

Case Law Document on Bilingualism in the Judiciary

Prepared by Anne-Marie Brien, student in Civil Law

•Research completed on August 27, 2013

Case Law Document on Bilingualism in the Judiciary

This Case law document was created to help lawyers find cases pertaining to linguistic obligations of the judiciary.

LEGISLATION
TABLE OF CONTENTS

Section 16 of the <i>Canadian Charter of Rights and Freedoms</i>	9
I. Civil Matters	12
i. Obligations Applicable to Federal Institutions	12
Section 133 of the <i>Constitution Act, 1867</i>	13
Paragraph 19. (1) of the <i>Canadian Charter of Rights and Freedoms</i> and part III of the <i>Official Languages Act</i>	26
ii. Obligations Applicable to Provincial Institutions	41
a. Quebec	41
Section 133 of the <i>Constitution Act, 1867</i>	41
Chapter III of the <i>Charter of the French Language</i>	54
b. Ontario	56
<i>Courts of Justice Act</i>	56
c. Western Provinces	60
Alberta	61
<i>Languages Act</i>	61
Saskatchewan	70
<i>Language Act</i>	70
Manitoba	71
Section 23 of the <i>Manitoba Act, 1870</i>	71
British Columbia	76
“1731 Act” and Rule 22-3 of the <i>Supreme Court Civil Rules</i>	76
d. Atlantic Provinces	82
New Brunswick	82
Section 16.1 of the <i>Canadian Charter of Rights and Freedoms</i> and Sections 3 to 5 of the <i>Official Languages Act of New Brunswick</i>	83

Case Law Document on Bilingualism in the Judiciary

Paragraph 19.(2) of the <i>Canadian Charter of Rights and Freedoms</i> and Sections 16 to 26 of the <i>Official Languages Act</i> of New Brunswick	86
Nova Scotia	96
<i>French-language Services Act</i>	96
e. Territories	97
Northwest Territories	97
<i>Official Languages Act</i> , section 110 of the <i>North-West Territories Act</i> and <i>Judicature Act</i>	97
Yukon	97
<i>Languages Act</i>	97
Nunavut.....	105
<i>Official Languages Act</i>	105
Section 110 of the <i>North-West Territories Act</i> and section 12 of the <i>Consolidation of Official Languages Act</i> of the Northwest Territories.....	105
<i>Official Languages Policy</i> (Northwest Territories)	106
 II. Criminal Matters	106
Jury Act	134
Quebec.....	134
Alberta.....	134
Saskatchewan	134
Manitoba	135
New Brunswick.....	135
Prince Edward Island	135
Newfoundland and Labrador	135
Northwest Territories	136
Yukon	136

CASE LAW
TABLE OF CONTENTS

Section 16 of the <i>Canadian Charter of Rights and Freedoms</i>.....	9
<i>Reference re Secession of Quebec</i> , [1998] 2 S.C.R. 217	9
<i>Conseil scolaire francophone de la Colombie-Britannique v. British Columbia</i> , [2013] SCC 4211	
 I. Civil Matters	12
 i. Obligations Applicable to Federal Institutions.....	12
Section 133 of the <i>Constitution Act, 1867</i>	13
Interpretation	14
<i>R v. Beaulac</i> , [1999] 1 S.C.R. 768	14
Decisions relevant to Section 133.....	16
<i>MacDonald v. City of Montreal</i> , [1986] 1 S.C.R. 460.....	16
<i>Attorney General of Quebec v. Blaikie et al.</i> , [1981] 1 S.C.R. 312	22
<i>Att. Gen. of Quebec v. Blaikie et al.</i> , [1979] 2 R.C.S. 1016.....	23
<i>Morand c. Québec (Procureur général)</i> , [2000] QCCA 2218 (French version only).....	24
Paragraph 19. (1) of the <i>Canadian Charter of Rights and Freedoms</i> and part III of the <i>Official Languages Act</i>	26
Interpretation	27
<i>R v. Beaulac</i> , [1999] 1 S.C.R. 768	27
<i>Charlebois v. Moncton (City)</i> , [2001] NBCA 117	29
Decisions relevant to paragraph 19.(1) before the adoption of the <i>Official Language Act</i> ..	31
<i>Société des Acadiens v. Assn. of Parents for Fairness in Education</i> , [1986] 1 R.C.S. 549.....	31
Decisions relevant to para. 19.(1) of the <i>Charter</i> and part III of the <i>Official Languages Act</i>	37
<i>Taire v. Canada (Minister of Citizenship and Immigration)</i> , [2003] CF 877.....	37
<i>Devinat v. Canada (Immigration and Refugee Board)</i> , [2000] 2 CF 212 (French version only).	38
<i>Belair v. Canada (Solicitor general)</i> , [2000] A.C.F. 199	40

