench, including arguments related to legislative intent, jurisdiction over procedural versus substantive matters, and the Crown prerogative. The Court relied on an old Privy Council decision, *Board v. Board*, [1919] A.C. 956, as authority for the proposition that "when a right exists, and if there is no other avenue to enforce that right, the Alberta Superior Court has the power to enforce it" (at para. 46). Having rejected the Crown's argument that *Okanagan* did not create a substantive right to claim interim costs, and in light of the fact that costs could not be ordered by the Alberta Provincial Court and no alternative remedy was available, the Court of Appeal held that it was open for the Court of Queen's Bench to order interim costs.

The third and final ground of appeal related to whether the test for interim costs from *Okanagan* had been properly applied. As a matter of discretion, the standard of review required a misdirection on the law or a palpable error in assessing the facts before the Court of Appeal would overturn the order originally made by Justice V.O. Ouellette.

Okanagan established three criteria for the granting of interim costs awards:

> (1) the party seeking interim costs cannot afford the litigation and there are no other realistic options for litigating the issues;
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> (2) the claim is *prima facie* meritorious, and it would be contrary to the interests of justice that it not proceed for financial reasons; and
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> (3) the issues must be novel and of public importance.

On the first criterion, Justice Ouellette had found that Caron had no means to pay his costs, particularly in light of expert evidence called by the Crown that extended the length of the trial, and in light of the cancellation of the CCP. He had also noted that the Crown had comparatively greater resources to litigate the claim than Caron. On appeal, the Crown argued that this reliance on an imbalance of resources was improper, but the Court of Appeal disagreed. According to the Court, "gross imbalance of resources in a constitutional case leads to the possibility of future arguments that the case was not fully litigated and that the underlying issue should be reconsidered … A victory for government because of a lop-sided case will be no victory, since the issue will likely arise again in the future and have to be re-argued" (at para. 56). This argument was particularly relevant in *Caron*, which is itself a re-litigation of language rights issues initially, but apparently not fully, argued in *R. v. Mercure*, [1988] 1 S.C.R. 234.

The Crown also argued that Justice Ouellette failed to consider the second part of the first criterion. While the Court of Appeal acknowledged that this was the case, it held that there was nevertheless a basis for concluding that there were no other realistic options for litigating the issues. The Court found that this criterion could not be taken to mean that because Caron could have initiated a civil action, there was another realistic option for litigating his language rights. If that interpretation was taken, it would follow that if he had brought a civil action instead, the Crown could have argued that he should have breached a law and brought the claim in the context of quasi-criminal proceedings! The Crown could not have it both ways here.

On the second criterion, the Crown's contention that Caron's underlying claim lacked sufficient merit was easily dismissed given that Caron had by that point succeeded on his claim in Provincial Court.

On the third criterion, the Crown returned yet again to the quasi-criminal nature of the proceedings, and argued that the benefit of a successful language rights argument in this context would accrue only to Caron and not the public. The Court rejected this argument too, noting that "the case law discloses many examples of quasi-criminal litigation which led to the establishment of important constitutional principles [and] should Caron successfully pursue this

case to an ultimate conclusion in the Supreme Court, its precedential value will be such that any other citizen would be able to rely on it in enforcing their language rights” (at para. 59).

The CCP featured prominently in the Court’s decision. First, the Crown argued that the cancellation of this program could not be used to support a right to interim costs. The Court disagreed, finding that this political fact was relevant to whether Caron had explored all possible sources of funding. As stated by the Court, “the applicant does not need to show that it checked with absolutely every person, organization or institution that might be remotely interested in the question. It is sufficient if the applicant sought funding from the primary players interested in the constitutional question before the court” (at para. 64). The CCP was one of those primary players, and the Court refused to interfere with the finding that Caron had pursued all his options here. The Court also saw the federal government’s reinstatement of the CCP language rights program as a signal “of the importance of language rights litigation” in the opinion of the government (at para. 45). As stated in a previous post (Funding Restored for Court Challenges Language Rights Programs), the return of language rights funding is certainly welcome, and this may in fact assist Caron in defending the Crown’s appeal of the Provincial Court decision on the merits of his claim. However, the government’s decision to restore this funding was made as part of its settlement of litigation with the Fédération des communautés francophones et acadienne. Let us not take this to mean that equality rights litigation - CCP funding for which has not been restored - is less important than language rights litigation, although it is hard not to think that the federal government believes this to be so.

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