December 11, 2007

Special Enough? Interim Costs and Access to Justice

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Cases Considered:
R. v. Caron, 2007 ABQB 632

On December 4, 2003, Gilles Caron was charged under Alberta's Use of Highway and Rules of the Road Regulation, Alta Reg. 304/2002, with making an unsafe left turn, a charge with a maximum fine of $100. Almost 4 years later his case is still before the courts, and has taken on a significance that belies the seemingly innocuous nature of his initial traffic ticket.

Caron sought to defend his charge on the basis of language rights, arguing that Alberta statutes are invalid because they are not enacted in both English and French. The grounds for his constitutional challenge are complex, involving the validity of Alberta's Languages Act, R.S.A. 2000, c. L-6 in light of The North-West Territories Act, R.S.C.1886, c. 50, the Alberta Act, S.C. 1905, c. 3, previous case law, and unwritten principles of constitutional law, including the protection of minorities. Caron's challenge was originally funded by the Court Challenges Program (CCP), a program that provided funding for Charter litigation in the areas of equality rights and language rights. Caron was granted CCP funding on the basis of mounting a 2 week constitutional argument, which took place in Provincial Court from March 1 to 15, 2006. When the Alberta Crown sought an adjournment to call expert evidence in reply, Caron requested further CCP funding, but the CCP program was gutted by the federal government in September 2006 before the trial recommenced. Caron's attempts to obtain legal aid funding were also unsuccessful, and he was found to be unable to afford a lawyer himself.

The trial ultimately resumed in October 2006 with thirty days devoted to the Crown's evidence, and 3 additional weeks of evidence called by the defence. In November 2006, Wenden, J. of the Alberta Provincial Court ordered the Crown to pay Caron's legal fees and expert witness expenses for the continuation of the trial (see *R. v. Caron*, 2006 ABPC 278), but this decision was quashed on April 19, 2007 by Mr. Justice R.P. Marceau of the Alberta Court of Queen's Bench (see *R. v. Caron*, 2007 ABQB 262). Marceau, J. upheld the trial court's finding that the Crown had unconscionably delayed the trial by failing to appoint counsel in a timely fashion, contrary to Caron's fair trial rights under s. 11(d) of the Canadian Charter of Rights and Freedoms (the Charter), and he upheld the s. 24 Charter remedy requiring the Crown to reimburse Caron's costs associated with this delay ($15,949.65). However, Marceau, J. found that the trial judge had improperly ordered state funded counsel and expenses under the Charter given the lack of seriousness of the underlying charge, a requirement in light of the Alberta

Court of Appeal decision in *R. v. Rain*, 1998 ABCA 315. Justice Marceau also found that the trial judge did not have the jurisdiction to grant an order for interim costs in the public interest under British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371 (Okanagan) and Little Sisters Book and Art Emporium v. Canada, [2007] 1 S.C.R. 38 (Little Sisters), although he did allow that such an application could be made directly to the Court of Queen's Bench.

Relying on this aspect of Marceau J.'s decision, Caron brought forward an application for an interim costs order, and his application was granted by Mr. Justice V.O. Ouellette in relation to expert fees on May 16, 2007, and in relation to legal fees in a judgment released on October 22, 2007 (Caron 2,).

An initial observation of note about Caron 2 is that the decision is written in French and translated into English. This is an infrequent practice by the Court of Queen's Bench of Alberta, but it is not surprising given the nature of Caron's underlying language rights claim. This aspect of the case is also in keeping with another piece of litigation mounted by Caron, a human rights complaint involving language-based discrimination in his former employment as a labourer with the City of Edmonton. In that case, Justice Joanne Veit of the Alberta Court of Queen's Bench ordered the Government of Alberta to pay for interpreter services for the judicial review hearing, noting that Caron's "receptive English is rudimentary, his expressive English is virtually nonexistent and the hearing process is relatively complicated" (seeCaron v. Alberta (Human Rights and Citizenship Commission), 2007 ABQB 525 at para. 1).