ii. Obligations Applicable to Provincial Institutions	41
a. Quebec.....	41
Section 133 of the <i>Constitution Act, 1867</i>	41
Interpretation	42
<i>R v. Beaulac</i> , [1999] 1 S.C.R. 768	42
Decisions relevant to Section 133.....	43
<i>MacDonald v. City of Montreal</i> , [1986] 1 S.C.R. 460.....	43
<i>Attorney General of Quebec v. Blaikie et al.</i> , [1981] 1 S.C.R. 312	49
<i>Att. Gen. of Quebec v. Blaikie et al.</i> , [1979] 2 S.C.R. 1016.....	50
<i>Morand c. Québec (Procureur général)</i> , [2000] QCCA 2218 (French version only).....	52
Chapter III of the <i>Charter of the French Language</i>	54
<i>Att. Gen. of Quebec v. Blaikie et al.</i> , [1979] 2 S.C.R. 1016.....	55
b. Ontario.....	56
<i>Courts of Justice Act</i>	56
<i>Belende v. Patel</i> , [2008] ONCA 148	57
<i>R c. Boutin</i> [2002], ONSC 2245 (French version only).....	58
<i>Wittenberg v. Fred Geisweiller/ Locomotive Investments Inc.</i> , [1999] ONSC 626.....	59
c. Western Provinces.....	60
Historical Context	60
Alberta.....	61
<i>Languages Act</i>	61
<i>R. v. Caron</i> , [2009] ABQB 745	62
<i>R v. Pooran</i> , [2011] ABPC 77	68
Saskatchewan	70
<i>Language Act</i>	70

Case Law Document on Bilingualism in the Judiciary

<i>R c. Rottiers</i> , [1995] SKCA 4003 (French version only).....	70
Manitoba	71
Section 23 of the <i>Manitoba Act, 1870</i>	71
<i>Re Manitoba Language Rights</i> , [1985] 1 S.C.R.721	72
<i>R. v. Rémillard (R.) et al.</i> , [2009] MBCA 112.....	73
British Columbia	76
“1731 Act” and Rule 22-3 of the <i>Supreme Court Civil Rules</i>	76
<i>Conseil scolaire francophone de la Colombie-Britannique v. British Columbia</i> , [2013] SCC 4276	
 d. Atlantic Provinces	82
New Brunswick	82
Section 16.1 of the <i>Canadian Charter of Rights and Freedoms</i> and Sections 3 to 5 of the <i>Official Languages Act</i> of New Brunswick	83
<i>Charlebois v. Mowat</i> , [2001] NBCA 117	83
Paragraph 19.(2) of the <i>Canadian Charter of Rights and Freedoms</i> and Sections 16 to 26 of the <i>Official Languages Act</i> of New Brunswick	86
<i>Société des Acadiens v. Assn. of Parents for Fairness in Education</i> , [1986] 1 S.C.R. 549.....	86
<i>Charlebois v. Saint John (City)</i> , [2005] 3 S.C.R. 563	92
Nova Scotia	96
<i>French-language Services Act</i>	96
 e. Territories	97
Northwest Territories	97
<i>Official Languages Act</i> , section 110 of the <i>North-West Territories Act</i> and <i>Judicature Act</i>	97
Yukon	97
<i>Languages Act</i>	97
<i>R v. T.D.M.</i> , [2008] YKCA 16.....	98
<i>Kilrich Industries Ltd. v. Halotier</i> , [2007] YKCA 12.....	99
Nunavut	105
<i>Official Languages Act</i>	105

<i>Section 110 of the North-West Territories Act and section 12 of the Consolidation of Official Languages Act of the Northwest Territories</i>	105
<i>Official Languages Policy (Northwest Territories)</i>	106

II. Criminal Matters.....106

<i>R v. Beaulac</i> , [1999] 1 S.C.R. 768.....	107
<i>R. v. Musasizi</i> , [2010] QCCM 17.....	109
<i>McCulloch Finney v. Canada (Attorney General)</i> , [2009] QCCS 4646.....	111
<i>Dow v. R.</i> , [2009] QCCA 478.....	112
<i>R v. T.D.M.</i> , [2008] YKCA 16.....	116
<i>Denver-Lambert c. R.</i> , [2007] QCCA 1301 (French version only)	118
<i>R v. Oliynyk</i> , [2006] BCSC 85.....	120
<i>R v. Sarrazin</i> , [2005] ONCA 257.....	121
<i>R v. Potvin</i> , [2004] ONCA 285.....	123
<i>R v. Mackenzie</i> , [2004] NSCA 10.....	126
<i>R. v. Schneider</i> , [2004] NSCA 151.....	129
<i>R v. Deveaux</i> , [1999] NSSC 477.....	133

Jury Act.....134

Quebec	134
Alberta	134
Saskatchewan	134
Manitoba	135
New Brunswick	135
Prince Edward Island	135
Newfoundland and Labrador	135
Northwest Territories	136
Yukon	136

Case Law Document on Bilingualism in the Judiciary

Note: The explications are mostly inspired from the book of Michel Bastarache called “Language Rights in Canada.”¹

Section 16 of the *Canadian Charter of Rights and Freedoms*

Section 16 of the *Canadian Charter of Rights and Freedoms*² establishes the principle of equality of both official languages of Canada. The Courts of justice must interpret language rights in light of this provision. However, the case law is not clear on the real extent of Section 16.

This provision reads as follows:

Official languages of Canada

16. (1) *English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.*

Official languages of New Brunswick

(2) *English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.*

Advancement of status and use

(3) *Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.*

Decisions relevant to Section 16 of the *Charter*

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

Summary of the Law: The underlying principle of protection of minorities must be considered in the interpretation of para. 16(3) of the *Charter*.

