Language Rights in Alberta — R. v. Caron

On December 4, 2003, Gilles Caron was charged with making an unsafe left turn. While paying the traffic ticket would have cost him well under $100, Caron sought to challenge the ticket on the basis that the legislation authorizing the traffic ticket was not enacted in both English and French, and so infringed his language rights.[1] Caron beat the charge [2] in one of the longest running cases in Alberta court history. His case has also addressed important supplemental issues such as the determination of entitlement to interim cost awards to help pay for legal expenses, an issue of importance to Caron after the federal government scrapped the Court Challenges Program that been supporting his court costs. This case brief offers a glimpse into the various court appearances by Mr. Caron, beginning with his first appearance in court in 2006, and ending in the recent Alberta appeal court decision on costs, discussed elsewhere by my colleague Alex Bailey.[3] Of particular importance in the constitutional context is the 2008 Alberta provincial court decision, which dives into the historical context surrounding Caron's language rights claim. The result of the case could have a long lasting impact on how legislation in drafted in Alberta.

First visit to the Provincial Court — 2006 ABPC 278[4]

On December 9, 2003, Caron sent a letter to the provincial court requesting to have his trial in French. He also plead that his traffic ticket was constitutionally invalid as it was not in both official languages.[5] A number of interactions between the court, the Crown prosecutor initially involved in the case (Mr. Kennedy), and Caron's lawyer (Mr. Beaudais) took place between 2004 and 2006, yet it was only on February 13, 2006 (16 days before the trial started) that Theresa Haykowsky was named the Crown's lawyer.[6] Because she was involved in another case at the time, many requests were made for adjournments. Notably, Mr. Kennedy was fully bilingual and there was much debate as to why the Crown needed to hire an outside lawyer at all to represent the Crown.[7] The outcomes sought by Caron in his case were as follows: an award of costs (under the authority of section 24(1) of the *Charter of Rights and Freedoms*) for the denial of his rights under the *Charter*'s sections 11(b) and 11(d),[8] as well as an award of interim costs to help cover Caron's onerous legal fees.[9] Regarding the award of costs, Justice Wenden, the provincial court judge involved in the case, ordered the Crown to pay Caron's legal fees, as well as to pay for the expenses of the expert witnesses for the continuation of the trial. This amounted to $15,949.65.[10] Regarding the award of interim costs, Justice Wenden decided that they should not be awarded in a quasi-criminal case like the one at hand, and so Caron's request was rejected.[11]

Issue of costs gains importance — 2007 ABQB 262[12]

In April 2007, three issues from the provincial court case were considered on appeal in the Court of Queen's Bench: a) the order of costs ($15,949.65) against the Crown, b) the dismissal of Caron's request for interim costs, and c) an appeal by the Crown of the costs awarded by the provincial court under section 24(1) of the*Charter*.[13]

Justice Marceau found that the Crown had indeed delayed the trial, which is contrary to section 11(d) of the*Charter*. However, the legal standard relevant to the case being "correctness,"and in the absence of a clear, palpable, and overriding error on the part of the lower court judge, the award of costs against the Crown was not interfered with on appeal.[14] As for the second issue of interim costs, Justice Marceau found that the provincial court did not have jurisdiction to make an order relating to interim costs, and he left for "another day the question as to whether a party in proceedings before the Provincial Court might bring an application or have the matter referred to the Court of Queen's Bench."[15] In the end, the first issue was dismissed, the second issue was dismissed for lack of jurisdiction, and the third issue was allowed. The third issue became the subject of further litigation.[16]

Costs continue to be at issue — 2007 ABQB 632[17]

On October 22, 2007, Justice Ouellette presided over Caron's request of an order for interim costs. Caron's argument was that "public interest issues" were at stake, and so he should receive government funding as a remedy for his inability to cover his own courts costs.[18] Caron argued that he would pass the "Okanagan" test for an award of interim costs laid out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*. [19] In the end, Justice Ouellette ordered that approximately $94,000 be granted to Caron to pay for his interim court costs, and costs associated with expert witnesses.[20]

Appealing the interim cost award — 2008 ABCA 111[21]

