

Court of Queen's Bench of Alberta

Citation: R. v. Caron, 2007 ABQB 262

Date: 20070419
Docket: 040241291S1
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

Gilles Caron

Respondent

and between:

Gilles Caron

Appellant

- and -

Her Majesty the Queen

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice R.P. Marceau**

Appeal from the Orders of
The Honourable Judge L. J. Wenden
Dated the 2nd day of August, 2006
and the 6th day of November, 2006
(Docket: 040241291P1)

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INTRODUCTION

[1] This hearing dealt with three appeals; two in which the Crown in right of Alberta is the Appellant and one in which Gilles Caron is the Appellant. For ease of reference I will not use the Appellant/Respondent nomenclature but rather will refer to Her Majesty the Queen in Right of Alberta as represented by the Attorney General of Alberta as “the Crown” and Gilles Caron as “Mr. Caron” or simply “Caron”.

Appeal No. 1 - Order of Costs against the Crown

[2] On August 2, 2006 the learned provincial court judge found that the Crown had breached s. 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I, *Constitution Act, 1982* [being Schedule B to the *Canada Act 1982 (U.K.) 1982*, c. 11], and granted the remedy of a costs award against the Crown in the sum of \$15,949.65 pursuant to s. 24(1) of the *Charter*. From that order the Crown has appealed.

Appeal No. 2 - Dismissal of the request for *Okanagan* interim costs

[3] On the same date, August 2, 2006, the learned provincial court judge refused to grant an order for state funded counsel based on the decision of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 (hereinafter “*Okanagan*”). From that refusal, Mr. Caron has appealed.

Appeal No. 3 - Order for State Funding

[4] On October 18, 2006 the learned provincial court judge refused to grant an application by counsel for Mr. Caron for state funded counsel based on a breach of s. 11(d) of the *Charter*. That decision has not been appealed. On November 6, 2006 (written reasons provided on November 7, 2006), the learned provincial court judge granted a new application for state funded counsel and state funded disbursements and expenses of research personnel and expert witnesses based on a prospective *Charter* breach of s. 11(d) (right to a fair trial). The remedy granted was a *Charter* s. 24(1) remedy. From this order of November 6, 2006 the Crown has appealed.

[5] All appeals are from a summary conviction court to the Court of Queen’s Bench.

BACKGROUND

[6] The trial arose from a prosecution of a regulatory offence, a traffic ticket alleging failure to make a left turn in safety, contrary to s. 34(2) of the *Use of Highway and Rules of the Road Regulation*, Alta. Reg. 304/2002. The traffic ticket was issued in 2003. The trial was adjourned several times for a variety of reasons including to allow Mr. Caron to serve Alberta with a Notice of Constitutional Challenge to the legislation, which Notice was served July 15, 2005.

[7] The basic challenge is that s. 2 of the *Languages Act*, c. L-6, R.S.A. 2000, originally enacted in 1988, and which declares the validity of all Acts, ordinances and regulations enacted before July 6, 1988 notwithstanding that they were enacted, printed and published in English only, is *ultra vires* the Province of Alberta.

[8] The basis of the challenge is somewhat convoluted. In *R. v. Mercure*, [1988] 1 R.C.S. 234 the majority of the Supreme Court of Canada ruled that in Alberta and Saskatchewan, s. 110 of *The North-West Territories Act*, R.S.C. 1886, c. 50, as amended by S.C. 1891, c. 22, s. 18 was the law of those provinces and mandated that the statutes, ordinances and regulations of those provinces had to be published in both official languages.

[9] The Supreme Court went on to say that this was, however, provincial legislation in the field of competence of the province and could therefore be amended and abrogated by the provincial Legislatures.

[10] The allegation of the accused is that this latter statement by the Supreme Court was *obiter* and that the Supreme Court failed to take into account and rule on matters that undermine that statement as well as the decision in *Alberta v. Lefebvre* (1993), 135 A.R. 338 (C.A.) (leave denied, October 21, 1993: (1993), 105 D.L.R. (4th) vi, request for reconsideration dismissed, May 11, 1995: [1993] C.S.C.R. no 177), which ruled that Alberta had the power under the *Alberta Act*, S.C. 1905, c. 3, to repeal s. 110 of *The North-West Territories Act* which it did in enacting the *Languages Act*.

[11] The accused's argument is that the *Languages Act* abolished or diminished French language rights which pre-existed the *Languages Act* and were protected by s. 16(3) of the *Charter*, or the legislation violated Canadian constitutional principles which protect minority linguistic rights in Canada. The argument goes on to allege that neither of these arguments was considered in *R. v. Mercure* (*supra*) or *Alberta v. Lefebvre* (*supra*).

CHRONOLOGY OF EVENTS

[12] The trial is ongoing. The following is a chronology of events to the date of the appeal hearing:

- December 4, 2003 - Mr. Caron is accused of an offence (fail to make a left turn in safety)
- December 9, 2003 - the Provincial Court receives a letter in which Mr. Caron requests a trial in French, and indicates an intention to raise the constitutional language issue
- December 10, 2003 - a letter (in English, without letterhead and unsigned) is sent to Mr. Caron stating that he must appear before the Court prior to January 6, 2004 in order to request a trial in French
- January 16, 2004 - Mr. Caron applies to quash his conviction *in absentia*; application granted
- February 17, 2004 - the Crown consents to a French trial; adjournment until March 2, 2004 to set a trial date
- March 2, 2004 - trial set for August 11 to 12, 2004
- May 26, 2004 - the Crown requests an adjournment; defence counsel objects; adjournment granted; K. Lepage is on the record for the Crown

- June 9, 2004 - set over until June 23, 2004 to set a trial date; peremptory on the Crown
- June 18, 2004 - brought forward to set a new date; trial date set for January 10 and 11, 2005; bilingual counsel, Mr. Kennedy is on the file
- December 17, 2004 - defence counsel requests an adjournment; trial date set for October 17 to 21, 2005
- July 15, 2005 - Notice of Constitutional Question served on the provincial and federal governments
- September 16, 2005 - defence counsel notifies Crown counsel that he will call two experts in the trial in October 2005, and provides the name and *curriculum vitae* of each expert
 - Crown counsel requests an adjournment in order to retain the services of a bilingual lawyer and to facilitate the exchange of expert reports; the Crown states that without this exchange, further adjournments may be necessary in order to respond to the experts; Crown counsel states that an adjournment is not necessary if the trial is set for a later date
- October 3, 2005 - pre-trial conference with Mr. Kamal, the Constitutional Law Section of Alberta Justice, Mr. Baudais (defence counsel) and the Court; Mr. Kamal requests an adjournment to retain outside counsel and to examine the experts' curriculum vitae and to exchange information
 - Mr. Kamal specifies that he will not be counsel at trial, and that he appears only for the purposes of the application for an adjournment; the judge asks Mr. Kamal if there is an explanation for the delay until September 30 prior to retaining outside counsel; Mr. Kamal replies that there is no explanation
- October 6, 2005 - less than 2 weeks prior to the date set for trial, Mr. Kamal, the lawyer from the Constitutional Law Section of Alberta Justice obtains an adjournment of the trial until March 1, 2006 in order to allow the Crown to retain outside bilingual counsel to act as prosecutor and to exchange information with the defence
- February 8, 2006 - the Crown retains outside counsel

- February 13, 2006 - Crown counsel contacts defence counsel for the names of the additional experts, the names of ordinary witnesses, and summaries of the expert reports; defence counsel refuses to produce this information
- February 21, 2006 - Crown counsel requests (8 days prior to the commencement of trial) disclosure of the summaries of expert reports and for an adjournment
- according to Mr. Baudais, the two expert summaries are provided to the Crown 6 days prior to the trial date (5 days according to the Crown); Mr. Baudais states that he followed s. 657 of the *Criminal Code*, and that the onus in a criminal matter is on the Crown; the court addresses the Crown as follows [translation]:

The Crown could have done something before you were retained. I know that you find that you are stuck because the Crown probably did it, but I think that I cannot ignore the fact that there are Crown delays. And when ... when I say “the Crown”, it is not you, madame.

and later:

The Crown has had ... that’s something that frustrates me. The Crown has had considerable notice [that] there was a constitutional question and it gives the appearance that the Crown is dragging its feet.

