

Interim Costs and Access to Justice at the Supreme Court of Canada

By Jennifer Koshan

Cases Considered:

[*R. v. Caron*](#), 2011 SCC 5

The Supreme Court recently upheld the Alberta Court of Appeal decision in [*R. v. Caron*](#), 2009 ABCA 34. That decision affirmed the jurisdiction of a superior court to award interim costs for public interest litigation before the provincial court, and found that Caron's language rights challenge was an appropriate one in which to order interim costs pursuant to the test in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 (*Okanagan*). The Supreme Court's decision was unanimous (with a majority judgment by Justice Ian Binnie and a concurring judgment by Justice Rosalie Abella), and was [welcomed](#) by groups such as the Canadian Civil Liberties Association (CCLA). The CCLA had [intervened](#) in the case along with a number of other public interest groups, indicating some anxiety that entitlement to interim costs awards as originally set out in *Okanagan* may be further restricted by the Supreme Court, a restriction it commenced in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 (*Little Sisters (No.2)*).

Judicial History

As noted in my previous posts on *Caron* (see [here](#) and [here](#)), the underlying claim involves a challenge to the constitutionality of Alberta's failure to enact its laws in both English and French. Caron raised this issue in the context of a Provincial Court trial for a traffic violation. Caron's language rights challenge was initially funded by the Court Challenges program, but that program was cancelled in September 2006 and Caron could not finance the ongoing litigation himself, particularly in light of the need to call rebuttal evidence in response to the Crown's "mountain of historical evidence" (2011 SCC 5 at para. 4). Nor was legal aid available for this type of challenge. At the Provincial Court level, Caron was denied an order for interim costs (also known as interim funding or advanced costs), but was granted a *Charter* remedy under s.24(1) ordering the Crown to pay his legal and expert witness fees based on unreasonable delay (see 2006 ABPC 278). On appeal, Justice R.P Marceau of the Court of Queen's Bench held that the Provincial Court did not have jurisdiction to make an interim costs order in any event, and it overturned the *Charter* costs remedy. Justice Marceau also found that a superior court would have the jurisdiction to make an interim costs order for a provincial court matter (see 2007 ABQB 262). Rather than appeal the decision relating to the Provincial Court's jurisdiction to order interim costs, Caron brought an application for an interim costs order before Justice V.O. Ouellette of the Court of Queen's Bench, who found that an order was appropriate in the circumstances (see 2009 ABQB 632). This decision was upheld by the Alberta Court of Appeal (Justices Keith Ritter, Constance Hunt and Patricia Rowbotham), holding that first, superior

courts have the jurisdiction to make interim costs orders in respect of provincial court matters, and second, that Caron met the *Okanagan* criteria for interim costs (see 2009 ABCA 34). The Crown appealed, and sought an order requiring Caron to repay \$120,000 in legal fees and disbursements.

Supreme Court decision

Justice Binnie began the majority judgment with a discussion of appropriate forums for constitutional challenges. He expressed concerns with a case like Caron's, where a complex constitutional issue is litigated in the context of a summary conviction trial in provincial court (at para. 19). This concern had earlier been raised by the Supreme Court in *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220 (paras. 142-44), and it was also raised by Justice Frans Slatter of the Alberta Court of Appeal in *R. v. Lefthand*, 2007 ABCA 206. However, Justice Binnie noted that the Crown had not sought to have the constitutional issues litigated in superior court rather than provincial court. Furthermore, if the issue had been litigated in superior court, that court would clearly have had jurisdiction to make an interim costs order under *Okanagan* (at para. 20). Did the superior court also have the jurisdiction to grant an interim costs order for a provincial court matter?

