

## Stay Of Interim Funding Denied In Language Rights Case

By Jennifer Koshan

### Cases Considered:

[R. v. Caron, 2008 ABCA 111](#)

In October 2007, Gilles Caron was awarded interim costs by Mr. Justice V.O. Ouellette of the Alberta Court of Queen's Bench in relation to legal fees for a language rights claim (see [here](#)). This case was the subject of an [earlier comment](#) on ABlawg. On March 19, 2008, Justice Keith Ritter of the Alberta Court of Appeal denied the Crown's application for a stay of the interim costs order pending appeal.

Caron's underlying claim is that Alberta statutes are invalid because they are not enacted in both English and French. His trial lasted over 80 days, during which expert witnesses were called by both sides. Caron's challenge was originally funded by the Court Challenges Program, which provided funding for Charter litigation in the areas of equality and language rights until the program was cancelled in the fall of 2007 (in the midst of Caron's trial). Caron thereafter sought and obtained an interim costs order under the authority of *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). That order required the Crown to provide approximately \$94,000 in legal fees to Caron to enable his trial to continue, on the basis that he could not afford the litigation and there were no other realistic options for litigating the issues; his claim was sufficiently meritorious; and the issues were novel and of public importance. This sum was actually less than Caron had been awarded in an earlier judgment of the Provincial Court, but that judgment was overturned by Justice Marceau of the Alberta Court of Queen's Bench, who found that the Provincial Court had no jurisdiction to order interim costs (see [here](#)). Caron's appeal of Marceau J.'s judgment will eventually be heard together with the Crown's appeal of Ouellette J.'s judgment.

On the Crown's application for a stay of Justice Ouellette's order, Justice Ritter, sitting as a sole member of the Alberta Court of Appeal, set out the governing test from *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311:

A court must determine: whether there is some merit to the question on appeal;  
whether the applicant would suffer irreparable harm should the stay be refused;

and whether the harm to the applicant would outweigh the harm to the respondent should the stay be granted (at para. 7).

Applying these criteria to the case at hand, Justice Ritter noted that Caron had conceded that the issue of interim funding was serious. The focus then was on the second and third criteria for a stay, which were said to be necessary to consider together.

Caron acknowledged that he had no ability to repay the costs award if the judgment in his case went against him, which is one of the factors to be considered in a stay application of a money judgment. However, Justice Ritter noted that the interim costs order was based on a finding that Caron's litigation was worthy of public funding given that his case engaged the public interest. Further, the Crown had comparatively greater resources to litigate the claim than Caron. While the trial judge had refused to allow Caron's counsel to withdraw part way through the trial, and the Crown argued that he would have legal representation as a result, Justice Ritter rejected the Crown's contention that Caron was therefore not prejudiced. The Court seems to chastise the Crown for its suggestion that Caron should have been required to "rely on the goodwill of an unpaid legal counsel" given the Crown's advantage in having "practically unlimited economic resources" (at para. 13). In the end, Justice Ritter held that in the "unique circumstances" of the case, the criteria of harm and balance of convenience both favoured the respondent, and the Crown's application for a stay pending appeal was dismissed.

It is difficult to think of a situation where a stay of an interim costs order would be appropriate. If the costs award has been used to proceed with litigation, then the recipient of the award, by definition, will not be in a position to pay back the award, but since the litigation was in the public interest, this will not be determinative. On the other hand, if the stay application for the interim costs order was heard before the trial itself, this would likely result in a delay of the trial of the underlying issue. Again, by definition, the Charter claimant could only proceed with the litigation if they had funding to do so, requiring an actual ruling on the appeal of the costs order itself. Because litigation funded by an interim costs award is necessarily in the public interest, the delay might harm that very same public interest.

A decision on the substantive issues in the Caron case is expected from the Provincial Court in May, 2008.