Justice Keith Ritter of the Alberta Court of Appeal declined to stay the interim funding award when it was appealed by the Crown. The Crown had not agreed with Justice Ouellette's award of approximately $94,000 for Caron's legal costs, and asked the court to stay the funding order pursuant to the Supreme Court's decision in *Okanagan*.[22] Caron had been able to obtain, in total, over $300,000 in a series of cost orders, but they had all been set aside by Justice Marceau in 2007. This is why Caron applied for the interim funding order at issue here.[23] In siding with Caron, Justice Ritter looked at the test for a stay pending appeal,

originating in *RJR-MacDonald Inc. v. Canada (A.G.)*.[24]

Language rights and crucial historical evidence — 2008 ABPC 232[25]

In order to defend himself against his traffic violation, Caron provided notice to the Alberta Crown of his constitutional argument that because the law authorizing his ticket had not been translated into French, his constitutional rights had been violated. Caron sought four important remedies in light of his constitutional challenge:

1. A declaration stating that Alberta's *Languages Act*[26] was constitutionally invalid because it clashes with article 110 of the *North-West Territories Act*,[27] in place at the time the province was created. Because the *Languages Act* clashes with provisions of the Constitution, it should be invalidated under the authority of section 52(1) of the *Constitution Act, 1982*;
2. As a remedy, an order that the accusations against him be struck from the court record on the authority of section 24(1) of the *Charter*;
3. A declaration, based on section 52 of the *Constitution Act, 1982*, that Alberta's provincial legislature should adopt and translate into French all of its laws and legislations, *starting with those required by Caron for his trial.*
4. A declaration based on section 52 of the *Constitution Act, 1982* that everyone has a constitutional right to a trial in French anywhere in Alberta.[28]

The trial, which started in March 2006, featured eight experts testifying over 89 days, and included four citizens who testified to the hardships of living in French in the province of Alberta.[29] Over 9000 pages of transcription and 93 pieces of evidence were used over the course of the trial. It is important to note that the trial was held entirely in French, with the exception of some interveners who were unilingual, and their testimony was translated in real-time in French.[30] The Crown was adamant that this trial not turn into an examination of historical evidence, as it felt this had been previously achieved in cases such as *R v. Paquette*[31] and *R v. Mercure*.[32] *Mercure* looked at section 110 of the *NWT Act*, which provides that "either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; … and all ordinances made under the Act shall be printed in both those languages." After a review of the case law as well as statutory obligations, it was deemed that Alberta was not *constitutionally* obligated to enact laws in both official

languages.[33] Following the verdict in *Mercure*, Alberta passed the *Languages Act* in 1988 to repeal the statutory requirement in the*NWT Act* and declare its English-only laws retroactively valid.

The crux of the Caron argument during this trial focused on expert evidence showing that "people of what is now Alberta only agreed to join Confederation if French language rights were protected."[34] University of Alberta Campus Saint-Jean professor Edmond Aunger showed that over 75 percent of the western Canadian population spoke French in the 1800s, and that they also enjoyed an "official, recognized right" to use French in courts prior to the creation of the Northwest Territories in 1870.[35] Aunger went on to add that a provision was added in the *NWT Act* in 1877 to ensure that such rights would be adopted, and it carried over to Alberta when it was created in 1905. These rights were never respected.[36] In other words, the historical argument can be articulated as follows: "When the transfer of Rupert's Land from the Hudson's Bay Company to the Government of Canada was negotiated by Riel, it included the entire North West Territories and not only the Red River Colony."[37]

Some examples of injustice towards Francophones in the province were discussed during the course of the trial. Leo Piquette, a former MLA for Athabasca-Lac La Biche, recounted the events surrounding the prohibition on him asking a question in French during question period in the Alberta legislature in the mid-1980s.[38] Another expert witness for the defence, Professor Dennis, who holds a doctorate in sociology, also testified about questions of cultural and social disadvantages of Francophones in Alberta.[39] Expert evidence, whether from academics or frontline people, is crucial in these types of cases. As stated by Nova Scotia judge Scanlon in *R v. Marshall*:[40] "the courts are very much dependant on the work of historians and anthropologists and the materials presented to the court by experts working in those areas."[41]