Justice Binnie discussed the broad nature of the inherent jurisdiction possessed by superior courts, described as “those powers which are essential to the administration of justice and the maintenance of the rule of law” (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at paras. 29-30, cited at para. 24). This jurisdiction has been said to include the power to appoint counsel for impecunious litigants (W. S. Holdsworth, *A History of English Law*, vol. IV (3rd ed. 1945) at p. 538, and G. O. Morgan and H. Davey, *A Treatise on Costs in Chancery* (1865) at p. 268, cited at para. 25) and also the power “to render assistance to inferior courts to enable them to administer justice fully and effectively” (I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23 at 48, cited at para. 26). Justice Binnie gave some examples of where such assistance had been rendered previously, for example where superior courts held parties in contempt for their actions in provincial courts or tribunals (see *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.) and *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901). Because a superior court's inherent powers are so broad, Justice Binnie said that they should be “exercised sparingly and with caution”, and “only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken” (at para. 30). Applying this test to the instant case, the supervisory jurisdiction of superior courts was found to include the power to order interim costs before an inferior tribunal where it is “essential to the administration of justice and the maintenance of the rule of law” (at para. 35, citing *MacMillan Bloedel*, emphasis added by Justice Binnie).

This question of jurisdiction is the aspect of the judgment on which Justice Abella wrote concurring reasons. She noted her concern “that the [majority] reasons may be seen to unduly expand the scope of the common law authority of a superior court in the exercise of its inherent jurisdiction” (at para. 50). Justice Abella indicated that in her view, superior courts should not unduly interfere with the evolving jurisdiction of statutory courts or tribunals. She expressed regret that the Supreme Court did not have before it the question of whether provincial courts had the jurisdiction to grant interim costs orders, that matter not having been appealed (at para. 53). But she also gave a strong sense of how she would answer that question (at para. 54): “The inability to order funding in the very limited circumstances contemplated by *Okanagan* and *Little Sisters* could well frustrate the ability of the provincial courts and tribunals to continue to hear potentially meritorious cases of public importance. As McLachlin C.J. observed in *Dunedin* [*R.*

v. 974649 *Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575], costs awards are significant remedial tools and “integrally connected to the court’s control of its trial process” (para. 81). Justice Abella did, however, agree with the majority that “in the exceptional circumstances of this case ... the award of *Okanagan* costs should be upheld and the appeal dismissed” (at para. 55).

That takes us to the criteria for interim costs from *Okanagan*. Justice Binnie articulated the Crown’s opposition to granting such costs in fairly colourful terms: the courts should not “create an alternative legal aid scheme by judicial fiat”, nor should they “judicially reinstate the Court Challenges Program” (at para. 37). The Crown also argued, as it had before the Court of Appeal, that *Okanagan* and *Little Sisters (No.2)* could be distinguished as they involved civil rather than quasi-criminal matters.

None of these arguments were found to be persuasive. While the majority acknowledged that *Caron* was not on all fours with *Okanagan*, it found that the *Okanagan* criteria were helpful in determining whether advanced costs should be available in a case like *Caron*’s, which was “in the nature of regular constitutional litigation conducted ... by an impecunious plaintiff for the benefit of the Franco-Albertan community generally” (at para. 49).

Justice Binnie stated the applicable criteria as follows (at para. 39, citing *Okanagan* at para. 40):

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases

He noted that an interim costs order is a matter of discretion in which courts must decide “whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application” (at para. 39, emphasis added by Binnie J., citing *Little Sisters (No.2)* at para. 37). Deference to the discretion of the judge awarding interim costs was said to be appropriate (at paras. 5 and 48).

Applying the first criterion from *Okanagan*, *Caron* was said to be an impecunious litigant who had sought appropriate sources of funding, but whose resources had been exhausted towards the end of his lengthy trial. The Crown’s argument that *Caron* should have mounted a “more aggressive fundraising campaign” was seen by Justice Binnie as having been properly rejected in the courts below (at para. 41).