- February 24, 2006 - the Crown states that it will produce its brief on the law and constitutional questions on February 27, 2006, and reserves the right to produce additional documents; there will be a request for an adjournment to prepare the cross examination of the witnesses and the reply; and the Crown asks whether the defence still intends to call 6 witnesses and produce a summary for 4 witnesses
- March 1 to 15, 2006 - defence counsel presents evidence on the constitutional questions raised in the case; he calls two experts of which the Crown had been given notice: a sociologist and an historian who refers to three of his publications, but does not produce any historical documents in support of his theory
- Judge Wenden tells the Crown that if Crown counsel wishes to see the documents, she will have to obtain them

- defence counsel calls three ordinary witnesses of which the Crown had no notice; defence counsel states that he is not obliged to disclose the names of witnesses until the day of the testimony in chief
- before and after each witness, the Crown asks for adjournments to prepare the cross examination and to obtain the documents referred to by the historian and to consult with the Crown's experts
- defence counsel vigorously opposes any adjournment
- the Court grants the following adjournments:

Witness	Date of the request	Time allowed
Denis Perreux (ordinary witness)	March 1, 2006	one half day (eventually 5 days)
Pierre Bergeron (ordinary witness)	March 1, 2006	one day (March 2, 2006)
Dr. Claude Denis (expert witness)	March 2, 2006	3 days (March 3-5, 2006) (eventually 8 days due to the limited availability of Dr. Denis)
Dr. Ed Aunger (expert witness)	March 6, 2006 (granted March 7, 2006)	one and one half days
Léo Piquette (expert witness)	March 8, 2006	one evening

- defence counsel takes 4 of the 5 days set to examine his witnesses

March 15, 2006

- defence counsel closes his case
- Crown counsel obtains an adjournment of the trial until October 23, 2006 to prepare evidence in reply and to obtain expert witness opinions
- Crown counsel indicates she will call at least three experts, providing the names of two

- Judge Wenden sets June 30, 2006 for disclosure of the names of the experts, August 31, 2006 for the summaries of expert reports, and August 31, 2006 for the *curriculum vitae* of each expert
- defence counsel makes his first application for costs and funding, based on ss. 11(b) et 11(d) and the *Okanagan* case
- Crown counsel obtains an adjournment of the argument regarding the request for funding
- May 1, 2006 - hearing regarding costs and funding
- [May 3, 2006 - decision rendered in *R. v. Yellowhorn*, [2006] A.J. No. 491 (Q.B.)]
- June 29, 2006 - Crown counsel provides the names of five experts
- June 30, 2006 - Crown counsel provides a draft summary of the expert historian's report
- August 2, 2006 - Judge Wenden renders his decision on the application for funding, granting costs of \$15,949.65 for violation of s. 11(d)
- August 31, 2006 - Crown counsel finalizes disclosure of the names, *curricula vitae* and summaries of expert reports of the three experts which the Crown intends to call
- Crown counsel advises that she will likely call one witness with respect to documentary research
- September 25, 2006 - the Court Challenges Program is abolished by the federal government
- beginning of October, 2006 - new application for funding based on *Rowbotham*, and for an adjournment; in the alternative, defence counsel requests permission to withdraw
- October 18, 2006 - *Rowbotham* application and permission to withdraw denied
- October 23 to 31, 2006 - trial recommences; first Crown expert (historian)
- November 1, 2006 - cross examination of the expert begins
- third request (without notice) for funding based on ss. 11(d) et 24(1) of the *Charter*

- November 6, 2006 - defence counsel states that he needs time to prepare the cross examination and to research the documents, and an adjournment is provided until February 26, 2007
 - the Court grants the application for funding for counsel and disbursements for experts
 - Crown counsel announces that the Crown will consider the decision and respond in one week; December 6 is contemplated as the last trial date before Christmas, and an adjournment until February 26, 2007, given the limited availability of a courtroom to continue the trial
 - November 7, 2006 - the judge renders his reasons for the order for funding
 - November 2006 - the Court will not be available to hear an application for a stay of its decision until February 26, 2007
 - December 5, 2006 - Crown counsel appeals the November 7, 2006 decision; a hearing date is set for January 25, 2007
 - December 6, 2006 - the Court orders the defence to disclose the names of rebuttal experts by December 15, 2006
 - December 14, 15 and 20, 2006 - cross examination of the first expert has not finished, but examination in chief of the second expert from New York proceeds and cross examination on his qualifications on December 20, 2006; defence counsel states that he needs time to prepare for the cross examination on the qualifications, and the Court agrees
 - November 30, 2006 - at the Court's initiative, the witness on documentary research testifies for one half day
 - December 15, 2006 - Crown counsel gives notice of an application for a stay of the November 6, 2006 decision
 - December 19, 2006 - Justice Veit hears the request for a stay
 - December 20, 2006 - Justice Veit dismisses the request for a stay
- February 26 to March 19 and May 22 to June 15, 2007 are set for continuation of the trial. Defence counsel has advised that he will call rebuttal witnesses and may reopen his evidence

STANDARD OF REVIEW

[13] The appropriate standard of review on appeal from a provincial court judge is correctness on issues of law and palpable and overriding error on issues of fact or mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. An award of costs is discretionary and will not be interfered with on appeal unless there is a clear, palpable, and overriding error: *Reilly v. Alberta (Provincial Court, Chief Judge)*, [2000] A.J. No. 1029, 2000 ABCA 241; *R. v. Robinson*, [1999] A.J. No. 1469, 1999 ABCA 367.

APPEAL NO. 1 - ORDER OF COSTS AGAINST THE CROWN

[14] As stated above, the first appeal is the Crown's appeal of the order that the Crown pay costs as a remedy under s. 24(1) of the *Charter*. That application was made in March 2006 and was granted on August 2, 2006.

[15] Sections 11 and 24(1) of the *Charter* provide in part:

11. Any person charged with an offence has the right

...(b) to be tried within a reasonable time;

...(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

...

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Jurisdiction

[16] There is binding authority from our Court of Appeal, *R. v. Krueger*, [2006] A.J. 177, 2006 ABCA 63, to the effect that an appeal lies against an award of costs as a s. 24(1) *Charter* remedy against a party where the trial is ongoing, as the award of costs is a freestanding award granted as a remedy pursuant to s. 24(1) and its effect is immediate and final regardless of whatever further steps may be taken in the prosecution of the charge. Although in that case the additional remedy of a stay had been granted, and therefore the costs order was clearly intended to be final as prosecution was ended by the trial judge, in my view the reasons in *Krueger* do not depend on that fact, and are therefore equally applicable to the present case.

[17] I conclude this Court has jurisdiction to entertain the appeal from the costs award of August 2, 2006.

Analysis of Reasons for Decision

[18] The learned provincial court judge cited passages from the following cases: *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Rahey v. R.*, [1987] 1 S.C.R. 588; G. Garton, *Re Canadian Charter of Rights and Freedoms, S. 11(b): The Relevance of Pre-Charge Delay in Assessing the Right to Trial Within a Reasonable Time* (1984), 46 Nfld. & P.E.I.R. 177; *R. v. Darrach*, [2000] 2 S.C.R. 443; *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3.

[19] The learned provincial court judge summarized the case law as follows:

(1) Sections 7 and 11(d) protect the fairness of the trial. (*Mills*) (*Rahey*);

(2) Sections 7 and 11(d) provide fundamental protection ensuring that the integrity of the entire process will always be a matter of prime concern for the court. (*Mills*) (*Rahey*);

(3) In analyzing whether there has been a violation of section 11(d), one must examine factors such as the conduct of the prosecution, whether the person charged asserted his right in a timely fashion, and whether he disclosed the nature of the prejudice. (*Mills*) (*Rahey*);

(4) Prior delay may be considered. (*Mills*);

(5) A fair trial in the meaning of section 11(d) is determined on the basis of the trial process as a whole. (*Stoddart*);

(6) The fair trial protected by section 11(d) is a trial that does justice to all of the parties. (*Darrach*) (*Harrer*);

(7) A fair trial is not a perfect trial, nor is it the most advantageous trial possible from the accused's point of view. (*Harrer*) (*Lyon*).

[20] The learned provincial court judge then embarked on his analysis. I will quote each item which he analyzed and make my observations after each one:

1. The decision to hire outside counsel

[21] The learned provincial court judge wrote:

Nowhere in any of the evidence is there an explanation or justification of the government's decision to hire outside counsel at the last minute. The government did this twice: in October 2005, when Mr. Kamal made a motion for adjournment two weeks before the trial date, as well as in February, again two weeks before the start of the trial.

The lack of an explanation becomes more significant when one considers that for sixteen months (from June 2004 to October 2005) the defence was dealing with Mr. Kennedy, a perfectly bilingual prosecutor who was abreast of the case.

[22] I agree with the learned provincial court judge that since the Crown knew as early as June 2005, a Notice of Constitutional Question would be filed (which Notice was filed on July 15, 2005), the government was at fault in not deciding until September that it would hire outside counsel. After having obtained the adjournment of the October trial to March 1, 2006 it was unconscionable of the government not to hire outside counsel until mid February 2006, some two weeks before the trial was set to proceed for two weeks. As acknowledged by the learned provincial court judge, this placed the selected Crown prosecutor in an untenable situation. It wrecked the schedule planned by the defence and the Court. It also placed the Crown in the untenable position of not knowing the case it had to meet because it had neither sought nor obtained a summary of the evidence to be led from the expert witnesses. I will comment on s. 657.3 of the *Criminal Code* and the matter of disclosure of the constitutional case by both parties extensively under the next heading.

[23] With respect, the comment that “the lack of explanation becomes more significant when one considers that for 16 months (from June 2004 to October 2005) the defence was dealing with Mr. Kennedy, a perfectly bilingual prosecutor who was abreast of the case” is in error if it suggests that having a bilingual prosecutor precludes the Crown from engaging outside counsel when faced with a constitutional challenge to its language laws, a situation which is quite different from prosecuting alleged criminals. The appointment of outside counsel by itself is a decision to be made by the Crown and not a decision of the Court. However, the unexplained delay in appointing outside counsel was unconscionable.

2. The “practice” on outlines

[24] I will set out some of the paragraphs from the judgment below under this heading and comment:

The Crown prosecutor maintains that the defence should have provided outlines of the expert evidence before the trial started. According to her, in a case such as this, the “practice” in Alberta is to exchange information on expert evidence.

[25] Section 657.3 of the *Criminal Code* provides in part:

s. 657.3...(3) For the purpose of promoting the fair, orderly and efficient presentation of the testimony of witnesses,

(a) a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the

other party or parties of his or her intention to do so, accompanied by

- (i) the name of the proposed witness;
- (ii) a description of the area of expertise of the proposed witness that is sufficient to permit the other parties to inform themselves about that area of expertise, and
- (iii) a statement of the qualifications of the proposed witness as an expert;

(b) in addition to complying with paragraph (a), a prosecutor who intends to call a person as an expert witness shall, within a reasonable period before trial, provide to the other party or parties

- (i) a copy of the report, if any, prepared by the proposed witness for the case, and
- (ii) if no report is prepared, a summary of the opinion anticipated to be give by the proposed witness and the grounds on which it is based; and

(c) in addition to complying with paragraph (a), an accused, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).

