January 11, 2012

"The proof of the pudding is in the eating" that litigation is not the best way to quantify interim costs.

By Jennifer Koshan

Cases Considered:
R v Caron, 2011 ABCA 385

Gilles Caron has been a very present figure before the Alberta courts since ABlawg began posting comments in late 2007 (see here). Caron is challenging the constitutionality of Alberta's legislation on the basis that the province's laws are not enacted in both English and French. That issue is now before the Court of Appeal (see 2010 ABCA 343 and here). Caron's litigation has also involved an access to justice component in that he has pursued interim costs awards to fund his litigation. That issue went to the Supreme Court of Canada, which ruled that the Alberta government was required to fund Caron's language rights challenge (see 2011 SCC 5, [2011] 1 SCR 78 and here). The lingering question was, to what extent was such funding required? That issue was recently considered by the Alberta Court of Appeal. In a decision written by Justice Jean Côté, Caron was awarded far less funding than he sought for the Court of Appeal litigation, and in the form of a loan rather than a grant (see 2011 ABCA 385).

Justice Côté's decision in *Caron* dealt with a couple of other issues as well. The first was whether his judgment should be issued in both English and French as most previous decisions in the *Caron* litigation have been. For reasons of time (estimated at four to five weeks for translation) and cost (estimated at $9000 to $10,000), Justice Côté decided "that the lesser of two evils is to issue unilingual reasons" (at para 10). He also noted that this was a decision on a procedural matter rather than the merits, suggesting that translation of a decision on the merits would be more worthy of issuance in both official languages.

Justice Côté also granted intervener status to two groups, l'Association Canadienne-Française de l'Alberta and l'Assemblée Communautaire Fransaskoise. He indicated that both groups had intervened at earlier stages of the litigation and had useful expertise in the area of language rights, and that there was no objection by the parties to these interventions (at paras 17-18).

On the main issue before the Court, funding for the Court of Appeal litigation, Justice Côté set out the criteria for interim costs developed by the Supreme Court in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, and most recently, *R v Caron*. These criteria are:

1. whether the party "genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial",

2. whether the claim is *prima facie* meritorious, i.e. "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. whether the issues raised in the case "transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases", and

4. "whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application." (*Caron*, 2011 SCC 5, para 39).

Applying these criteria to the facts, Justice Côté had no difficulty finding that Caron's case was *prima facie* meritorious given different decisions on the merits by the Alberta Provincial Court and Court of Queen's Bench, and in light of the Court of Appeal having granted leave to appeal on two issues. This was seen to satisfy criteria #2 and #3 (at para 23), and Justice Côté suggested that the outcome on these 2 issues was essentially determinative of the 4th criterion as well (at para 25).

It was in relation to the 1st criterion that Justice Côté devoted the most analysis. He also noted that even if all four criteria were met, this would not necessarily translate into full funding for every stage of the litigation. He quoted the following passage from the Supreme Court's 2011 decision in *Caron* in support of this proposition:

> funding orders . . . should be carefully fashioned and reviewed over the course of the proceedings . . . [to be] balanced against the need to encourage the reasonable and efficient conduct of litigation . . . (2011 SCC 5 at para 47, cited in 2011 ABCA 385 at para 14).

In Justice Côté's own words, the interim costs jurisprudence "does [not] necessarily mean full funding for the most exhaustive and lavish effort that can be planned, using the best possible means and the fullest resources in Canada (or on the globe)" (at para 28). Put another way, the court "should sign no blank cheque" (at para 31), nor should it "create a new Legal Aid scheme" (at para 32). Rather, "considerations of proportionality and due economy call for partial or strictly restricted funding in many cases" (at para 33). Justice Côté did not explain what he meant by the term "due economy," nor what is to be measured in a search for "proportionality."

Noting that there was little Canadian authority dealing with quantum of funding in interim costs cases, Justice Côté drew an analogy to the issue of spousal support. In this area, "Support need not produce equalization of the resources on both sides, and the court must look at all the relevant factors, and at practical and policy considerations in individual cases" (at para 34). Although this private law example might be easily distinguished, Justice Cote also cited *Little Sisters* in support of the notion that equality of resources was not the aim of interim costs orders. As stated in that case (at para 44), "In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties."

