R. v. Caron , 2011 SCC 5

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Case Summary

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Per McLachlin C.J., and **Binnie**, LeBel, Deschamps, Fish, Charron, Rothstein and Cromwell JJ; **Abella** J. (concurring)

BACKGROUND

Mr. Caron was prosecuted for a minor traffic offence. His defence was based on a constitutional languages challenge resting on the fact that the court documents were uniquely in English. He insisted on his right to use French "in proceedings before the courts" of Alberta. He claimed that Alberta could not abrogate French language rights and that the *Alberta Languages Act* was unconstitutional.

The central issue before the Supreme Court of Canada was not related to the actual traffic violation or the constitutional issue but concerned the jurisdictional legality of two interim costs orders that had been made by the Alberta Court of Queen's Bench. Although Mr. Caron had initially been able to find the necessary funds for his defence/constitutional challenge in the provincial court, as the litigation unexpectedly lengthened his ability to fund the litigation was exhausted. Without funding, the defence/ constitutional challenge could not have been completed and would have resulted in months of effort, costs and judicial resources being "thrown away".

Mr. Caron first sought funding (by way of a costs order) from the provincial court. That court, satisfied that Mr. Caron could not fund the litigation himself, made an interim award of costs. The award was overturned by the Alberta Court of Queen's Bench on the basis that the provincial court lacked the necessary jurisdiction to render such an order. However, the Court of Queen's Bench then stepped in to make the interim costs order itself.

ISSUES

On appeal before the Supreme Court of Canada the only issues related to the ability of the Court of Queen's Bench to make the interim costs orders in respect of proceedings before the provincial court. Two issues were considered on the appeal:

1. Whether the Court of Queen's Bench had inherent jurisdiction to grant an interim remedy (i.e. an interim costs order) in litigation taking place in the provincial court; and

2. If yes, whether the criteria for an interim costs order had been met.

Significantly, the issue of whether the provincial court had the jurisdiction to issue such an award was not before the SCC.

HOLDING

The Alberta Court of Queen's Bench has inherent jurisdiction to make the interim costs orders in respect of the proceedings in the provincial court. In the case of inferior tribunals (such as a provincial court) a superior court may render "assistance" in circumstances where the inferior tribunal is powerless to act and it is essential that action be taken in order to avoid an injustice. Such inherent jurisdiction must be exercised sparingly and with caution. As to the second issue, the Queen's Bench judge, in assessing the criteria relevant to the exercise of its discretion to make such an award, exercised that discretion reasonably. The appeal from the decision of the Alberta Court of Queen's Bench was dismissed with costs to Mr. Caron on a party and party basis.

REASONS

As a general rule, it is for Parliament and the provincial legislatures to determine if and how public monies will be used to fund litigation against the Crown, but it has sometimes fallen to the courts to make such determinations. A cost order in a constitutional challenge must be highly exceptional and made only where the absence of public funding would cause a serious injustice to the public interest.

The SCC confirmed that superior courts possess an inherent jurisdiction to render assistance to inferior courts to enable to them to administer justice fully and effectively. While this type of assistance is best known in the context of contempt proceedings, the inherent supervisory jurisdiction of a superior court is not limited to the contempt context and may be invoked in an "apparently inexhaustible variety of ways" including, in an appropriate context, by making interim costs orders in connection with proceedings before the inferior court where such an award is essential to the administration of justice and the maintenance of the rule of law.

When assessing whether or not to make an interim costs award, the SCC confirmed that the analysis in two decisions involving civil proceedings - *British Columbia (Minister of Forests) v. Okanagan Indian Band*, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue) ("Little Sisters (No.2*)") should be applied to a quasi-criminal proceeding such as that found in *Caron.*

The *Okanagan/Little Sisters (No.2)* criteria are helpful to delineate when a court may exercise this inherent jurisdiction. The criteria are: 1) the litigation would be unable to proceed if the order were not made; 2) the claim to be adjudicated is *prima facie* meritorious; and 3) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. Even where these criteria are met there is no "right" to a funding order. The court must then decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or

whether it should consider other methods to facilitate the hearing of the case. When the SCC applied the public funding criteria to the Caron case, it determined that the Alberta Court of Queen's Bench had made no legal error in the exercise of their jurisdiction to render the costs orders.

What was "sufficiently special" about the case was that it constituted an attack of *prima facie* merit on the validity of the entire corpus of Alberta's unilingual statute books. The injury created by continuing uncertainty about French language rights in Alberta transcended Mr. Caron's particular situation and risked injury to the broader Alberta public interest. The issue had not been fully dealt with in the previous litigation and it was in the public interest that it be dealt with in the context of the Caron litigation.

Concurring Reasons Raise a Cautionary Note

Concurring in the result, the separate reasons rendered by Abella J. raise a cautionary note. Starting with a reminder that the issues before the Court had not included an assessment of the scope of the powers of the provincial court to make an interim award of costs, Justice Abella cautions that the majority reasons must not be seen to encourage the "undue expansion of a superior court's inherent jurisdiction" into matters the SCC had increasingly come to see as part of a statutory court's implied authority to do what is necessary to administer justice fully and effectively. Justice Abella described the SCC as, in this case, being in the "problematic position" of having to decide the issue of the jurisdiction of a superior court to render a funding order "as if" no other jurisdictional course were available. Further, she cautions, an inability to order funding in the limited circumstances in which the *Okanagan* and *Little Sister (No 2)* criteria are met "could well frustrate the ability of provincial courts and tribunals to continue to hear potentially meritorious cases of public importance".

Commentary

Caron confirms that the inherent jurisdiction of a superior court to "assist" an inferior court is not limited to any existing categories and will include making public interest costs awards in proceedings before an inferior court in the limited context in which the criteria for such funding have been met. *Caron* also confirms the applicability of the *Okanagan/Little Sisters (No 2)* criteria to quasi-criminal (as well as civil) proceedings. The Court emphasized that the scope of an inferior court's power to order public interest funding was not before the Court and, potentially, has left this issue open to be considered in another case.

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