Summary of the Facts: In its analysis of the question relevant to the unilateral secession of Quebec, the Supreme Court studied the four underlying principles of the Constitution, the federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

The Court ruled, among other things, that the underlying principle of protection of minorities must be considered in the interpretation of para. 16(3) of the *Charter*.

¹ Michel Bastarache, “Language Rights in Canada ” (2004) 2nd ed. [Bastarache]

² *Constitution Act, 1982*, (R.U.) 1982, c 11, Schedule B, s 16

Case Law Document on Bilingualism in the Judiciary

Concerning the question of the unilateral secession of Quebec, the Court unanimously ruled that it would be unconstitutional under the four underlying principles of the Constitution. Nonetheless, it mentioned that, should a clear majority of the residents of Quebec voted in favour of the secession in a clear referendum, the federal government could negotiate the conditions of secession with the Quebec government. In addition, the Court ruled that international law could not allow the unilateral secession of Quebec.

For these reasons, the Supreme Court unanimously dismissed the appeal.

Relevant Paragraphs:

(e) *Protection of Minorities*

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, at p. 1173, and in *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377, at pp. 401-2, and *Adler v. Ontario*, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter's* provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the *Charter*. Undoubtedly, one of the key considerations motivating the enactment of the *Charter*, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: *Senate Reference*, *supra*, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which

Case Law Document on Bilingualism in the Judiciary

Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, [2013] SCC 42

Summary of the Law: Section 16(3) allows the adoption of legislative measures to broaden the equality of language rights, but does not confer any rights in this regard.

Summary of the Facts: The appellants asked the Supreme Court to rule on the residual discretionary power of the courts of British Columbia to accept documents filed in another language than English and not accompanied by a translation in this language.

Judgment of Wagner, McLachlin, Rothstein and Moldaver JJ.

Wagner J., writing for the majority, dismissed the appeal under the *1731 Act* and Rule 22-3 of the *Supreme Court Civil Rules*. He also determined that Section 16(3) allows the adoption of legislative measures to broaden the equality of language rights, but does not confer any rights in this regard because of the principle of respect for the constitutional powers of the provinces.

The majority dismisses the appeal but awards the costs to the appellants throughout.

Judgment of Karakatsanis, LeBel and Abella JJ. (Dissenting)

According to Karakatsanis J., writing for the dissent, the judges of the Supreme Court of BC have the discretionary power to accept documents filed in French, but not prepared for a future use before the Court. She also ruled that when a judge receives this form of request, he should consider the fundamental importance of Canadian bilingualism as stated at Section 16 of the *Charter*.

Karakatsanis J. would have allowed the appeal and remitted the matter to the B.C. Supreme Court.

Relevant Paragraphs:

Judgment of Wagner, McLachlin, Rothstein and Moldaver JJ.

[56] However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country's official languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of

Case Law Document on Bilingualism in the Judiciary

English and French. In my view, therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada's underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.

[57] This being said, in light of s. 16(3) of the *Charter*, which specifically provides that provincial legislatures may advance the equality of status of English and French, it would be open to the British Columbia legislature to enact legislation, like that proposed in 1971, to authorize civil proceedings in French. Such legislation would no doubt further the values embodied in s. 16(3), which protects legislative initiatives intended to increase the equality of the official languages but does not, as this Court has already held, confer any rights. However, given the absence of any such initiative by the British Columbia legislature, it is not possible for this Court to impose one on it.

Judgment of Karakatsanis, LeBel and Abella JJ. (Dissenting)

[106] Sections 16 and 23 of the *Charter* affirm the fundamental importance of bilingualism in the Canadian constitutional fabric. Section 16(1) of the *Charter* declares that English and French are the two official languages of Canada.

[107] The *Official Languages Act* manifests the fundamentally bilingual character of Canada. This Court has recognized it as a quasi-constitutional statute: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23. While aspects of s. 16 and the *Official Languages Act* require the equal status and equal treatment of each language in federal institutions, the commitment and the aspiration to express Canada's bilingualism is evident. The Preamble of the *Official Languages Act* makes this clear:

[109] Thus, the motion judge should consider relevant constitutional values in exercising his or her inherent jurisdiction. These include the status of French as an official language in Canada, the protection of official language minority rights, and the constitutional commitment to safeguarding and promoting both the French and English languages.

I. Civil Matters

i. Obligations Applicable to Federal Institutions

Section 133 of the *Constitution Act, 1867*

Note: This Case law document only applies to the judicial part of Section 133.

When the Supreme Court of Canada ruled on the extent of Section 133, it adopted a broad and generous interpretation in the famous decisions *Jones v. A.G. of New Brunswick*³, *Att. Gen. of Quebec v. Blaikie et al.(n°1)*⁴ and *Att. Gen. of Quebec v. Blaikie et al.(n°2)*.⁵ However, in 1986, the Court preferred a restrictive approach in *MacDonald v. City of Montreal*.⁶

This provision reads as follows:

Use of English and French Languages

133. *Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.*

*The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.*⁷

The persons concerned by this disposition comprise the litigants, lawyers, witnesses, judges, court officials and legal entities.⁸

The word “Pleading” only includes the written conclusions and oral arguments presented in Court. It does not include the testimony.⁹

³ *Jones v. A.G. of New Brunswick*, [1975] 2 S.C.R. 182

⁴ *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 S.C.R. 1016 [*Blaikie n° 1*]

⁵ *Att. Gen. of Quebec v. Blaikie et al.*, [1981] 1 S.C.R. 312 [*Blaikie n° 2*]

⁶ *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460 [*MacDonald*]

⁷ *Constitution Act, 1867*, 30&31 Vict 1867, c 3, s 133.