...

(5) If, in the opinion of the court, a party who has received the notice and material referred to in subsection (3) has not been able to prepare for the evidence of the proposed witness, the court may do one or more of the following:

- (a) adjourn the proceedings;
- (b) order that further particulars be given of the evidence of the proposed witness; and
- (c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony.

[26] This provision was obviously designed to ensure that the Crown in a criminal prosecution would not be able to ambush the accused by calling expert evidence without giving at least 30 days notice before the commencement of the trial of the name of the expert witness, the area of expertise and qualifications. It also provides that the prosecutor who intends to call such a witness must also either supply the expert's report or a summary of the evidence of the expert within a reasonable time prior to trial. The same onus is placed on the accused except that the accused only has to provide the expert report or the substance of opinion before the close of the Crown's case, in the absence of an order for further particulars.

[27] These are rules which were enacted to enable an accused to prepare to cross-examine the Crown's expert and to enable the Crown to prepare to cross-examine the accused's expert. These rules were devised specifically for the ordinary prosecution where the Crown bears the onus of proving its case beyond a reasonable doubt and the defence need only raise a reasonable doubt.

[28] An orderly trial and fair disclosure is quite different where the accused bears the onus of proving something to the civil law standard of a preponderance of evidence. Our Court of Appeal as long ago as 1992 (*R. v. Dwernychuk* (1992), 135 A.R. 31 (C.A.)) set out some principles which I think are of general application when the defence raises a *Charter* argument (which it bears the onus of proving) or a constitutional challenge which it also has the burden of proving. In *Dwernychuk* the Court wrote at pp. 36 to 38:

In deciding the procedure which is to be followed, the court should also have in mind that the Charter is to receive a liberal and generous interpretation, this being a Constitution which is being construed: see *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145 at 155, per Dickson J. Thus, in approving one procedure and disapproving another, the court's decision should reflect a "liberal" and a "generous" approach (*Hunter v. Southam Inc.*, *supra*, at 156), one which will render more effective the right in issue than would otherwise be the case, and will enhance the repute of the administration of justice. If the procedure followed is one which will tend to result in a flawed, awkward or unprincipled narrowing of the right, or will tend to reduce the esteem attached to the right "in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case" (to use the test for exclusion articulated by J.-Y. Morissette and adopted by Lamer C.J. in *R v. Collins* [1987] 1 S.C.R. 265 at 281), then, in our view, the procedure is inconsistent with the purposive, liberal and generous approaches to Charter interpretation.

Such a reasonable person would expect that where the defence intends to raise a Charter issue and seek the exclusion of evidence, the procedure followed would be such as to give the Crown and the judge reasonable notice of the intention to do so. As far as the merits of the criminal charge for which the accused is being prosecuted are concerned, the adversary system remains unmodified in terms of the obligations of the defence; the defence need not disclose what evidence of fact or opinion it intends to adduce. This, it is thought, is a rule which at least in part matches the investigative and prosecutorial powers of the prosecution. However,

when it comes to an issue of the exclusion of evidence where there has been an infringement of a Charter right, no similar established rule exists. The reasonable person would expect that defence counsel would make known to the prosecution, either before or at the commencement of the trial, that he or she intends to allege that there has been an infringement of a specific Charter right and to apply for the exclusion of evidence. Such advance notice would enable Crown counsel and the court to plan and decide how and when best to call witnesses; whether witnesses should be called whose evidence would be relevant to the issue raised and who otherwise would not be called; the order in which witnesses should be called; what questions should be asked; and whether and when witnesses, once they have testified, may be released. It enables Crown counsel to prepare legal submissions in advance rather than hastily and on the spur of the moment. It enables the judge, with the help of both counsel, to begin to read relevant cases and to put his or her thoughts in order, rather than becoming aware of the existence and nature of a Charter issue only after he or she has heard the evidence without realizing what he or she should be listening for and without being able to exercise his or her limited right to ask questions of witnesses. If such notice is given, the judge is better able to reach a rational decision which is based on a calm reading and serene appreciation of the law, rather than having to reach a decision, perhaps without due consideration, because of the inexorable pressure of his or her docket.

Fair and reasonable notice to the Crown and to the court will better enable the judge to carry out his constitutional duty, mandated by s. 24(2), to have regard to "all the circumstances" when he or she decides whether the admission of the evidence would bring the administration of justice into disrepute. The Crown cannot see to it that all the relevant circumstances which are within the evidentiary control of the Crown are placed in evidence before the court, if the Crown is not made aware in a timely manner that a Charter issue will be raised. If the Crown is thus unable to marshal evidence which, given the opportunity, it would place before the court, the judge is required to reach his or her decision without knowing what all the circumstances are which it would be within the Crown's capability of placing before the court. If such timely notice is not given, and if it is clear that the defence has lain in ambush when it might have given timely notice, those are circumstances which in themselves might frustrate the court's duty to have regard to "all the circumstances" and might lead the court to conclude that the s. 24(2) application should be dismissed without consideration of its merits. If the merits were considered only on the basis of those selective circumstances which are presented by the defence, and by the Crown when it is forced, in the absence of notice, to scramble to meet what is presented by the defence, the judge would be asked to exclude the evidence without having regard to "all the circumstances". That would amount to asking the judge to exercise a constitutional power in a manner which falls short of what s. 24(2) contemplates.

...

Moreover, the onus in the case of most allegations that a Charter right has been infringed being upon the defence, there is an element of unfairness to the Crown if the court allows the defence to lie in ambush and thus requires the Crown to anticipate every possible infringement. The Crown would be encouraged to call evidence or have on "standby" Crown witnesses, usually police officers, who might be able to give testimony concerning possible issues, which when the trial concludes turn out to be non-issues. That is surely not to be encouraged. Moreover, it would be, in the result, akin to placing the onus upon the Crown when, in law, it should not be.

[29] It is obvious to me (and this with hindsight) that an orderly trial in this matter should have required, probably months before the trial, disclosure of the substance of opinions of the experts for the defence and this should have been followed by disclosure by the Crown of the substance of its experts' opinions. Had that been done, both the Crown and the defence would have been able to conduct their cross-examination following the evidence in chief. Similarly, while there is no rule to this effect, where as here, lay witnesses are to be called by the defence as part of their constitutional attack, the trial would be rendered more efficient for all parties if opposing counsel had a "will say" or "summary of proposed evidence" so that the Crown is not taken by surprise and has to request an adjournment to properly prepare for cross-examination, which is what happened here.

[30] In her supplementary submission, Counsel for the Crown argued that the court should have ordered timely disclosure of the Defence expert outline which would have enabled the Crown to be prepared for cross-examination of these experts. With hindsight, it is obvious that should have occurred, but even when there was a motion for adjournment on October 26, 2005, both parties were adamant that a period of two weeks was sufficient for trial even though Mr. Kamal was only standing in until outside counsel would be appointed. Mr. Kamal's statement that the adjournment would enable an exchange of expert reports is hardly an application for an order compelling disclosure of the expert reports of the defence. At that time, Mr. Baudais for the defence did not indicate that he was going to take the approach that all he need disclose before the trial was the names of his experts and their fields of expertise in accordance with s. 657.3 of the *Criminal Code*. Had the provincial court judge realized at the time of the adjournment application that this was the defence's position, he might have begun to micro-manage pre-trial disclosure, but there was no indication at that stage that timely disclosure would not occur.

[31] I am not faulting counsel for the defence for not supplying his expert summary of opinion before he did. Section 657.3 mandated only that he give notice of the name of his experts, their field of expertise and their qualifications and that he did in a timely fashion. Between the time when Mr. Kennedy ceased to be the prosecutor (sometime it would appear in early September) and the time when Ms. Haykowsky was appointed, he was never asked for a summary of his expert opinions. Indeed, even if Mr. Baudais had been anxious to share his experts' opinions, he had nowhere to send them to as Mr. Kamal had made it clear it was not his case.

[32] I make the observation that Ms. Haykowsky was correct in stating that it is the practice in Alberta to provide outlines of expert evidence before the trial starts. The *Alberta Rules of Court* provide for it in trials before the Court of Queen's Bench and judges of both trial courts are required by law as stated in *Dwernychuk (supra)* to ensure fair process and that means avoiding trial by ambush and ensuring that the trial will not be postponed because of late disclosure.

[33] The learned trial judge under this heading then wrote:
This is not the first time that the Crown has sought to obtain outlines from the expert witnesses. Mr. Kamal made this request in his letter of September 15, 2005 and again in October when he made the motion for adjournment. On each occasion, he said nothing about this "practice." In his letter of September 15, 2005, he wrote: "*An adjournment will give the parties an opportunity to exchange written briefs and information concerning expert evidence.*"
In making his motion for adjournment, he said nothing about this practice. During the four months that elapsed between the October 6 motion and the month of February, Mr. Kamal never dealt with defence counsel concerning this "practice" or the outlines of expert evidence. These were four months, after all, during which the Crown could have set out its position on the "practice" and repeated its requests for outlines. This was not done, and as for many things in this case, there is no explanation or reason given why the government failed to act when it had plenty of time to do so.

[34] I make nothing of the failure of Mr. Kamal to not mention "the practice". In stating that the time period would provide for "the exchange of written briefs and information concerning expert witnesses", Mr. Kamal was simply indicating what should take place before trial if the trial was to be orderly and fair.

[35] As to the comments about what the Crown did not do during the four months, I agree with the learned trial judge. The delay in appointing counsel was inexcusable.

