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Leave to Appeal Granted in Language Rights Case

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Cases Considered:
R. v. Caron, 2010 ABCA 343

Gilles Caron was charged with a traffic violation under Alberta's *Use of Highways and Rules of the Road Regulations*, A.R. 304/2002, back in 2003. He sought to defend himself against that charge on the ground that Alberta legislation is unconstitutional because it is not enacted in both English and French. Caron's case has two important dimensions to it. First, he argued that he was entitled to an interim costs award to permit him to pursue his language rights challenge, relying on *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371. This argument was successful at the Court of Queen's Bench (see Special Enough? Interim Costs and Access to Justice) and at the Court of Appeal (see Interim Costs Order Upheld in Language Rights Case). The Supreme Court granted the Alberta government leave to appeal in August 2009, and heard the appeal on the interim costs issue on April 13, 2010.

The second dimension of the case involves the language rights claim itself, which was successful at trial before Judge L.J. Wenden of the Provincial Court (see La Belle Province? Developments in Alberta Language Rights Cases but was overturned on summary conviction appeal by Justice K.M. Eidsvik of the Court of Queen's Bench (see *R. v. Caron*, 2009 ABQB 745). In the latest decision in the case, Court of Appeal Justice Jack Watson granted leave to appeal to Caron and another applicant, Pierre Boutet, who had joined Caron's language rights challenge (see 2010 ABCA 343).

Caron and Boutet faced a significant burden in arguing that the Court of Appeal should grant leave to appeal from the Court of Queen's Bench decision. Under section 19 of the *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, leave to appeal can only be granted where the summary conviction appeal judgment "involves a question of law of sufficient importance to justify a further appeal." The Court of Appeal is then to certify the question(s) of law on which an appeal will be heard. Justice Watson noted that such question(s) "should have specificity, precision and really arise from the record and not just from the ingenuity of counsel" (at para. 2, citing *R. v. Tollefson*, 2010 ABCA 268). At the same time, the judge hearing the leave application should not decide the merits of the claim, nor preclude a later panel of the Court of Appeal from approaching the appeal in its own way.

In this case, Justice Watson was prepared to find that two questions should be certified for a further appeal, as they were issues "of importance transcending the case itself and enter[ing] the realm of the general public interest" (at paras. 17, 20):

> (a) Est-ce que les lois de la Province de l'Alberta doivent être imprimées et publiées en français et en anglais?
>
> (b) Est-ce que la *Loi linguistique de l'Alberta* est *ultra-vires* ou sans effet dans la mesure où elle abroge un obligation constitutionelle de l'Alberta d'imprimer et de publier ses lois et règlements en anglais et en français?

Roughly translated, these questions are (a) whether the laws of Alberta must be written and published in both English and French, and (b) whether Alberta's *Languages Act*, R.S.A. 2000, c. L-6, is *ultra vires* or of no force or effect to the extent that it abrogates from a constitutional duty to write and publish laws and regulations in both English and French. Justice Watson rejected the government's argument that the questions had already been "conclusively resolved by binding authority" (at para. 18), noting that there had been an 89 day trial with 12 witnesses and 9000 pages of transcript, and lengthy trial and appellate judgments dealing with the implications of previous case law and constitutional texts. More specifically, the implications of the Royal Proclamation of 1869 and the *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union* (1870) had not been dealt with in an earlier language rights case, *R. v. Mercure*, [1988] 1 S.C.R. 234, and were thus live issues rather than an "academic inquiry" as alleged by the Crown (at para. 18).

Justice Watson refused to certify other questions proposed by the applicants. For example, the question of whether language rights encompass a right to a trial in French before a judge competent in that language was not certified, as no findings of fact had been made in relation to this issue in the courts below, and the issue was seen to be moot in any event, as Caron had received a trial and appeal in the French language (see paras. 23-25).

In the course of deciding not to certify a question on the language of trial issue, Justice Watson stated as follows:

> in the absence of final and concrete factual and legal determinations, and bearing in mind that a summary conviction appeal from a trial of an alleged highway traffic offence is not the exclusive means by which such an important and multi-faceted legal topic area can be explored by the Court of Queen's Bench, I am not persuaded that it is appropriate to certify a question of law for this Court to address effectively as a matter of first instance. (at para. 25, emphasis added)

The reference here is to the fact that the language of trial issue could be litigated by way of an action for declaratory relief rather than as a defence to a summary conviction offence. In fact, the Crown took the position during the interim costs aspect of this case that Caron should have initiated his language rights challenge directly by a notice of motion seeking declaratory relief rather than in a quasi-criminal trial (citing Justice Frans Slatter's *obiter* remarks in *R. v. Lefthand*, 2007 ABCA 206). The Court of Appeal rejected this argument in its decision on the interim costs issue (see *R. v. Caron*, 2009 ABCA 34). Justice Watson's comment above should not be seen as a resurrection of this issue, rather as an attempt to confine the appeal to the issues that were the focus of the trial and summary conviction appeal and as an indication that there are other ways to raise further language rights issues in the future.

One final issue of interest was addressed by Justice Watson, and that was the application of the Association canadienne-française de l'Alberta to intervene on the leave to appeal motions and on the appeal itself. Justice Watson stated (at para. 26) that he had in fact heard submissions from the Association as to which questions should be certified, and that "it would be less than frank for me to fail to admit that, in effect, the Association intervened on the motions." However, he did not wish his "*de facto* hearing … of the Association" to be seen as a precedent, noting that this was a case with "unique circumstances", and that there appeared to be no previous cases where an intervention had been allowed on an application under s. 19 of the *Provincial Offences Procedure Act* (at para. 27). Nor did this *de facto* hearing of the Association on the leave to appeal motions determine whether it should have intervener status on the appeal itself. Justice Watson decided that that issue should be heard by a different Court of Appeal judge or panel, with the opportunity given to the Crown to decide whether it wished to oppose the intervention (at para. 29).

It will be interesting to see whether the Supreme Court decision on interim costs comes down before the Court of Appeal hears the language rights appeal on the merits. That being said, it is unclear whether Caron is still funding his challenge by way of an interim costs order at this point. The federal government's funding for language rights challenges, formerly provided through the Court Challenges Program (CCP), cancelled in 2006, and restored via the new Language Rights Support Program (LRSP) in 2009, is likely not available to Caron. The LRSP excludes claims brought before September 25, 2006 and those that previously received funding under the CCP, as Caron's claim did before the CCP was cancelled (see *R. v. Caron*, 2007 ABQB 632 at para. 3).