⁸ *Blaikie n° 1*, *supra* note 3

⁹ *Ibid.*

Case Law Document on Bilingualism in the Judiciary

The word “Process” means the proceedings flowing from any court in Canada.¹⁰ In *Att. Gen. of Quebec v. Blaikie et al.*(n°2), the Supreme Court determined that the rules of court were also subject to Section 133.¹¹

In *MacDonald v. City of Montreal*, the Supreme Court explained that Section 133 conferred the right to not be disturbed in the use of the official language chosen, but not a corresponding duty to facilitate the use of this official language. Nonetheless, based on a broad and purposive interpretation of this provision, Justice Wilson dissenting in this case determined that Section 133 created a positive obligation upon the State.¹²

The Supreme Court retained the same broad interpretation framework in the more recent case *R v. Beaulac*.¹³ It determined that this interpretative framework should apply to all language rights. However, the question of the extent of Section 133 in light of *Beaulac* is a new point of law that has not yet been raised before the courts of justice.¹⁴

Interpretation

R v. Beaulac, [1999] 1 S.C.R. 768

Summary of the Law: Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

Summary of the Facts: Mr. Beaulac, a francophone, had his trial for murder in English before the courts of British Columbia contrary to Subsection 530(4) of the *Criminal Code*. Thus, he asked the Supreme Court to order a new trial in French.

In its analysis, the Supreme Court studied the criteria of the “best interests of justice” as found in the article. It determined that in the application of this criterion, the judge must consider the principles of equality of the two official languages of Canada and preservation and development of official language communities in Canada. The Supreme Court also stated that language rights must be interpreted purposively. It drew a clear distinction between language rights in a trial and the universal right to a fair trial, which applies to every accused regardless of the language. Finally, it stated that an administrative inconvenience could not justify the exercise of the judge’s discretionary power because the use of an official language should not be considered an accommodation.

¹⁰ *Ibid.*

¹¹ *Blaikie n° 2*, *supra* note 4

¹² *Macdonald*, *supra* note 5

¹³ *R v. Beaulac*, [1999] 1 S.C.R. 768 [*Beaulac*]

¹⁴ Bastarache, *supra* note 1 at 179.

Case Law Document on Bilingualism in the Judiciary

For these reasons, the Court unanimously ordered a new trial in French for Mr. Beaulac. It also allowed, by a 7-2 majority, the interpretative framework proposed by Bastarache J.

Relevant Paragraphs:

20 These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, “Liberal Theory and Minority Group Rights” (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999), 21 *Hum. Rts. Q.* 80, at p. 83: “[A] right . . . is conceptually tied to a duty”; and R. Cholewinski, “State Duty Towards Ethnic Minorities: Positive or Negative?” (1988), 10 *Hum. Rts. Q.* 344.

22 The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard, supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

25 Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick, supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language

Case Law Document on Bilingualism in the Judiciary

rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later.

Decisions relevant to Section 133

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460

Summary of the Law: Section 133 imposes a duty to not disturb the exercise of language rights conferred by this provision.

Summary of the Facts: Mr. MacDonald received a summons from the Municipal Court of the City of Montreal written exclusively in French. Before the Supreme Court, Mr. MacDonald disputed the legality of the summons under Section 133 of the *Constitution Act*.

Judgment of Beetz, Estey, McIntyre, Lamer and Le Dain JJ.

In his analysis, Beetz J., writing for the majority, determined that Section 133 should receive a restrictive interpretation. He ruled that the language rights provided at Section 133 belonged to the lawyers, witnesses, judges and other court officials, and not to the persons they address. Thus, it ruled that the appellant did not have the right to a summons in English because the State had no corresponding duty to facilitate the use of an official language.

For these reasons, the majority dismissed the appeal.

Judgement of the dissent (Wilson J.)

In her analysis, Wilson J. stated that since Section 133 gave the litigant the right to use the official language of his choice before the courts of justice, the State had the corresponding duty to facilitate the use of this language.

For these reasons, Wilson J. would have allowed the appeal.

Relevant Paragraphs:

Judgment of Beetz, Estey, McIntyre, Lamer and Le Dain JJ.

58. The appellant's main submission was stated above. That submission is to the effect that s. 133 of the *Constitution Act, 1867* gives to any person, anglophone or francophone, the right to be summoned before any court of Canada and any court of Quebec by a process issued in his own language, at least where the "State" is a party to the proceedings, such as penal or criminal

proceedings.

