Alberta Court of Appeal Awards Costs in Caron Case

On January 30, 2009, in *R. v. Caron*,[1] the Alberta Court of Appeal affirmed the Court of Queen's Bench decision to award costs to Gilles Caron for the legal fees he incurred in preparing his defence to an alleged violation of section 34(2) of the *Use of Highway and Rules of the Road Regulation*.[2] Caron did not dispute that he failed to make a left hand turn safely. He argued instead that the ticket was invalid because it was not in French.[3]

To help pay for his court costs, Caron applied to the Provincial Court judge for an interim cost order on the basis of the test developed in the Supreme Court case *British Columbia (Minister of Forests) v. Okanagan Indian Band*.[4] On November 6, 2006, the order was granted but set aside on appeal at the Court of Queen's Bench, where the judge held that the Provincial Court judge lacked jurisdiction to grant *Okanagan*costs orders.[5] Thereafter, Caron successfully applied to the Court of Queen's Bench for a funding order according to *Okanagan*.[6] The Court of Queen's Bench judge directed the Crown to pay for Caron's counsel and expert witnesses on May 16, 2007. On October 19, 2007, the same judge awarded Caron costs of $91,046.29 plus GST, representing the remainder of Caron's legal fees for the trial. On July 2, 2008, the trial judge handed down his decision on the traffic infraction, stating that Caron's language rights had been violated. Caron was granted the relief he sought.[7]

The issues on appeal at the Alberta Court of Appeal were:[8]

1. Are *Okanagan* interim costs available in quasi-criminal litigation?
2. Does the Court of Queen's Bench have inherent equitable jurisdiction to award *Okanagan* interim costs for the purposes of a Provincial Court summary conviction proceeding?
3. Was the test set out in *Okanagan* properly applied in this case?

Issue 1: Are *Okanagan* interim costs available in quasi-criminal litigation?

In the criminal context an accused person enjoys the right to counsel.[9] Occasionally that right entails having counsel provided at government expense. In order for that to occur, the offence must be serious and complex. This principle arose from the case *R. v. Rowbotham*.[10] In Alberta, it was decided in *R. v. Rain*[11]that government funding may additionally require that the accused's liberty be at stake. The same principles apply in the quasi-criminal setting.[12] The charge against Caron was neither complicated nor serious; therefore, he could not be awarded costs under either *Rowbotham* or *Rain*.[13]

In the civil context, advance costs are available to those who meet the test laid out in *Okanagan*:[14]

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.

4. In the 2007 case *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*,[15] the Court added a fourth component to the test, emphasizing that only in exceptional circumstances should advance costs be granted.

In *R. v. Caron*, the Crown argued that no cost award should have been made because Caron should have raised the constitutional challenge by filing a civil notice of motion instead of challenging Alberta's *Languages Act*[16]in a quasi-criminal context.[17] The Crown submitted that Caron should not receive the protection of criminal processes *and* simultaneously be allowed access to rights which are restricted to civil processes. The Court of Appeal found that where the constitutional issue is clear from the start, there is little difference between a constitutional challenge in the quasi-criminal sphere and one brought via strictly civil litigation.[18]The appeals court concluded that "in principle, an *Okanagan* order may be available with respect to quasi-criminal proceedings when the real issue is not the guilt or innocence of the accused, but rather a constitutional question of public importance."[19]

Issue 2: Does the Court of Queen's Bench have inherent equitable jurisdiction to award *Okanagan* interim costs for the purposes of a Provincial Court summary?

The Court of Appeal concluded that in *Okanagan* the Supreme Court established the right to costs; however, that right is not capable of being enforced in the Provincial Court. On the authority of *Board v. Board*,[20] the right must therefore be enforceable by the Alberta superior court if there is no other avenue of enforcement.[21] There is a presumption that where a right exists, there is a court with the power to enforce it.

Issue 3: Was the test set out in *Okanagan* properly applied in this case?

The Court of Appeal found that the *Okanagan* test had been satisfied.[22] The Crown argued that several errors had made in the application of the test by the Queen's Bench judge. First, the Crown suggested that reliance on the argument of an imbalance of resources between the Crown and the defendant was inappropriate.[23] The Court of Appeal, however, pointed out that the *Okanagan* test implies that there must be an imbalance of resources before such an order is made.[24] Additionally, the appeals court said that this principle is an important one because a gross imbalance of resources in a constitutional case may lead to the possibility of future arguments that the case was not fully litigated.[25] It is always in the interest of the government to fully resolve constitutional issues.

Another important argument made by the Crown was that the Provincial Court's jurisdiction limits the scope of any order, meaning that the order granted affects only Caron's personal rights and not those of Albertans in general.[26] This makes *Okanagan* funding inapplicable. The Court of Appeal pointed out, however, that the case law demonstrates that quasi-criminal litigation has often established important constitutional principles that have precedential value for all Canadian citizens.[27] Caron admitted the facts underlying the traffic ticket, making "everyone well aware that this was constitutional litigation."[28]

The Court of Appeal did note, however, that the Queen's Bench judge failed to address the second requirement of the first *Okanagan* criteria.[29] The defendant had to show that he could not pay for the litigation and that there was no other realistic way that the issue could come to trial. The Court of Appeal found that omitting to show that no other realistic way exists would not affect the outcome of the appeal.[30] The Supreme Court of Canada must have meant that if there is an alternative means of proceeding with respect to the charge that is laid, the litigant might not be entitled to *Okanagan* costs.[31] The Court of Appeal judge stated that if Caron had been able to mount a complicated language challenge on his own, this might have been considered a realistic alternative for the issue to come to trial.[32] As it stands, the Court of Appeal judge did not find any other realistic way for the issue to come to trial.

Finally, the Queen's Bench judge disagreed with the Crown that Caron had not gone to exhaustive efforts to obtain funding.[33] The Court of Appeal found no legal error in this determination, stating that "the applicant does not need to show that it checked with absolutely every person, organization, or institution that might be remotely interested in the question. It is sufficient if the applicant sought funding from the primary players interested in the constitutional question before the court."[34]

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[1] *R. v. Caron*, 2009 ABCA 34.
[2] Alta. Reg. 304/2002.
[3] *Supra* note 1 at para. 1.
[4] 2003 SCC 71.
[5] *Supra* note 1 at para. 3.
[6] *Ibid*. at para. 4.
[7] *Ibid*. at para. 5.
[8] *Ibid*. at para. 6.
[9] *Ibid*. at para. 13.
[10] (1988), 41 C.C.C. (3d) 1, (Ont. C.A.).
[11] (1998), 223 A.R. 359 (C.A.).
[12] *Supra* note 1 at para. 15.
[13] *Ibid*. at para. 16.
[14] *Supra* note 4 at para. 40.
[15] 2007 SCC 2 at para. 37.
[16] R.S.A. 2000, c. L-6.
[17] *Supra* note 1 at para. 20.
[18] *Ibid*. at para. 23.
[19] *Ibid*. at para. 24.
[20] [1919] AC 956.
[21] *Supra* note 1 at paras. 46-47.
[22] *Ibid*. at paras. 50-53, 65.
[23] *Ibid*. at para. 55.
[24] *Ibid*.
[25] *Ibid*. at para. 56.
[26] *Ibid*. at para. 59.
[27] *Ibid*.
[28] *Ibid*. at para. 60.
[29] *Ibid*. at para. 62.
[30] *Ibid*.
[31] *Ibid*.
[32] *Ibid*.
[33] *Ibid*. at para. 64.
[34] *Ibid*.