[36] The next paragraph of the judgment reads:

Furthermore, there is no evidence that such a "practice" exists. The only thing that Crown counsel said was that she "had been advised by the Constitutional Law section" that there was a "practice" whereby "the parties exchange materials."
This is hearsay.

(Written pleading by the Crown April 7, 2006 page 13).

[37] Representations by counsel as to the practice of the Court is not "hearsay evidence". As it turns out the representation was correct.

[38] The next paragraph reads:

In my opinion, the idea of a “practice” in the situation before the Court is nothing other than a façade behind which the government is attempting to hide its lack of preparation for this case.

If this is meant to disparage the conduct of Ms. Haykowsky, it is an unfair accusation. She did not excuse the Crown for its tardiness in appointing her, nor did she try to hide the fact that she was unprepared for the case because disclosure had not been made.

[39] The next seven paragraphs of the judgment read:

When Mr. Kamal proposed to “*exchange written briefs and information concerning expert evidence,*” the government did not have any evidence whatsoever to exchange. Moreover, even at the outset of the trial, on March 1, the government had no evidence whatsoever to exchange.

The Crown prosecutor submits that the exchange of relevant information Mr. Kamal spoke of was to take place unilaterally. “It goes without saying that without details from the accused, the prosecution had nothing to ‘exchange’ ... because the exchange process triggered [sic] by the accused.

...

The prosecution exchanges material *in response* to what the accused provides to the prosecution.”

(Written pleading by the Crown April 7, 2006 page 13)

In my opinion, there is no explanation for this position. The case law cited by the Crown prosecutor is not relevant. On three occasions (letter of September 15, pre-trial conference on October 3, 2005 and formal motion of October 6, 2005), Mr. Kamal was always asking for an exchange. He never said that “the prosecution exchanges material *in response* to what the accused provides to the prosecution.” This was not even implied.

In the Crown’s written pleading (April 7, 2006) counsel stated that “the accused’s constitutional notice is the part of the case that triggered the constitutional challenge to Alberta’s legislation.” In other words, the Constitutional Law section had known since July 15, the date when the notice was served on the Crown, that the challenge to Alberta’s legislation was a serious challenge.

Furthermore, the Constitutional Law section had received the Notices of Expert Witnesses on September 15. The Court has had occasion to read them. In my opinion, the notices are highly detailed and comply with section 657.3 of the Criminal Code. The Constitutional Law section could have taken steps earlier to obtain more detailed information.

Crown counsel seems to have forgotten that this is a quasi-criminal trial and that she must conduct herself as a prosecutor rather than as an adversary.

[40] In general I agree with the learned trial judge that there was nothing for the Crown to exchange, but that was not Ms. Haykowsky's fault and does not reflect upon her but rather on the inexcusable delay in appointing her as counsel. I will make other remarks about whether Ms. Haykowsky properly discharged her role as a prosecutor rather than as an adversary when I deal with the trial judge's heading "The Role of the Prosecutor".

3. Nature of the trial

[41] The trial judge wrote:

The Constitutional Law section and Crown counsel have handled this case as though the trial were a civil proceeding. The request to have outlines of expert evidence and the "practice" substantiate this interpretation.

[42] I agree with the learned trial judge that initially this was a quasi-criminal proceeding to which the *Provincial Offences Procedures Act*, R.S.A. 2000, c. P-34 applies. However for the reasons above stated when the accused challenges the constitutionality of Alberta legislation he bears the onus of proof and that of necessity changes the rules and, in my view, given the reasoning in *Dwernychuk*, at least an exchange of expert summaries similar to a civil proceeding is mandated in appropriate circumstances.

4. The role of the Crown prosecutor

[43] The learned provincial court judge wrote:

The fact that Mr. Caron chose as his defence to challenge Alberta's language legislation does not alter the nature of the proceeding. This is not a civil proceeding and by no means do the rules of civil procedure apply. Anyone appearing for the Crown must conduct himself as a Crown prosecutor and not as an adversary.

[44] As I wrote above, this does not become a civil proceeding but the application of rules akin to civil procedure were mandated in this case.

[45] The provincial court judge then cited well known authorities which say that prosecutors do not act strictly in a partisan way but are required to lay out all of the evidence in a fair and objective manner. Their role is not to seek a conviction. The provincial court judge cites *R. v. Regan*, [2002] 1 S.C.R. 297, LeBel J. at para. 151, which in turn cites *R. v. Bain*, [1992] 1 S.C.R. 91, Gonthier J. at para. 39; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Lamer J. at para. 39; *R. v. Lemay*, [1952] 1 S.C.R. 232, Cartwright J. at p. 257; *R. v. Chamandy* (1934), 61 C.C.C. 224 (Ont. C.A.), *per* Riddell J.A., at p. 227.

[46] The provincial court judge also cited M. Proulx, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001) at p. 641.

[47] The learned provincial court judge then wrote:

In the context of a court proceeding, it is quite easy to cross the line separating the role of Crown counsel from that of an attorney. In my opinion, Crown counsel crossed the line on several occasions.

[48] The provincial court judge then gave examples and I will comment on each of these examples:

(1) “The accused... decided to adopt a strictly ‘criminal’ approach to his constitutional challenge.”

(Written pleading by the Crown April 7, 2006 page 6 para (e))

The “constitutional challenge” is the accused’s defence for a violation of section 34(2) of the *Use of the Highway and Rules of the Road Regulation*, i.e., ‘fail to make a left turn in safety’. The accused has the right to use a constitutional defence. That does not mean that the trial becomes anything other than a quasi-criminal proceeding.

[49] This comment by Crown counsel was not only a fair comment but described exactly the approach taken by the defence and the Court. It makes no sense to me to take the approach that because this is a prosecution for a quasi-criminal offence the procedure remains the same even if the only defence is a constitutional attack on the legislation. To insist that the Crown be prepared to cross-examine the accused’s experts immediately after their testimony with a few days’ notice of the content of their testimony is just not fair. To ask for more time to prepare and that the Court allow time to prepare is hardly a confusion of the role of prosecutor and counsel; rather it is the Crown asking that trial not be by ambush.

[50] The provincial court judge then gave a second example:

(2) “The accused’s constitutional challenge to the *Language Act* has been conducted (before and during the trial) using an “element of surprise” approach.

(Written pleading by the Crown April 7 page 8, para (m))

It is difficult to discern what counsel means by this. In my opinion, in looking at the background of the case, counsel for the defence has clearly conducted the defence according to the rules and requirements of the *Criminal Code*. There have been no surprises.

[51] I agree with the trial judge that the defence had done all it was required to do according to s. 657.3 of the *Criminal Code* but as I explained earlier the Crown should have applied for

disclosure of expert testimony early in the game. That is not the fault of newly appointed counsel but of the government in not appointing counsel until the last minute. This counsel did all she could to make the process fair to the Crown, if the trial was to proceed as scheduled, after the tardy appointment of counsel had already compromised the chance for an efficient trial. Nevertheless, the observation that defence counsel relied on an element of surprise is justified, given the initial refusal in February 2006 to provide the expert reports and the refusal (sustained by the judge) to disclose ahead of time a summary of the anticipated testimony of the ordinary witnesses.

[52] The provincial court judge then gave a third example:

(3) “During the trial the accused did not even disclose the names of lay witnesses who were scheduled to give evidence in the courtroom. ... the prosecution was unable to prepare in advance for cross-examination...”
(Written pleading by the Crown April 7 page 8, para (n))

There is no rule requiring that this be done. It is not necessary for the defence to disclose the names of witnesses who are not experts. In a quasi-criminal proceeding, cross-examination of the accused’s witnesses begins automatically as soon as the examination has been completed.

[53] Once again the learned provincial court judge has erred in applying rules in criminal cases where the accused bears no onus and the Crown bears the onus. The lay persons being called were members of the francophone community whose evidence was to support the constitutional challenge. The Court had an obligation to ensure the Crown was not taken by surprise, thereby unnecessarily hampering the proceedings. It could have ordered a “will say” be provided well in advance of the testimony, or provided adequate time to prepare for cross-examination. Insisting that because in an ordinary criminal prosecution the defence does not need to disclose the names of its witnesses and the Crown should be ready to cross-examine immediately after that evidence, the learned judge was making it very difficult for the Crown and the judge to get at the truth. This is not an example of the Crown prosecutor confusing her role as prosecutor with that of advocate.

[54] The provincial court judge then gave a fourth example:

(4) “Furthermore, given the strategy chosen by the accused (i.e., an interpretation of the procedure relating to a constitutional challenge of legislation in a summary prosecution (as to evidence and the sharing of information), he did not make a realistic calculation of how long the constitutional challenge would take. This is not to lay blame. It is merely meant to examine the actions of the accused that are causing a delay in the trial.”
(Written pleading by the Crown April 7 page 9, para (s))

This is a proceeding in which the accused is being prosecuted by summary procedure. His defence consists of challenging Alberta’s legislation. That does not

change the nature of the proceeding nor does it tinge it in such a way that “the rules of the game” switch to those used in constitutional challenges.

[55] I have quoted only the first two paragraphs under the fourth example. My comments above apply. It is obvious that I disagree with the proposition that advancing a constitutional attack on Alberta’s legislation does not in fact change “the rules of the game”.

[56] Under this fourth example, the learned provincial court judge wrote:
As I have mentioned several times, this is a quasi-criminal proceeding, although the defence is a constitutional defence. In my opinion, the accused was deprived of several rights that are protected for persons charged.

(1) The right to have the Crown be prepared for the trial.

Adding counsel from the Constitutional Law section changed the dynamics of the proceeding from a quasi-criminal proceeding in which the Crown had the burden of proof to a civil proceeding aimed at defending Alberta’s language legislation with rules and procedure more appropriate for a civil proceeding than a criminal one.