59. This submission is erroneous, in my respectful opinion. It fails to meet the above-quoted reasons of Hugessen A.C.J. in *Walsh* which I find conclusive and with which I agree. Furthermore, it is contrary to the plain meaning of s. 133 as construed by this Court in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), and *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*).
60. Hugessen A.C.J. correctly observed in *Walsh* that the essential words of s. 133 are the same with respect to the language of Parliamentary debates and to the language of court proceedings and should receive the same construction. It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical. Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by the very person or body who is purporting to address him.
61. The same reasoning applies to the language spoken in the courts covered by s. 133 and in the written pleadings in and processes of such courts: the language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof. The appellant exercised his constitutionally protected language right when he presented his oral and written argument in English before Judge Bourassa, and the latter exercised his own right when he delivered judgment partly in French and partly in English. In my view, under s. 133 of the *Constitution Act, 1867*, and apart from other legal principles or statutory provisions such as the *Official Languages Act*, R.S.C. 1970, c. O-2, the appellant was not entitled to a summons in English only, any more than to a judgment in English only, from the Municipal Court or from any court contemplated by s. 133, including this Court.
62. The appellant's main submission is not bolstered by his reference to the "State". Whether or not the State is a person or has rights under s. 133, it was held in *Blaikie No. 1* that the option to use either language under this Section extends to the courts themselves in documents emanating from them or issued under their name or under their authority. As I have said above, the summons is a process in or issuing from the Municipal Court. Furthermore, the issuer of the summons in the case at bar had by law to be either the clerk or a judge of the Municipal Court. These are physical persons whose language rights under s. 133 receive the same protection as those of the appellant.
66. Since s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else.
67. The only positive duty that I can read in s. 133 is the one imposed on the Houses of Parliament

of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* at p. 1022. In *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347 at p. 355, it seems to have been suggested by Freedman C.J.M. that s. 23 of the *Manitoba Act, 1870*, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.

68. A negative duty is also imposed by s. 133 on everyone not to infringe language rights conferred by the Section with respect to the language of Parliamentary debates and court proceedings. These are constitutionally protected rights and it would be unlawful for instance to expel a member of the House of Commons or of the Quebec National Assembly on the ground that he uses either French or English in debates, or for a judge of a Quebec or a federal court to prevent the use of either language in his court. But this duty is not the positive one which the appellant invokes.
103. I respectfully agree with these observations. Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.
104. This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.
108. It should be stated at the outset that compliance with s. 133, as this section provides for a minimum constitutional protection of language rights, may very well fall short of the requirements of natural justice and procedural fairness. These requirements protect not language rights but other rights, referred to as legal rights in the *Charter*, which s. 133 was never intended to safeguard in the first place and to which it is entirely unrelated.
114. It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of

the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

116. This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

Judgement of the dissent (Wilson J.)

149. In *Blaikie No. 1, supra*, this Court found that s. 133 of the *Constitution Act, 1867* gave persons involved in proceedings in the courts of Quebec the option to use either French or English in any pleading or process, including oral argument, and that this guarantee could not be modified by unilateral act of either the federal or Quebec Legislature. This line of reasoning was taken one step further in *Blaikie No. 2, supra*, in which the Court held that matters of an essentially judicial character such as rules of court were subject to the s. 133 right "by necessary intendment" and that persons would be deprived of the right if rules and prescribed forms for court proceedings and processes were couched in one language only. Quoting from the judgment of the Court at p. 332:

Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

(Emphasis added.)

Case Law Document on Bilingualism in the Judiciary

150. The first submission made by the appellant and by the intervenors on his behalf is that it takes no great conceptual leap (if, indeed, it takes any) to accept that items such as a summons commanding a person to appear in court fall into the category discussed in *Blaikie No. 2*. I agree with the appellant on this issue. There can be no doubt about the "judicial character" of a summons. Indeed, it would be hard to envisage a more "judicial" document than a command or citation issuing from a court requiring the recipient to attend before it. It is, in my view, a "process" of the Court within the meaning of the phrase employed in s. 133 "... or in any Pleading or Process ... issuing from ... any of the Courts of Quebec". Indeed, in *Jowitt's Dictionary of English Law* (2nd ed. by John Burke, 1977, vol. 2) the following definition of "process" is advanced:

Process, the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end; strictly, the summons by which one is cited into a court, because it is the beginning or principal part thereof, by which the rest is directed.

(Emphasis added.)

159. It seems to me then that there is substantial support in legal theory for the appellant's submission that right and duty are correlative terms and I would accept that if s. 133 confers a right on a litigant to use his or her own language in court (which appears to be accepted in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and in both *Blaikies*), then there is a correlative duty on the state to respect and accommodate that right.

160. It is argued, however, that no such correlative duty can be imposed on the state under s. 133 because of the antithetical use of the words may/either and shall/both in the section. It is pointed out that shall/both is used in relation to the language of the records and journals of the legislatures of Canada and Quebec and in relation to the language in which the statutes of Canada and Quebec are printed and published. They must be in both languages. But may/either is used in relation to the language of the debates in both Houses and in relation to the language of the courts in both jurisdictions. These may be in either language. It is submitted that had the legislators intended to compel a particular language to be used in the courts in any given situation it would not have used may/either; it would have used shall/both. How valid is this submission?