Secondly, the lower courts all found *prima facie* merit in the constitutional claim, and it would be “contrary to the interest of justice if the proper resolution of this case on the merits was forfeited just because Mr. *Caron* — the putative standard bearer for Franco-Albertans in this matter — lacked the financial means to complete what he started” (at para. 43). This finding was not undermined by the fact that while *Caron*’s underlying constitutional claim was successful in Provincial Court (see 2008 ABPC 232), that judgment was overturned on appeal (see 2009

ABQB 745); the Court of Appeal has granted leave to appeal on the merits (see 2010 ABCA 343 and [here](#)).

With respect to the third criterion, Justice Binnie noted its three constituent elements: “[t]he issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases” (at para. 44, citing *Okanagan* at para. 40). He found that what made the *Caron* case “sufficiently special” as required by *Little Sisters (No.2)* was that it involved a *prima facie* meritorious claim that had the potential to render Alberta’s entire body of statute law invalid. The impact of such a finding “could be extremely serious”, and would have to be “addressed as quickly as possible” (at para. 44). If Caron’s claim failed mid-trial because he could not afford to complete his challenge, this would not be the end of the matter, and the costs already spent on the issue would go to waste. In these “very unusual circumstances”, the third criterion from *Okanagan* was met (at para. 46).

Overall, the Supreme Court held that the Court of Queen’s Bench did not err in using the *Okanagan / Little Sisters (No.2)* criteria to exercise its inherent jurisdiction in favour of granting interim costs in *Caron*. Put another way, this could reasonably be seen as a case where an interim costs order was “essential to the administration of justice and the maintenance of the rule of law” (at para. 46).

Comment

The Supreme Court’s judgment is certainly significant in its holding that interim costs orders can be made by superior court judges in relation to provincial court matters, and that *Caron* was an appropriate case for such an order to be made. However, it is not cause for a full on celebration of access to justice. Rather, *Caron* is another “evolutionary step, but not a revolution” in the area of courts’ discretion regarding interim costs (see *Little Sisters (No.2)* at para. 34). As in *Okanagan* and *Little Sisters (No.2)*, there is plenty of language in *Caron* to limit the scope of the Court’s decision. For example, Justice Binnie stated that interim costs orders made by superior courts in relation to provincial matters “must be highly exceptional and made only where the absence of public funding would work a serious injustice to the public interest” (at para. 5, emphasis omitted). He also noted that “the present decision does not constitute a general invitation for applications to fund the defence of ordinary criminal cases where constitutional (including *Charter*) issues happen to be raised” (at para. 23). The “unusual” and “exceptional” nature of the *Caron* case was noted a number of times by both Justices Binnie and Abella (e.g. at paras. 5, 9, 46, 49, 55). The Court seems to have rejected the argument of a coalition of interveners in *Caron* that the “sufficiently special” requirement from *Little Sisters (No.2)* should be reconsidered (see the [factum](#) of the Council of Canadians with Disabilities, Charter Committee on Poverty Issues, Poverty and Human Rights Centre, and Women’s Legal Education and Action Fund at para. 5). The Crown’s concerns that a decision in favour of *Caron* would create a judicial legal aid scheme or a judicial Court Challenges Program are not at all borne out by the Court’s narrowly crafted decision.

Justice Abella’s concerns about bifurcated proceedings in provincial and superior courts are also important from an access to justice perspective. Unless provincial courts have the jurisdiction to grant interim funding orders, public interest litigation will be sidetracked and needless judicial and other resources will be expended in applications to superior courts to seek funding for such litigation.

The problem goes far beyond a jurisdictional one, however. Access to justice in public interest litigation requires a program like Court Challenges to be broadly reinstated. It also requires a more generous approach to public interest standing, contrary to cases such as *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 and *The Canadian Bar Association v. HMTQ et al*, 2006 BCSC 1342, aff'd on other grounds 2008 BCCA 92, leave to S.C.C. denied 2008 CanLII 39172. As noted by the coalition of interveners in *Caron*, it is crucial to consider “whether it is consistent with the interests of justice to have constitutionally enshrined rights that cannot be exercised by their intended beneficiaries” because their cases cannot be heard (at para. 9).