Returning to the claim for interim costs (also known as "advanced costs"), the governing authorities provide a novel way to fund litigation in the very exceptional cases where "it would be contrary to the interests of justice" to deny the application (Caron 2 at para. 27, citing Little Sisters), and where it is necessary to "mitigate severe inequality between litigants" (Okanagan at para. 31). In the context of Caron's public interest claim, Ouellette J. identified 3 issues:

> 1) whether an interim costs award is available in a quasicriminal case;
> 2) whether the Court of Queen's Bench has inherent jurisdiction to grant such an order in litigation before the Provincial Court; and
> 3) whether the criteria for an interim costs award were met in the circumstances?

On the first issue, Ouellette, J. held that the quasi-criminal nature of the underlying matter did not preclude an Okanagan order for interim costs; rather the question was whether the case was a public interest matter "special enough to rise to the level where the unusual measure of ordering costs would be appropriate" (at para. 9). While the underlying matter itself was not particularly special, Ouellette J. noted that the real issue was the validity of the entirety of Alberta's written laws, an issue raised in "exceedingly rare cases" and "naturally and efficiently" raised by Caron, a francophone being prosecuted for a violation of those laws (at para. 12).

The second issue was also resolved in Caron's favour. If the Court had agreed with the Crown's argument on this issue, that would have left Caron in a Catch-22 in light of Marceau, J's finding that the Provincial Court did not have the jurisdiction to grant interim costs. Ouellette, J.

considered the provisions of relevant statutes (the Court of Queen's Bench Act, R.S.A. 2000, c. C-31 and the Judicature Act, R.S.A. 2000, c. J-2), case law and scholarly opinion, and found that the inherent jurisdiction of the Court of Queen's Bench included the power to provide assistance to lower courts "where that Court does not have equivalent jurisdiction" (at para. 25). Given that the Provincial Court did not have the jurisdiction to grant interim costs, the Court of Queen's Bench was found to have the jurisdiction to do so.

Having dealt with these preliminary issues, the Court turned to criteria from Okanagan for interim costs in public interest cases:

> 1) the party seeking interim costs cannot afford the litigation and there are no other realistic options for litigating the issues;
> 2) the claim is sufficiently meritorious;
> 3) the issues are novel and of public importance.

Applying these criteria to the circumstances, Ouellette, J. held that Caron had no ability to pay for his language rights challenge in light of the cancellation of the CCP, the denial of legal aid, and his lack of personal means. While Caron had engaged in some fundraising efforts (through which $30,000 had been raised from members of the public), Ouellette, J. did not find that he could have completely funded the litigation in this way given the timing of the trial. Further, Justice Ouellette found that Caron's claim was prima facie meritorious. In support of this finding, the Court noted that the language rights claim entailed novel legal issues that had not been resolved in previous cases, and pointed to the fact that the Crown had not sought a non-suit when Caron closed his case – rather it called 3 of its own experts and filed 4000 pages of expert and historical documents. Finally, the case was found to be one of public importance in light of its impact on the language rights of "descendants of the founding peoples", comparable to the interpretation of treaty rights and their impact on Aboriginal peoples in Okanagan. Justice Ouellette held that "it would be contrary to the interests of justice if the opportunity to pursue the case were forfeited just because the litigant lacked financial means" (at para. 36), and awarded Caron $91,046.29 in legal fees and disbursements to cover his trial costs.

The scope of the Caron 2 decision may be limited in light of Ouellette, J.'s finding that Caron's need for funding arose due to developments "completely beyond his control", including the cancellation of the Court Challenges Program part way through his trial (at para. 42). Further, the requirement of a "rare and exceptional", "very special" case will limit the use of interim costs orders as a way of responding to the abolition of the CCP and trying to ensure some measure of access to justice for equality and language rights litigants. Indeed, other constitutional litigants have had to resort to private fundraising as a way of carrying on or initiating cases that could have been funded by the CCP. The federal Conservatives have been bombarded by a number of campaigns to restore funding to the CCP, and it remains to be seen whether they will bow to this pressure. In the meantime, interim costs awards remain an important option for litigants in constitutional cases that are "special enough".