[57] This language seems to impose upon the Crown the onus of justifying its legislation where clearly the onus of proving unconstitutionality was on the defence.

[58] The trial judge went on:
The Constitutional Law section’s participation in the case occurred very late in the day. Almost five months went by between the motion of October 6, 2005 and the start of the trial on March 1, 2006, during which time the Crown could have made preparations. Nothing was done. It is obvious that the Constitutional Law section had done no preparation.

The government had known for four months (from July to October) that the case involved a challenge to the language legislation and was being made in French. Nevertheless, it was not until two weeks before the trial date of October 6, 2005 that it filed a motion for adjournment in order to hire bilingual counsel. No explanation for this delay. No explanation as to why Mr. Kennedy, a perfectly bilingual attorney who had handled the file for the preceding months, could not continue. Moreover, an attorney was hired only two weeks before the start of the trial in March. She did not have enough time to prepare.

[59] I agree with the trial judge’s conclusion that the government should have appointed constitutional counsel much, much earlier. I agree with the trial judge that Ms. Haykowsky did not have enough time to prepare.

[60] The provincial court judge went on:

(2) The right to an impartial and objective analysis by a prosecutor experienced in criminal law and criminal procedure.

Given the issues involved, that is to say, a defence challenging Alberta's language legislation, this was crucially important. The Department of Justice should have ensured that the case was handled by a prosecutor who had experience in criminal matters as well as a prosecutor with experience in constitutional matters.

[61] I am of the view that in matters involving a "run of the mill" quasi-criminal prosecution, the criminal law experience required may be no higher than that of the student-at-law. However, defending against a constitutional challenge based on history and arguments about fundamental unwritten constitutional principles requires considerable ability on the part of an advocate, and particular expertise in constitutional language rights law. Given the nature of this case, I disagree with the trial judge that the accused had a right to have an experienced criminal prosecutor involved in this case.

[62] The provincial court judge went on:

(3) The right to a criminal procedure with regard to the outlines of expert evidence.

The Constitutional Law section made only two requests for the outlines of expert evidence, on September 15 and October 6. Between October 6 and February 13, it made no effort to obtain the outlines.

To justify her many motions for adjournment during the trial, Crown counsel adduced the fact that she had not had an opportunity to prepare for the cross-examination of the expert witnesses because the defence refused to follow "practice" and disclose its outlines.

Crown counsel's insistence that this was governed by a "practice" for which no evidence or explanation exists contributed to the waste of time.

A week was added to the trial solely to respond to the motions for adjournment.

[63] My comment is simply that it is an error to blame present counsel for past mistakes of the Constitutional Law Section and the government in not appointing counsel earlier. Obviously the Crown should have been applying in the fall of 2005 for disclosure of the expert testimony to be addressed. Although the learned trial judge refers in the above excerpt to "requests" for outlines, the record does not indicate that the Crown ever applied for a court order.

[64] The provincial court judge went on:

(4) The right to expect the Crown to fulfill its duties.

On the whole, the prosecution was conducted unfairly and this had the effect of making the trial unfair and thus of undermining the integrity of the judicial process. As a result, the trial became a sham. The accused did not get a fair trial.

[65] If the learned trial judge is saying that it was unfair to the Court and the accused for the government to not appoint counsel much sooner, I agree. However, the only real prejudice to the accused was that he had funded counsel for only 14 days and some days were added because the Crown needed more time to prepare for cross-examination, resulting in adjournments during the trial for that purpose. That would not have been necessary if the Court had acceded to the Crown's application for an adjournment of the trial and the application to have the names and "will says" of the lay witnesses. Of course, in the end result, trial time will take about 10 weeks, only a few days of which relates to preparation for cross-examination of the defence experts.

[66] By the time the learned trial had heard the evidence of the defence experts and the lay witnesses, it became obvious to him that for the trial to be fair to the defence they required what the Crown had asked for from the defence prior to commencement of the trial (albeit just prior to commencement of the trial). The trial judge fixed June 30, 2006 as the date for disclosure of the names of the experts, August 31, 2006, for summaries of experts' reports and for the *curriculum vitae* of each of the experts.

Conclusion

[67] The learned trial judge relied on *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 and the Alberta Court of Appeal decision in *R. v. Pang* (1994), 162 A.R. 24 as authority for the proposition that a provincial court judge hearing a summary conviction criminal or quasi-criminal trial is a court of competent jurisdiction to grant costs on grounds of violation of a *Charter* right. I agree.

[68] I have found the learned trial judge's characterization of Ms. Haykowsky's actions as blameworthy conduct to be a clear, palpable, and overriding error. However, I have found the trial judge was correct in identifying the tardiness in appointing counsel as blameworthy conduct. The test for costs against the Crown is some misconduct, or a marked and unacceptable departure from the reasonable standards expected of the prosecution: *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575; *R. v. Neil*, [2003] A.J. No. 140, 2003 ABCA 45.

[69] I find the disruption of the trial by the requests for adjournment was the fault of the government in not appointing counsel until just before the trial date. The learned provincial court judge did not err in finding that this conduct amounted to a marked and unacceptable departure from the reasonable standards expected of the prosecution. There is a connection between the blameworthy conduct of the Crown, the disruption of the trial, and some extra work performed by Mr. Baudais.

[70] The basis for the award of \$15,949.65 was a bill of costs prepared by defence counsel showing the extra time spent responding to adjournment requests by the Crown. While I have

found the prosecutor had no option but to make those requests, it is the Crown's fault that adjournments had to be requested and the trial was disrupted.

[71] The awarding of costs and the amount of the award is largely discretionary, and I will not interfere with the learned trial judge's discretion. The Crown's appeal of the award of costs of \$15,949.65 is dismissed.

Appeal No. 2 - Dismissal of the request for *Okanagan* interim costs

[72] As mentioned at the outset of this decision, the second appeal relates to the dismissal on August 2, 2006 of the request for interim costs as provided for in *British Columbia (Minister of Forestry) v. Okanagan Indian Band* [2003], 3 S.C.R. 371.

[73] In the *Okanagan* case LeBel J. wrote at para. 40:

40. With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

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.

[74] The learned provincial court judge analyzed the defence application for interim costs based on those three principles. In the result, the learned provincial court judge found the three criteria were met by the accused, but declined to make an order for state funding holding that the *Okanagan* principles apply to civil suits and not to criminal cases based on the decision of Langston J. in *R. v. Yellowhorn* (*supra*).

[75] The *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34, s. 18 provides for appeals from final orders: *R. v. Adams*, [2001] A.J. No. 572 (Q.B.). In my view, this Court's jurisdiction to entertain the appeal of the dismissal cannot be based on s. 676.1 of the *Criminal Code*, which creates a right of appeal that, in practice, benefits only the Attorney General with respect to costs awards against it: *R.C. v. Quebec (Attorney General)*; *R. v. Beauchamps*, [2002] 2 S.C.R. 762 at para. 16.

[76] Further, the reasoning in *R. v. Kimmie*, [2006] S.J. No. 509, 2006 SKCA 87 addresses jurisdiction where there has been an order against a third party to the criminal proceeding, in that case, an award of costs appealed by Court Services. The Court characterized that order as a final one in the only matter in existence as between those parties, making it a final order within the meaning of s. 830(1) of the *Code* and subject to appeal. Similarly, the decision in *R. v. Krueger*, [2006] A.J. No. 177, 2006 ABCA 63 was on an appeal of an award of costs which the Court characterized as “a freestanding award granted as a remedy pursuant to s. 24(1)”. In this case, with respect to this second appeal, there was no order against the Crown, nor was a *Charter* remedy requested or granted.

[77] Defence counsel submitted that if his appeal should not be heard, then the Crown’s appeals should also not be heard. That is not a legal argument upon which I can base a finding of jurisdiction.

[78] In my view, the dismissal of the application for *Okanagan* interim costs was not a final order subject to appeal. However, given the inter-relationship between the order of November 7, 2006 and the request for relief and reasons provided on August 2, 2006, I deal further with the substance of Mr. Caron’s argument below.

APPEAL NO. 3 - ORDER FOR STATE FUNDING

Analysis of Reasons for Decision

[79] On November 6, 2006 (written reasons provided on November 7, 2006), the learned provincial court judge granted an application for state funded counsel and state funded disbursements and expenses of research personnel and expert witnesses based on a prospective *Charter* breach of s. 11(d) (right to a fair trial). The remedy granted was a *Charter* s. 24(1) remedy. From this order of November 6, 2006 the Crown has appealed.

[80] For the reasons set out with respect to jurisdiction in relation to Appeal No. 1, I have jurisdiction to entertain this appeal of an order granting a s. 24(1) *Charter* remedy.

[81] The November 6 order followed a ruling on October 18, 2006 wherein the learned provincial court judge dismissed a motion by defence counsel for state funded counsel payable in advance. In considering that request, the learned provincial court judge quoted *R. v. Rain*, [1998] A.J. No. 1059, 1998 ABCA 315 for the following proposition at para. 35:

The authorities establish that funded counsel is not a right in every case, but in some circumstances, where the assistance of counsel is essential in order to assure a fair trial, the *Charter* requires the provision of funded counsel.

[82] Also cited was McDonald J.'s decision in *Panacui v. Legal Aid Society of Alberta*, [1988] 1 W.W.R. 60 (Alta.Q.B.). The provincial court judge's decision was written only in French. I translate his conclusion at p. 3 of the judgment as follows:

Therefore in my opinion, in Alberta, there has always existed a right where the charge is serious and complex for state funded counsel. Consequently state funded counsel is not available for charges which are not serious or complex.