Justice Côté went on to note that "In constitutional funding litigation …, financial exigencies are to be taken into account" (at para 37). He did not provide any authority for this point, but applied it by delving into the Alberta government's finances, which predicted a $3.4 billion deficit for 2011-12. Justice Côté translated this into "about $1,000 for each man, woman and child in

Alberta" (at para 37), and indicated that the government could either borrow more money to fund the *Caron* litigation or make cuts to its spending on health, education, legal aid, and benefits for the disabled. Put in such stark, utilitarian terms, Caron's claim for funding seems easily outweighed by other interests. This aspect of the decision reminds me of the Supreme Court of Canada's judgment in *Newfoundland (Treasury Board) v N.A.P.E.*, 2004 SCC 66, [2004] 3 SCR 381, where the Court held that a government decision to renege on a pay equity agreement, although violating equality rights under the *Charter*, was justified in light of a "fiscal crisis" in Newfoundland and Labrador. Even if one accepts that a fiscal crisis should amount to a pressing and substantial basis for overriding constitutionally protected rights, it is difficult to see the province of Alberta, a resource-rich "have" province, as experiencing a fiscal crisis. This factor was not determinative, but it did seem to colour the subsequent analysis.

The other factors considered by Justice Côté related more to Caron's circumstances and those of his lawyers in preparing for the next stage of litigation. Justice Côté noted that counsel had already prepared for two rounds of litigation on the merits as well as the leave to appeal application, concluding that while "[a] few hours' discussing and thinking about the topic afresh, and rearranging the order of arguments, would possibly be useful … I doubt that anything much needs to be built from scratch" (at para 46). Further, stating that "The proof of the pudding is in the eating", he noted that there were "some signs of insufficient economy and restraint in this litigation to date, quite apart from the percentage of the litigation which has been about funding itself" (at paras 49-50). It does not seem right to hold this lack of restraint against Caron, however, as it was the government who litigated the funding issue all the way to the Supreme Court (and lost), and it was the government whose decision to call expert witnesses was largely responsible for an 89 day trial (see here). Justice Côté also likened the issue to one of supply and demand (and more puzzlingly, gravity), suggesting that if the level of interim funding was without limits the litigation and time spent on it would expand accordingly (at para 54).

In terms of Caron's circumstances and the 1st criterion for interim costs, Justice Côté believed that the issue was one of current financing rather than long-term lack of resources. The evidence showed that Caron had assets he could leverage and future employment prospects, and had previously been successful in fundraising for his litigation (at paras 61-65). Justice Côté also queried whether Caron's co-litigant, Pierre Boutet, or the two interveners might contribute to the funding of the litigation. He noted that public interest litigation often proceeds with groups such as the interveners taking the lead and the party in Caron's position "riding their coattails" (at para 71). Counsel for Caron had indicated in oral argument that his client was not prepared to give up control of the litigation, leading Justice Côté to state "I have trouble seeing that the taxpayers should fund expenses which arise simply from M. Caron's desire to remain at the wheel of this appellate vehicle, and to leave the interveners in the passengers' seats or driving their own vehicles" (at para 73). While the driving metaphor is perhaps apt given that Caron's litigation stems from a traffic violation ticket, by this point in the judgment I was wondering whether translation cost estimates would have been lower if Justice Côté had written a shorter decision with fewer asides and metaphors.

In the final sections of the decision, Justice Côté reviewed the need to control litigation expenses, considering concerns expressed by courts, in electronic journals, in *Canadian Lawyer* magazine, and in government reports about the problem and some of the proposed solutions. Although he stated that he was tempted to "try here a more innovative blended approach of a kind in the literature cited", such as flat fees or alternative billing, Justice Côté decided to control costs in *Caron* by use of hourly billing with a cap (at para 92). He rejected the cap of $80,000 proposed by Caron's counsel, which translated into 400 hours of work at $200/hour, questioning the need

for Caron to have two senior lawyers on his case (even though those lawyers had agreed to work for half their usual rates) as well as the number of hours estimated for preparation of the appeal. Justice Côté estimated the costs required for preparing the factum and oral argument to be $8700 in fees, to which he added costs for travel, copying and other disbursements ($1800) and a 10% contingency to arrive at a total of $11,600. This was the cap he fixed for Caron's appeal (at para 105). Further, noting that other funding sources such as Legal Aid make loans rather than grants, and that Caron's need for funding was temporary, Justice Côté ordered Caron to repay the interim costs with interest (3% annually, compounded) at a rate of $200/month beginning April 1, 2012 (at para 109).

Interim costs orders are now part of the public interest litigation context, and in my view they are a welcome addition in terms of access to justice (at least until such time as Legal Aid covers public interest litigation or the Court Challenges program is reinstated, neither of which is likely to happen any time soon). Whether an interim costs order should be made in a given case is the proper subject of litigation in light of the *Okanagan* criteria (unless, of course, the government agrees to provide such funding in worthy cases without litigation). However, one can't help but wonder whether it is the best use of judicial resources to have the quantum of interim costs awards determined by litigation as it was in *Caron*. While litigation may always be required as a last resort on such issues, surely there is a better way involving the courts' administrative resources to resolve issues of quantum.

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