161. In my opinion, it has no validity because it fails to take account of the "subject" of the provision, *i.e.*, the person to whom the different parts of the section are addressed. Two parts are addressed to the state and two parts to the citizen. The parts addressed to the state are mandatory; they impose an obligation on the state; you must keep bilingual records and journals of both Houses and you must print and publish your statutes in both languages. Clearly this is mandatory on the state so that the citizens speaking either language can understand them. The parts addressed to the citizen, on the other hand, confer rights on the citizen; you may use your own language, English or French, in parliamentary debates and in court proceedings. The purpose again is to facilitate understanding by the citizen regardless of language. It would be quite inappropriate to use both/shall in conferring rights although perfectly appropriate in imposing obligations. The intention of the legislators was clearly to present the citizen with an option with respect to language in debates and in the courts. Had the legislators intended to require totally bilingual proceedings in the courts it would have aimed the directive at the state (as in the case of records

and journals and legislation) and used shall/both. It did not do so. It validated the use of either language and gave the litigant the option. Similarly, with respect to the debates in both Houses it wished to provide an option to the speaker as opposed to giving a directive to the state that both must be used. I do not believe that the use of may/either in relation to the use of language in the courts was intended to provide an option to the state. It was, in my view, intended to provide an option to the citizen. But the provision of that option to the citizen has implications for the state which I have described as its correlative duty.

163. It seems to me that in s. 133 we have an excellent illustration of Coode's point. In relation to the records and journals and the legislation of both jurisdictions the obligation is imposed and it is directed to the state. The right of the citizen is implied. In the case of the debates and language in the courts the right is conferred and it is directed to the citizen; the obligation on the state is implied.

180. Presumably the legislative concern with language disclosed by the foregoing legislative history is the "continuous practice going back almost to the beginning of the British rule" referred to by this Court in *Blaikie No. 2* at p. 330. In 1867, s. 133 of the *Constitution Act* carried forward the either/may language of the C.S.L.C. 1861, thus putting the historical concern with the status of both languages on a constitutional footing. Although the section does not spell out how the determination as to the appropriate language is to be made, the legislative history seems to me to demonstrate clearly that the focus of concern was meaningful access to the judicial system by users of both languages. The provisions in the early statutes dealing with the adequacy of notice, trial by a jury which could understand the defence, dual publication of writs in French and English language newspapers, the translation of unilingual statutes, the short-lived flirtation with official bilingualism, the provision for the appointment and payment of translators, and, particularly interesting, the very early provision in 1785 requiring the issuance of a summons *in the language of the defendant* all indicate that it was the needs of the persons subject to the court's process that was at the core of the various enactments, repeals and re-enactments. This is hardly surprising. It would appear to go without saying that a judicial system exists to meet the needs of the individual in society and is not an end in itself. Section 133, in my view, recognizes the linguistic duality in the Province of Quebec and assures both French and English speaking citizens that their linguistic rights will be protected by the state in a meaningful fashion.

183. I take no issue with this Court's conclusion in *Blaikie No. 1* that under s. 133 documents, judgments and other materials issued by Quebec courts are valid in either language. It does not, however, follow from this that a French speaking litigant may be dealt with in English and an English speaking litigant in French. The purpose of the provision, it seems to me, goes beyond validating the use of both languages. It validates them for a reason and that reason is that the person before the Court will be dealt with in the language he or she understands. To say otherwise is to make a mockery of the individual's language right. Regardless of whether a judge acting in his or her official capacity retains the right as an individual to write judgments in the language of his or her choice, this cannot, in my view, detract from the state's duty to provide a translation into the language of the litigant.

Case Law Document on Bilingualism in the Judiciary

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312

Summary of the Law: Section 133 of the *Constitution Act* applies to the courts rules of practice enacted by judicial and quasi judicial tribunals of the federal government and the province of Quebec.

Summary of the Facts: The Attorney general of Quebec asked the Supreme Court to rule on the application of Section 133 to regulations enacted by the Government and municipal and school bodies by-laws.

In its analysis, the Supreme Court ruled that the courts rules of practice enacted by judicial and quasi judicial tribunals must be bilingual because of their judicial character.

For these reasons, the Court unanimously allowed the appeal.

Relevant Paragraphs:

Court rules of practice

Page 332 Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

Page 333 Furthermore, and as was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.

We accordingly reach the conclusion that, given the nature of their subject-matter, rules of court stand apart and are governed by s. 133 of the *B.N.A. Act*.

Case Law Document on Bilingualism in the Judiciary

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 R.C.S. 1016

Summary of the Law: Section 133, as entrenched in the Constitution, is not only forbidding modification by unilateral action of Parliament or the Quebec Legislature, but also providing a guarantee to litigants before the Courts of Canada or Quebec that they are entitled to use French or English in their oral or written submissions.

Summary of the Facts: The Attorney general of Quebec appealed before the Supreme Court from a decision of the Court of Appeal of Quebec declaring *ultra vires* of Section 133 of the *Constitution Act* the provisions of Chapter III, Title I of the *Charter of the French Language*, making French the only official language of Quebec.

In its analysis, the Court ruled that in accordance with the principles set out in *Jones*, the rights provided at Section 133 are a minimum constitutional protection and cannot be altered by the Quebec Legislature or Parliament.

For these reasons, the Court unanimously dismissed the appeal and affirmed the decision of the Court of appeal.

Relevant paragraphs:

Page 1022 So, too, is there incompatibility when ss. 11 and 12 of the *Charter* would compel artificial persons to use French alone and make it the only official language of "procedural documents" in judicial or quasi-judicial proceedings, while section 133 gives persons involved in proceedings in the Courts of Quebec the option to use either French or English in any pleading or process. Whether s. 133 covers the processes of "bodies discharging judicial or quasi-judicial functions", whether it covers the issuing and publication of judgments of the Courts and decisions of "judicial or quasi-judicial" tribunals, and also whether it embraces delegated legislation will be considered later.