[83] He went on to characterize the offence as one that is not serious (\$100 fine) nor complex in and of itself (failing to make a left turn in safety). However, he found that the defence was complex.

[84] Defence counsel apparently conceded that his client could not meet the test of "a serious case" in terms of "serious consequences" to the accused.

[85] The issue raised can be framed as follows. When the Court in *R. v. Rain* said that counsel is not a right in every case and then said that in some circumstances assuring a fair trial required the provision of funded counsel, did the Court intend to rule that funding might be available where penal consequences were almost non-existent, but because the complex constitutional argument raised by the defence - a constitutional challenge to an *Act* of the Alberta Legislature - was so complex that it would not be properly defended without the help of state funded counsel?

[86] I state the question this way because the learned provincial court judge in rejecting on October 18, 2006 the application for state funded counsel held without more that he was not convinced the defence had met the onus upon it to prove the trial would be unfair. In particular his ruling was that the sheer volume of materials the defence counsel would have to read (summaries provided by the Crown) might be a hardship to counsel but did not render the trial unfair to the accused. The trial resumed from October 23, 2006 to the November 6, 2006 and counsel for the defence made a new application for state funded counsel. This application was granted on November 6, 2006 and written reasons were issued by the learned provincial court judge on November 7, 2006.

[87] Counsel cited para. 7 of *R. v. Cai*, [2002] A.J. No. 1521 (C.A.) as authority for a renewed application for state funding. That paragraph reads:

Deciding prospectively whether there will be a *Charter* breach is really an exercise in conjecture. Therefore, it is hard for the applicant to show the high degree of probability required: Cory J. in *Phillips*, supra at 159. One should always keep in mind that the applicant can apply later to the trial judge for timely relief if prejudice occurs, or becomes easier to prove: *Phillips*, supra at 160.

[88] I agree with the learned provincial court judge that dismissal of the original application on October 2 did not preclude a further application for state funding.

[89] The learned provincial court judge then outlined what had happened at trial as justifying state funded counsel. He pointed out that the lawyer for the accused cross-examined Professor Munro, an expert witness for the Crown, an historian who had just concluded eight days of testimony. The 14 binders filed contained 4,000 sheets of paper. The professor had spent 200 hours on the file. The expert summary report consists of 133 paragraphs, is supported by 564 documents, which emanate from archival research by a third party. In addition the lawyer for the accused referred to an expert summary report of another witness, Professor Fishman, whose proposed testimony was also very complex. The lawyer for the accused also referred to incessant efforts to obtain funding, unpaid work done by his firm, the work of students and the *pro bono* lodging for the lawyer supplied by a Francophone family in Edmonton. The defence counsel is from Regina, Saskatchewan.

[90] Crown counsel appeared to have simply replied to this argument by saying that defence counsel can hardly be surprised that in such a complex case, the case put forward by the Crown to defend its legislation would be extensive and complex. That, in my opinion, is a fair statement.

[91] The learned provincial court judge then set out the “test” required by the *Cai* case from para. 6 of that judgment:

6 At the time of the Queen's Bench hearing, no *Charter* breach had yet occurred. The respondents applied because they anticipated a breach of their right to a fair trial. But binding authority lets one seek relief based on a prospective *Charter* breach only if one can prove that "there is a sufficiently serious risk that the alleged violation will in fact occur": *Phillips v. Westray Mine Inquiry* [1995] 2 S.C.R. 97 at 158. The test has been said to require a "high degree of probability", or "a real and substantial risk": *Operation Dismantle v. R.* [1985] 1 S.C.R. 441 at 458, and *Canadian Broadcasting Corp. v. Keegstra* (1986) 77 A.R. 249, 35 D.L.R. (4th) 76 at 78 (C.A.). The essence of the test is that the court must be satisfied that there "is a very real likelihood that in the absence of that relief an individual's *Charter* rights will be prejudiced", as Cory J. concluded in *Phillips*, supra at 159. The inquiry must be contextual, considering all surrounding circumstances, the nature of the right threatened, and the extent to which the harm is susceptible of proof: *Phillips*, supra at 159.

[92] The learned provincial court judge then agreed with the defence argument that it would not be possible for defence counsel to prepare a coherent cross-examination for the purpose of focussing on the main points of the testimony of the expert witness. He concluded at p. 3 of the English version (p. 4 of the French version):

In my opinion the accused has demonstrated on the basis of preponderant evidence that his Section 11(d) rights risks [*sic*] to be violated. There will be a breach of Section 11(d) in relation to the fairness of the trial if the Defendant's financial situation in the present case is not reestablished.

Analysis of the Law

State Funding *per Rowbotham*

[93] The only distinction that I can see between the October 18, 2006 decision and the November 7, 2006 decision is that meeting the Crown's response to the constitutional challenge of the defence would now require more lawyer time and therefore more money than was foreseen in October. It would also require further funds to engage experts.

[94] Having looked at the history of the proceedings, it seems to me almost axiomatic that undertaking such a constitutional challenge to an *Act* of a provincial Legislature is almost always going to be an expensive proposition that cannot be undertaken by the ordinary citizen without special funding. In the result, the learned provincial court judge ordered funding for legal costs and the cost of retaining experts.

[95] The Court in *Cai* started out by saying at para. 2:

In both courts, both sides assumed that the respondents face serious charges, lack funds, qualify for Legal Aid, and are not competent to defend this complex case without counsel.

[96] The facts in the case at bar are somewhat different. The accused does not face a serious charge; he does not need a lawyer to defend the charge but he does need a lawyer to mount a complex defence that is based on a constitutional challenge. He does not qualify for Legal Aid presumably because the charge he faces is not serious enough to warrant representation by counsel. The learned provincial court judge also had evidence before him that the accused, Caron, cannot pay for the legal fees of mounting this constitutional challenge.

[97] In *Cai*, the remedy sought and obtained by Cai was a stay of proceedings unless counsel was remunerated for fees at a higher rate and for more counsel time than was afforded by Legal Aid. In this case the accused does not seek the usual remedy for a breach of his *Charter* rights, a stay, because that would preclude him from arguing the real issue upon which he wishes a decision, the constitutionality of the *Languages Act*.

[98] I have not been able to find persuasive case law, civil or criminal, where state funding was granted where, as here, there are no serious penal consequences should the accused be convicted and, in fact, the constitutional question, not guilt or innocence, is the only serious question the accused wishes to argue. In my view, the cases cited by Caron, *R. v. Dedam*, [2001] N.B.J. No. 186 (Prov.Ct.) and *R. v. Peter Paul*, [2002] N.S.J. No. 380 (Prov.Ct.) are not persuasive. The decision in *R. v. Dedam* was reversed on appeal ([2002] N.B.J. No. 146 (Q.B.)) and the Court in *R. v. Peter Paul* suggests that imprisonment on default for paying a fine constitutes a serious penal consequence, which proposition was clearly rejected by our Court of Appeal in *R. v. Rain* (*supra*).

[99] I have a grave concern that were I to uphold the funding order of the learned provincial court judge, I would be deciding spending priorities for public funds, the very trap that the Court in *Cai* warned against at para. 9 where it wrote:

Courts are not the best qualified agencies to determine spending priorities for public funds: *Robinson, supra* at 487 (C.C.C.); *Rain, supra* at 192 (C.C.C.). Courts do not set, nor are they asked to set, elevated fees for doctors or other professionals such as nurses, accountants, or midwives. Courts do not set health care premiums, levels of taxation, sessional indemnities or jury fees.

[100] It seems that the learned provincial court judge was concerned that counsel in this case without a funding order was going to be doing a lot of *pro bono* work. In that connection the Court in *Cai* wrote at para. 26:

Severe unfairness to the accused at trial would doubtless mean an unfair trial; but unfairness to counsel, even severe unfairness, is not the same as an unfair trial. Nor did the Reasons even suggest that the two were the same.

[101] The grave concern I have is that constitutional challenges, even meritorious ones, should not be indirectly funded under the guise of a *Charter* fair trial right just because they involve a quasi-criminal trial and are complex. It seems to me that to employ the *Charter* in that way is colourable and is to be discouraged.

[102] In *R. v. Rain (supra)* Sulatycky J.A. with whom Irving J.A. and Hunt J.A. concurred considered a number of authorities and stated at para. 35:

The authorities establish that funded counsel is not a right in every case, but in some circumstances, where the assistance of counsel is essential in order to assure a fair trial, the *Charter* requires the provision of funded counsel.

[103] Sulatycky J.A. then considered the question of when the assistance of counsel is essential to a fair trial noting that in many cases counsel is not necessary, keeping in mind the obligations imposed on trial judges to assist an unrepresented accused to ensure a fair trial. He then considered the guidelines set out in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont.C.A.). At para. 51 Sulatycky J.A. wrote:

The test which has evolved from *Rowbotham* has two aspects which must be considered. One is the accused's circumstances. It must be determined if the accused can afford to retain counsel and if the accused has the education, experience and other abilities to conduct his or her own defence. The other is the nature of the charge or charges. Regard must be had to the seriousness of the offence, the complexity of the case and the length of trial. The central concern throughout is the fairness of the trial.

[104] I am not concerned with the first aspect in this case because there was ample evidence from which the learned provincial court judge could conclude that Mr. Caron could not conduct his defence where the only defence was a constitutional attack on a statute passed by the Alberta Legislature. The second branch of the test is, in my view, determinative of this appeal.

[105] Sulatycky J.A. then considered cases where the need for counsel at trial had been considered. I will refer only to a couple of the cases considered. In *Rowbotham* the accused faced a year-long trial for conspiracy to import narcotics. In *Panacui* (*supra*) the accused faced numerous charges including kidnapping, murder, robbery, escape from lawful custody and firearms offences.