Crucial to Caron's case was a December 6, 1869 governor general proclamation, deemed by Caron to be a constitutional document guaranteeing linguistic rights.[42] As discussed earlier when talking about Aunger's expert testimony, the defence's main focus in the case was on the years 1846-77, with the argument that French was used in tribunals and the Assiniboia district council meetings for many years prior to the transfer of Rupert's Land.[43] Three important events were held to have taken place prior to this land transfer, and Caron considered them important in order to show the extent of the use of French before the land transfer date: 1) documents (mémoires) exchanged between Métis Francophones and "half-breed" Anglophones in 1846, 2) the Sayer trial in 1849 and finally, 3) the use of French by the government of Assiniboia.[44] The importance of the Sayer trial was also much contested between the parties. The defence viewed it as

an important case dealing with the use of French, while the Crown and many experts only viewed it in the context of fair trade.[45] Justice Wenden also decided to accept evidence that French was an official language of the Assiniboia council, and was widely used in tribunals there at the time.[46]

The Métis in Rupert's Land organized a convention in December 1869, where a first list of rights was drafted, including linguistic rights. Among these rights was the declaration that "the English and French languages are common in the Legislature and the Courts, and that all public documents and Acts of the Legislature be published in both languages," as well as that "the Judge of the Supreme Court speak the English and French languages."[47] A second Métis convention was organized in Fort Garry in 1870, with the main objective being to draft a constitution. Professor Aunger suggested the list of rights was discussed at this convention, with the goal of assuring the status of French as an official language in the West. According to Aunger official bilingualism was solidified in Manitoba by section 23 of the *Manitoba Act*,[48] and that this extended to the North-West Territories, as the latter territories had the same governor as Manitoba.[49] Defence counsel stressed the importance of not only examining how established the Métis were in Manitoba, but also in the rest of the country. For example, many Métis were established in Rupert's Land and the North-West Territories prior to 1870, and some were also employed by the Hudson's Bay Company and spoke French in the course of employment. They also acted as interpreters with First Nations peoples.[50]

When the province of Manitoba was created, two administrations were needed but the defence alleged that in practice the two were the same, and that this ensured that bilingualism would continue in both Manitoba and the North-West Territories. Defence argued that this thesis is supported by a) relevant sections of the*Manitoba Act*, b) the administrative structure of the North-West Territories, c) the membership of the North-West Territories council and d) the politics of the council.[51] The resistance of the Métis in 1869-70 was the result of a miscommunication between people in power and the Métis concerning their rights. The need for a constitutional guarantee regarding linguistic rights was a priority, as a simple political guarantee would not have been enough. The Métis wanted to make sure linguistic rights would be entrenched for future generations.[52]

Going back to the outcome of Caron's case, Justice Wenden found that the law was clear that when it came to declarations stemming from section 52(1) of the *Constitution Act, 1982*, prior case law shows that "there is no inherent jurisdiction in the provincial court to issue general declarations of invalidity."[53] Justice Wenden further concluded that he did, however, have the

competence to give a limited declaration that the *Traffic Safety Act*[54] is invalid with respect to the portions of the Act authorizing Caron's traffic ticket, as well as parts of the *Use of Highways and Rules of the Road Regulation*.[55] Because Justice Wenden was convinced by the constitutional arguments raised before the provincial court, Mr. Caron was found not guilty.[56]

Court of Appeal awards costs — 2009 ABCA 34[57]

My colleague Alex Bailey discusses the Court of Appeal's decision here in greater detail. The appeal concerned two interim funding orders granted by the Court of Queen's Bench regarding expert witnesses and legal fees.[58] Specifically, this decision has to do with the period of time in which Court Challenges Program funding was not available, leaving Caron to rely on funding orders granted by the courts.