Page 1023 The central issue in this case, reflected in the question posed for determination by this Court, is whether the Legislature of Quebec may unilaterally amend or modify the provisions of s. 133 in so far as they relate to the Legislature and Courts of Quebec. It was the contention of the appellant that the language of the Legislature and of the Courts of Quebec is part of the Constitution of the Province and hence is within the unilateral amending or modifying authority of the Legislature under s. 92(1). Emphasis was, understandably, placed on the words in s. 92(1) "notwithstanding anything in this Act".

Page 1025 In *Jones v. Attorney-General of New Brunswick*^[7], which concerned the validity of the federal *Official Languages Act*, the Court had this to say about s. 133 (at pp. 192-3):

... Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North*

Case Law Document on Bilingualism in the Judiciary

America Act (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.

Page 1026 The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* refer-able to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribed . . .

What the *Jones* case decided was that Parliament could enlarge the protection afforded to the use of French and English in agencies and institutions and programmes falling within federal legislative authority. There was no suggestion that it could unilaterally contract the guarantees or requirements of s. 133. Yet it is contraction not enlargement that is the object and subject of Chapter III, Title I of the *Charter of the French language*. But s. 133 is an entrenched provision, not only forbidding modification by unilateral action of Parliament or of the Quebec Legislature.

Morand c. Québec (Procureur général), [2000] QCCA 2218 (French version only)

Summary of the Law: Section 133 of the *Constitutional Act* and the general right to equality do not confer the corresponding duty upon the courts of justice to render and publish their decisions in both official languages.

Summary of the Facts: Before the Court of Appeal of Quebec, the appellants alleged the uncertainty of the judicial value of a decision rendered and published in only one official language.

In its analysis, the Court ruled that Section 133 of the *Constitution Act* did not confer the corresponding duty to put in place an institutional bilingualism. The Court also determined that a general right to equality could not create a language right that is not already provided at Section 133, because fundamental rights must be conceptually distinguished from language rights.

For these reasons, the Court unanimously dismissed the appeal.

Relevant Paragraphs:

[7] CONSIDÉRANT que la Cour, dans l'arrêt Pilote précité, a rejeté l'argument fondé sur l'article 10 de la *Charte québécoise des droits et libertés de la personne*, le juge Brossard, pour la Cour, écrivant :

L'appelant est incapable d'identifier quelque disposition que ce soit de la *Charte québécoise des droits et libertés de la personne* qui serait susceptible d'imposer à l'État l'obligation de fournir une traduction d'un jugement dans la langue de la partie qui l'exigerait.

Les droits linguistiques ne font pas partie des libertés fondamentales énumérées à l'article 3. Ils ne sont pas non plus mentionnés au chapitre III traitant des droits judiciaires, si ce n'est qu'à l'article 28, de portée limitative, on stipule que toute personne a le droit d'être informée «dans une langue qu'elle comprend», des motifs d'une arrestation ou d'une détention. L'appelant ne saurait donc s'appuyer que sur l'article 10, mais dans la mesure où il faudrait alors interpréter cet article comme signifiant que le fait pour le juge de prononcer son jugement en anglais, à l'égard d'une partie francophone, constituerait, par ses effets, une discrimination fondée sur la langue. Or, dans mon opinion, une telle interprétation de l'article 10 équivaldrait à lui donner une portée dont l'effet serait de contredire l'article 133 de la *Loi constitutionnelle*.

[8] Et plus loin:

Il me paraîtrait, de fait, qu'obliger l'État québécois, en vertu des articles 9.1 ou 10 de la *Charte québécoise*, à fournir des traductions authentifiées dans une langue donnée des jugements écrits dans l'autre langue, équivaldrait incontestablement à améliorer, ajouter ou modifier le compromis constitutionnel historique exprimé dans l'article 133 de la *Loi constitutionnelle de 1867*.

Enfin, disons en terminant sur ce point, comme nous le soumet le Procureur général du Québec, que le Gouvernement du Québec fournit effectivement un service de traduction de la langue anglaise à la langue française et vice versa, sur demande d'une partie au litige. Il ne s'agit pas d'une traduction authentifiée, non plus que d'une traduction automatique jointe à l'original. Ce service, cependant, me paraît suffisant pour répondre à toute exigence de la *Charte québécoise des droits et libertés de la personne*, même si nous en venions à la conclusion que la *Charte* confère aux parties le droit d'exiger une telle traduction, ce que je ne suis pas personnellement prêt à affirmer.
(p.2438)

Case Law Document on Bilingualism in the Judiciary

[9] CONSIDÉRANT que la portée du droit d'utilisation de la langue anglaise ou française à l'occasion de la rédaction d'un jugement est clairement définie et le juge Brossard, au nom de la Cour, l'a ainsi résumée :

Bref, quel que soit l'angle sous lequel on analyse l'article 133 de la *Loi constitutionnelle de 1867*, la jurisprudence me paraît très claire à l'effet que c'est au juge que cette disposition confère le droit constitutionnel d'utiliser à son choix la langue française ou anglaise dans la rédaction de son jugement alors que cette même disposition n'impose aucune obligation à l'État de fournir une traduction authentifiée.