[106] Sulatycky J.A. considered the following cases where the courts held that the trial was not unfair even if the accused lacked legal representation: two counts of mischief by making false statements to the police (*R. v. Sechon* (1995), 104 C.C.C. (3d) 554 (Que. C.A.)), a conviction arising from a sit-in demonstration and pursuit of two civil complaints under provincial human rights legislation (*Mireau v. Canada* (1991), 96 Sask. R. 197 (Q.B.)); common assault in a domestic situation (*R. v. Satov*, [1996] O.J. No. 2500 (Ct.Just.)), and charges of indecent acts and being found in a bawdy house (*R. v. Lafontaine and Lafontaine*, [1998] A.Q. no. 1285 (S.C.)). I note these were criminal charges, but not as serious as murder, drug trafficking and the like.

[107] Sulatycky J.A. then considered *R. v. Hill* (1996), 34 C.R.R. (2d) 344 (Ont. Prov. Ct.) in which a judge had found the accused could not have a fair trial without state funded counsel on a charge of driving over the legal limit. That case was not followed by subsequent Ontario cases and our Court of Appeal expressly disagreed with that finding. In *Rain*, Sulatycky J.A. specifically found it to be an error of law to conclude the possibility of incarceration is enough to satisfy the requirement of “seriousness” in the assessment of need for counsel in cases of impaired driving.

[108] *Rain* had been charged with impaired driving and refusing to comply with a demand for a breath sample. The Court of Appeal ruled that those charges were not serious enough to warrant funded counsel even if there was a potential for imprisonment. In the case at bar, the specified penalty is a \$100 fine and the potential for imprisonment only arises for nonpayment of the fine and that is remote because of the fine option provisions.

[109] The quasi-criminal regulatory offence faced by the accused in this case is far less serious than the criminal offence of impaired driving no matter what criterion is used. A conviction will not affect the accused’s operator’s licence which an impaired driving conviction would.

[110] The test in *Rain* requires a serious and complex charge. Earlier, the learned provincial court judge had rightly found that the charge was not serious. Nothing occurred in the interim to change the basis for that finding, and the finding itself was not revisited.

[111] As I am bound by the decision and reasoning in *R. v. Rain*, I conclude that state funded counsel is not required for a fair trial of the offence with which this accused is charged. In my

view, raising a complex constitutional argument which, I agree, can only be fairly argued by counsel does not change the seriousness of the offence. That requirement for state funded counsel has not been met. The appeal is allowed and that portion of the November 7, 2006 judgment of the learned provincial court judge granting state funded interim costs to the Respondent is quashed.

[112] If the learned provincial court judge concluded in his decision on November 6 that it was not necessary to find that the charge was serious in order to meet the test for state funded counsel set out in *Rain* and *Cai*, then he erred in law. If he concluded that the charge in this case was serious, then this constituted either an error in law (as per the analysis by Sulatycky J.A. in *Rain*) or a palpable and overriding error of fact or mixed fact and law. Either way, his order cannot stand on this basis.

Interim Costs per Okanagan

[113] The learned provincial court judge referred in his November 7 written decision to his earlier decision of August 2. Although it appears he was specifically referring to the portions of his decision dealing with the request for state funded counsel on the basis of an apprehended breach of s. 11(d) of the *Charter*, at the conclusion of oral argument on January 25, 2007 it became obvious to me that the Appellant Caron was arguing that the Provincial Court had jurisdiction to grant the remedy of state funded counsel and state funded experts based not only as a *Charter* remedy following the approach taken in *R. v. Rowbotham (supra)*; *R. v. Cai (supra)* and *R. v. Rain (supra)* but also as an exercise of the Court's inherent jurisdiction to ensure a fair process employing the reasoning set out in *Okanagan* as commented upon in *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 S.C.C. 2 (which had not yet been decided by the Supreme Court).

[114] In his August 2 decision, the trial judge cited para. 64, part of para. 66 and all of para. 67 of the defence's written pleadings and I repeat these arguments here because in my view this argument was in effect later accepted by the learned provincial court judge in his November 7, 2006 reasons:

64. These applications by the accused are being made firstly on the grounds of s. 24(1) of the *Charter*. The accused therefore asks that this Honourable Court acknowledge that there have been breaches of ss. 11(b) and 11(d) of the *Charter*. The accused then wishes to point out that in formulating an appropriate and just remedy for the accused in this case, the Court may base itself, among others, on the principles endorsed by the Supreme Court in *Okanagan supra*.

66. We therefore emphasize that the criteria set out in *Okanagan* support the accused's motion for an order for interim costs, but in the broader context in which the accused also has a remedy under s. 24(1) of the *Charter* ...

67. The accused maintains that an order for interim costs is the most just and appropriate form of remedy in the present circumstances of this case. But it is also important to point out that this [sic] has greater discretion in this case than in *Okanagan*, where the party making the application for an order for costs did not have a remedy under s. 24(1) of the *Charter*.

[115] The trial judge then wrote at p. 32:

Clearly the accused wants to conflate two different principles. But the criteria in *Okanagan* have nothing to do with a breach of the *Charter* and remedies for that breach.

[116] After citing parts of LeBel J.'s judgment in *Okanagan* the trial judge wrote at p. 33:

It is therefore quite clear that the motion made by the Bands seeking interim costs did not arise from a breach of rights protected by the *Charter*. On the contrary, the award of interim costs was strictly tied to the three conditions summarized in paragraph 40. (This is a reference to para. 40 of LeBel J.'s judgment cited above.)

[117] The *Okanagan* test requires an analysis along the lines of the analysis performed by Langston J. in *R. v. Yellowhorn* 2006 ABQB 307. *Little Sisters* affirmed the principle that in special circumstances (which the Supreme Court felt would be rare) judges invoking their equitable jurisdiction may order one party to pay the others interim costs where it is necessary to avoid unfairness or injustice. The Supreme Court stated that when interim costs are ordered in the public interest, the issues raised must transcend the individual interests of the particular litigant and have special interest for the broader community. The Supreme Court then set out the three criteria for an order for advance costs, that is:

- (1) impecuniosity
- (2) a meritorious case
- (3) special circumstances making this extraordinary exercise of the Court's power appropriate.

[118] The trial judge embarked on this analysis. He gave compelling reasons for his finding that Mr. Caron did not have the financial ability to fund the constitutional argument. Unlike the accused in *R. v. Fournier*, [2004] O.J. No. 1136 (Sup.Ct.Just.), reversed [2006] O.J. No. 2434 (C.A.), Mr. Caron had applied to Alberta Legal Aid, had been refused funding and appealed that finding unsuccessfully which exhausted his right to review the refusal. I accept the learned provincial judge's reasons for that finding.

[119] With respect to the second criterion in *Okanagan*, the trial judge wrote at p. 34 of his decision of August 2, 2006:

- (2) The application appears at least reasonably valid:

The accused maintains that there are several public interest legal issues that were not resolved by the Supreme Court in *Mercure*.

- (1) Whether section 16 of the *Charter* applies to language rights in Alberta;
- (2) Whether the underlying constitutional principle of protection for minorities applies;
- (3) The impact of new historical research that was not considered in the *Mercure* decision;
- (4) The impact of the Royal Proclamation of December 6, 1869.

According to the accused, the Royal Proclamation of 1869 is what makes this an exceptional case. The legal effect of the proclamation on the language rights of Francophones in Alberta has not been argued, nor was it considered by the Supreme Court in *Mercure*.

In my opinion, the accused has fulfilled the second condition.

[120] With respect to the third criterion the trial judge wrote at p. 34:

(3) Litigation of special public interest

The questions raised by the constitutional notice transcend the private interests of the accused. Many issues raised by this language impasse, such as the right to an education in French or the right to services in French, would be resolved in this case.

In my opinion, the accused has fulfilled the third condition.

Nevertheless, the question remains whether the criteria set out in *Okanagan* can be applied in a criminal case.

As regards the applicability in a criminal case of the criteria set out in *Okanagan*, a similar issue was adjudicated in *Yellowhorn v. R.*, [2006] A.J. No. 491.

Jacobsen J. of the Provincial Court of Alberta found the accused guilty of driving an uninsured vehicle. This was a violation of the *Motor Vehicle Administration Act* (the act has been repealed and replaced by the *Traffic Safety Act*).

The accused appealed to the Court of Queen's Bench. In his decision, Langston J. noted that

“Issues:

9 The Appellant seeks an order requiring the Crown ... to pay her interim costs.

10 Thus, the issues raised by this application are the following:

1. ...

2. Is the Appellant entitled to the payment of interim costs?

3. ...”

In his ruling on this application, Langston J. stated that:

“52 The Appellant also seeks an order for payment of her interim costs and cites the case of *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 in support of that application. That case involved a dispute between a provincial government and an Indian Band over logging rights and was, accordingly, a civil proceeding. The Crown argues that that case is inapplicable here because this is a criminal proceeding and that, therefore, different principles apply.

53 Admittedly, the Appellant in this case has not been charged under the *Criminal Code*. Nevertheless, without wishing to belabour the point, I note simply that this is not a situation in which litigants have chosen to have resort to the courts to resolve their private dispute. Rather, this case is one in which the state has brought its machinery to bear against an individual and, therefore, I am satisfied that this proceeding is more properly characterized as criminal or quasi-criminal. Therefore, the costs principles applicable to the criminal context are appropriate here.

...

57 Even if I were to accept that the principles set out in *Okanagan* apply to this case, I would nevertheless decline to make an order for interim costs in the Appellant's favour.”