Natasha Dubé (March 26, 2009)
Further Readings:

Natasha Dubé, "The Infamous $54 Traffic Ticket" *Centre for Constitutional Studies* (7 July 2008)

Natasha Dubé, "Minority Language Rights in Canada" *Centre for Constitutional Studies* (August 2008)

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[1] Jennifer Koshan, "La Belle Province? Developments in Alberta Language Rights Cases" (8 September 2003).
[2] In *R c. Caron*, 2008 ABPC 232, Justice Wenden ruled in favour of Caron's language rights claim, and dismissed the traffic offence.
[3] Alex Bailey, "Alberta Court of Appeal Awards Costs in Caron Case" *Centre for Constitutional Studies* (7 February 2009).
[4]*R c. Caron*, 2006 ABPC 278.
[5] *Ibid*. at para. 1.
[6] *Ibid.*
[7] *Ibid*. at para. 40. This case also addressed the importance of Caron's case, and that since it was a quasi-criminal matter, the justice minister should "have assured himself that this case was managed by a prosecutor experienced in criminal law more than in constitutional law." Ibid at para. 100.
[8]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11 .
[9] *Supra* note 4 at para. 1.

[10] *Ibid*. at para. 126.
[11] *Ibid*. at para. 159.
[12]*R v. Caron*, 2007 ABQB 262.
[13] *Ibid*. at para. 1.
[14] *Ibid*. at para. 13.
[15] *Ibid*. at para. 142.
[16] *Ibid*. at para. 143.
[17] *R v. Caron*, 2007 ABQB 632
[18] *Ibid*. at para. 8.
[19] 2003 SCC 71 . This test was further considered in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2. In should be noted that the request for interim funding considered by Justice Ouellette followed the comments of Justice Marceau who had decided that interim costs *could* be awarded in a quasi-criminal case in *R. v. Caron*, 2007 ABQB 262.
[20] *Supra* note 15 at para. 46. As stated earlier, my colleague Alex Bailey discusses the issue of costs in a separate article found here.
[21] *R v. Caron,* 2008 ABCA 111
[22] *Ibid*. at para. 1.
[23] *Ibid*. at para. 5.
[24]1994 SCC 117. The three parts of the test are: serious question to be tried, irreparable harm, and balance of convenience.
[25]*Supra* note 2.
[26]*Languages Act*, R.S.A. 2000, c. L-6.
[27] R.S.C. 1886, c. 50 .
[28] *Supra*. note 2 at para. 4.
[29] *Ibid*. at paras. 14-15.
[30] *Ibid*. at para. 21.
[31] [1990] 2 S.C.R. 1103
[32][1988] 1 S.C.R. 234
[33] *Ibid.*
[34] *Supra* note 1.
[35] Geoff McMaster, "Campus Saint-Jean Prof Debunks Myth of English Alberta" Office of the Vice President (Research), University of Alberta (8 January 2009).
[36] *Ibid.*
[37] La Cause Caron, "The Argument".
[38] *Supra* note 2 at para. 47.
[39] *Ibid*. at para. 60.
[40] 2002 NSSC 57
[41] *Ibid*. at para. 16.
[42] *Supra* note 2 at para. 73.
[43] *Ibid*. at para. 77.

[44] *Ibid*. at paras. 80-82. The following paragraphs explain what was found in those memoires exchanged between the Métis and the Half-breeds. While it is not important for this case brief to discuss all the intricate details found in them, it is important to note that at least one of the expert witnesses of the province feels these memoires have absolutely no value to the case. See *ibid.* at para. 106.
[45] *Ibid*. at para. 120.
[46] *Ibid*. at para. 167.
[47] *Ibid.* at para. 179.
[48] An Act to amend and continue the Act 32 and 33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 33 Victoria, c. 3 (Canada) .
[49] *Ibid*. at para. 185.
[50] *Ibid.* at para. 302.
[51] *Ibid*. at para. 324. The importance of section 23 has been examined elsewhere in the paper. Specifically, it guarantees the use of French or English in all matters that go to court, the court in question being the Supreme Court of Manitoba and the North-West Territories. See *ibid.* at para. 326. Section 35 also states that the Lieutenant-Governor of Manitoba is also that of the North-West Territories.
[52] *Ibid*. at paras. 559-560.
[53] *Alberta v. K.B.*, 2000 ABQB 976 at paras. 565 and 568.
[54] R.S.A. 2000, c. T-6
[55] Alta. Reg. 304/2002. *Supra* note 2, at para. 571.
[56] *Ibid*. at para. 575.
[57] *R v. Caron,* 2009 ABCA 34.
[58] *Ibid.* at para. 1.