As I have repeatedly indicated, the case before the Court is quasi-criminal. Given that *Yellowhorn* is a ruling on appeal from a summary conviction, that is the law I am obliged to apply. Accordingly, the *Okanagan* criteria are not applicable in this case. The application seeking an order for interim costs is dismissed.

[121] Therefore, the provincial court judge concluded that he did not have jurisdiction to make the order under *Okanagan*. However, in my view, in his November 7, 2006 reasons the learned provincial court judge did what on August 2, 2006 he stated he had no jurisdiction to do.

[122] The merits of the case and the special circumstances were not dealt with in great detail by the Provincial Court judge. Rather, the Court placed particular emphasis on the inability of Caron without financial aid to litigate the complicated constitutional question raised by him.

[123] The narrow ground for dismissal of the application was that this was not a civil proceeding and therefore *Okanagan* funding was not available. There is a difference between the powers of a provincial court sitting on a summary conviction matter and an application to the Court of Queen's Bench for state funding to pursue an appeal from a decision of a provincial court judge. That was the application before the Court of Queen's Bench in *Yellowhorn*.

[124] In a similar case, *R. v. Fournier* (*supra*) a superior court judge on an application for state funding to raise a constitutional challenge to an indictment charging sale of fraudulent native status cards, the Court considered *Rowbotham* (*supra*) and *Rain* (*supra*) but seemed to rest its decision on an *Okanagan* analysis.

[125] On appeal, the Ontario Court of Appeal commented at para. 10:
In making his funding order, the trial judge briefly assessed the underlying merits of the case. Although we have serious doubts as to whether the trial judge was correct in this assessment and we note that he did not carry out a detailed legal analysis of the issues as was done in the decision in *R. v. Yellowhorn*, [2006] A.J. No. 491, we need not deal with this aspect of his decision in light of the conclusion we have reached on the procedure that ought to have been followed...

[126] It seems from this passage, that the Court of Appeal by advocating a detailed legal analysis of the underlying merits of the case, was of the view that the criminal nature of the case did not necessarily preclude such an analysis.

[127] On a careful reading of *Okanagan* and the subsequent case of *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, 2007 SCC 2, I do not find any principle or statement which would rule out such an order in an appropriate criminal case.

[128] Essentially, the reasoning of Langston J. in *Yellowhorn* was that the costs principles applicable to the criminal context outlined in cases such as *R. v. Robinson* (1999), 250 A.R. 201, 1999 ABCA 367 are exhaustive (see also *Vukelich v. Mission Institution* (2005), 38 B.C.L.R. (4th) 132, 2005 BCCA 75). However, *Robinson* was rendered before the Supreme Court's decision in *Okanagan*, and did not purport to address whether the equitable jurisdiction discussed in *Okanagan* is restricted to civil cases.

[129] I have carefully considered the decision in *Okanagan* and the reconsideration of the *Okanagan* criteria in *Little Sisters*. In both *Okanagan* and *Little Sisters*, the plaintiffs were in civil disputes with government. However, nowhere in either case does the Supreme Court indicate that one of the criteria for interim costs be that the case not be criminal or quasi-criminal

in nature. I see no reason in principle why interim costs should not be granted to raise a constitutional question in a criminal or quasi-criminal matter if the criteria in *Okanagan* is met. Therefore with respect I disagree with that part of Langston J.'s decision in *R. v. Yellowhorn*.

[130] With respect, in my view, the case law on this issue has not definitively excluded the possibility that in an appropriate and exceptional criminal or quasi-criminal case, jurisdiction might exist to award *Okanagan* costs.

[131] What is clear, however, in *Okanagan* and *Little Sisters* is that such an order is an exercise of the inherent power of the Court or its equitable jurisdiction. In *Okanagan* McLachlin C.J. for the majority wrote at para. 19:

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

and at para. 35:

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the *Ontario Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the *Supreme Court of British Columbia Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

In my view, it would not be appropriate to embark on a review of Judge Wenden's *Okanagan* analysis here, as I am of the view that the learned provincial court judge did not have jurisdiction to award *Okanagan* interim costs in any event, because of the limited jurisdiction of the provincial court with respect to costs.

[132] Moen J. of this Court in **R. v. Onevathana**, [2002] A. J. No. 34; 2002 ABQB 27 held that a Provincial Court dealing with charges laid under the *Public Health Act*, R.S.A. 1980 c. P-27.1, a quasi-criminal charge, could only award those minuscule costs against an accused set out in ss. 809 and 840 of the *Criminal Code*. In coming to that conclusion, Moen J. first distinguished all of those cases submitted by the Respondent before her which dealt with the inherent power of the Court of Queen's Bench of Alberta and other Supreme Court decisions as well as Courts of Appeal (also superior courts) to order costs. Moen J. then distinguished the line of cases where costs have been granted to an accused as a s. 24(1) *Charter* remedy by a Provincial Court relying on the decision of our Court of Appeal in **R. v. Pang** (*supra*); **R. v. 974649 Ontario Inc.**, [1998] O.J. No. 4735 appeal dismissed with reasons [2001] S.C.J. No. 79 and **Mills v. The Queen**, [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481.

[133] I agree with Moen J.'s conclusion and find no *Charter* basis for the November 7, 2006 order for state funding of counsel fees and expert retainers. I also find the Provincial Court has no jurisdiction beyond ss. 409 and 480 of the *Criminal Code* to award costs in a summary conviction matter except as a *Charter* remedy.

[134] Langston J. in **R. v. Gunn**, [2003] A.J. No. 467, 2003 ABQB 314 also reviewed the limited jurisdiction of the provincial court to award costs. The Court in **Canada (Attorney General) v. Savard**, [1996] Y.J. No. 4 (C.A.), leave denied [1996] S.C.C.A. No. 297 (cited with approval in **Cai** at para. 93) confirmed that the provincial court has neither statutory nor common law jurisdiction to order the Attorney General to bear the costs of legal representation for an accused. The Court of Appeal in **R. v. Pang** (*supra*) at para. 25 stated that prior to the *Charter*, the provincial court could award costs against the Crown in limited circumstances circumscribed by statute, for example the *Criminal Code*, whereas in the case of the superior court it was circumscribed by common law. The Court further held that the provincial court's jurisdiction to grant the remedy of costs as codified in the *Criminal Code* has not been enlarged by the *Charter*, but s. 24(1) has enlarged the grounds upon which that jurisdiction can be exercised to include a *Charter* infringement.

[135] Therefore, the provincial court's jurisdiction as to costs in criminal matters is limited. It is clear from the reasons of the majority of the Supreme Court in **Okanagan** that the jurisdiction to grant interim costs in that case was viewed as an aspect of the inherent equitable jurisdiction of the court as to costs. The Court in **Little Sisters** again referred to the equitable nature of the relief.

[136] At my request, the parties submitted arguments dealing with the criteria set out in **Okanagan** and **Little Sisters**. Mr. Caron's position as set out in his brief is that this is the first case which will examine in depth the evidence which was not available when **R. v. Mercure** (*supra*) was decided and such an examination will reveal that contrary to the *obiter* in **R. v. Mercure** and the decision in **Alberta v. Lefebvre** (*supra*), the Alberta Legislature did not have the power to abrogate the language rights of the French minority in Alberta, as they were continued by s. 110 of the *North West Territories Act* 1875 as amended by S.C. 1891, c. 22, s. 18. The Alberta legislation did abrogate them by enacting the *Languages Act*. The reason for this, it is

argued, is that the rights of the French minority in Alberta were the same as those in Manitoba, and the Manitoba rights cannot be abrogated by the Manitoba Legislature.

[137] The allegation is that these rights are constitutionally entrenched and *R. v. Mercure* must be reconsidered in light of subsequent decisions of the Supreme Court of Canada. There is also a novel argument that the Legislature may not have the right to abrogate French minority rights because that would be a breach of the Honour of the Crown. Alberta's position is simply that *R. v. Mercure* and *Lefebvre v. Alberta* are binding authorities and there is no merit to the argument of the accused Caron.

[138] I will not comment upon these arguments nor will I analyze the substantial presentation of counsel for Mr. Caron with respect to the *Okanagan* and *Three Sisters* criteria because I have decided the Provincial Court even if it found all the criteria of those cases were met does not have jurisdiction to make an order for state funding of counsel and expert fees.

[139] I will briefly address the argument that even though the Provincial Court did not have jurisdiction to make such an order, this Court, exercising its inherent jurisdiction, should make the order the Provincial Court could not make. The simple answer to that proposal is that an appeal court should not use its inherent power to confirm an order of the Provincial Court which that Court had no jurisdiction to make.

[140] Having concluded that I respectfully disagree with Langston J.'s finding that criminal and quasi-criminal cases are excluded from consideration for *Okanagan – Three Sisters* funding, it might be possible for Mr. Caron to make an application to this Court for such a funding order not on appeal but as a freestanding application before this Court.

[141] Given the abolition of the Court Challenges Program, the questions I have just raised may well have to be answered sooner than later.

[142] In my view, the provincial court does not have jurisdiction to award *Okanagan* interim costs. I leave 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, a court of inherent equitable jurisdiction.

Conclusion

[143] For the foregoing reasons:

- the order of August 2, 2006 granting costs to Mr. Caron of \$15,949.65 is upheld and the Crown's appeal against those costs (Appeal No. 1) is dismissed;
- the appeal from dismissal of the *Okanagan* interim costs application (Appeal No. 2) is dismissed for want of jurisdiction;

- the appeal against state funding (Appeal No. 3) is allowed, and the order of November 7, 2006 granting state funded counsel fees and state funded expert fees is quashed.

Heard on the 25th day of January, 2007.

Dated at the City of Edmonton, Alberta this 19th day of April, 2007.

R.P. Marceau
J.C.Q.B.A.

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