[10] CONSIDÉRANT que les appelants confondent liberté d'expression et droits linguistiques garantis, ce qui est erroné, la Cour suprême ayant exprimé l'avis que "la liberté générale de s'exprimer dans la langue de son choix et les garanties spéciales de droits linguistiques dans certains secteurs d'activité ou de compétence gouvernementale – la législature et l'administration, les tribunaux et l'enseignement – sont des choses tout à fait différentes" (Ford c. Québec (Procureur général), 1988 CanLII 19 (CSC), [1988] 2 R.C.S. 712);

[11] CONSIDÉRANT que les appelants ne peuvent prendre appui sur la règle du droit au procès équitable pour soutenir leurs prétentions car les droits linguistiques et la garantie de l'équité du procès sont deux droits distincts tant par leur origine que par leur rôle et leur objet (MacDonald c. Ville de Montréal, 1986 CanLII 65 (CSC), [1986] 1 R.C.S. 460 et Beaulac c. La Reine, 1999 CanLII 684 (CSC), [1999] 1 R.C.S. 768);

[12] CONSIDÉRANT, en conséquence, que l'obligation de fournir une traduction des jugements ne peut découler que de la loi, ce que la Province a prévu à l'article 9 de la Charte de la langue française, (L.R.Q. c. C-11). (Voir sur l'effet de cette disposition: Société des Acadiens c. Association of Parents for Fairness in Education, [1986] 1 R.C.A. 549 et Pilote, précité);

[13] CONSIDÉRANT que le pourvoi est mal fondé;

Paragraph 19. (1) of the *Canadian Charter of Rights and Freedoms* and part III of the *Official Languages Act*

This provision reads as follows:

Proceedings in courts established by Parliament

Case Law Document on Bilingualism in the Judiciary

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Its equivalent is part III of the federal *Official Languages Act*, which has a quasi constitutional status. The wording of Section 19 of the *Charter* is very similar to section 133. Until now, Section 19 has received the same interpretation as Section 133.

However, according to author Vanessa Gruben, the interpretation in *R v. Beaulac* and *Charlebois v. Moncton (City)*¹⁵ should encourage a broad and generous interpretation of Section 19.¹⁶ In *Société des Acadiens v. Association of Parents* (1986),¹⁷ the Supreme Court has given a restrictive approach to Section 19 by ruling that it confers negative rights only.¹⁸ However, the question of the interpretation of Section 19 in light of *Beaulac* and *Charlebois* is a new point of law that has not yet been raised before the courts of justice.¹⁹

Interpretation

R v. Beaulac, [1999] 1 S.C.R. 768

Summary of the Law: Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

Summary of the Facts: Mr. Beaulac, a francophone, had his trial for murder in English before the Courts of British Columbia contrary to Subsection 530(4) of the *Criminal Code*. Thus, he asked the Supreme Court to order a new trial in French.

In its analysis, the Supreme Court studied the criteria of the “best interests of justice” as found in the article. It determined that in the application of this criterion, the judge must consider the principles of equality of the two official languages of Canada and preservation and development of official language communities in Canada. The Supreme Court also ruled that language rights must be interpreted purposively. It drew a clear distinction between language rights in a trial and the universal right to a fair trial, which applies to every accused regardless of language. Finally, it stated that an administrative inconvenience could not justify the exercise of the judge’s discretionary power because the use of an official language should not be considered an accommodation.

For these reasons, the Court unanimously ordered a new trial in French for Mr. Beaulac. It also

¹⁵ *Charlebois v. Moncton (City)*, [2001] NBCA 11[*Charlebois*]

¹⁶ Bastarache, *supra* note 1 at 183.

¹⁷ *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549 [*Société des Acadiens*]

¹⁸ Bastarache, *supra* note 1 at 183.

¹⁹ *Ibid* at 190.

Case Law Document on Bilingualism in the Judiciary

allowed, by a 7-2 majority, the interpretative framework proposed by Bastarache J.

Relevant Paragraphs:

20 These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, “Liberal Theory and Minority Group Rights” (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999), 21 *Hum. Rts. Q.* 80, at p. 83: “[A] right . . . is conceptually tied to a duty”; and R. Cholewinski, “State Duty Towards Ethnic Minorities: Positive or Negative?” (1988), 10 *Hum. Rts. Q.* 344.

22 The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard, supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

25 Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick, supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language

Case Law Document on Bilingualism in the Judiciary

rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later.

Charlebois v. Moncton (City), [2001] NBCA 117

Summary of the Law: Contrary to Section 133 of the *Constitution Act*, Sections 17, 18 and 19 of the *Charter* must be interpreted purposively.

Summary of the Facts: Mr. Charlebois disputed before the Court of Appeal of New Brunswick the validity of a by-law passed exclusively in English by the city of Moncton. Mr. Charlebois alleged that this by-law contravened the bilingualism obligation provided at Subsection 18(2) of the *Charter*. In its analysis, the Court of Appeal determined that it would be contrary to the principles of *Beaulac* to give a restrictive approach to Sections 17, 18 and 19 of the *Charter*. The Court of appeal thus ruled that the municipal by-laws of New Brunswick were subject to Subsection 18(2) of the *Charter*.

For these reasons, the Court unanimously allowed the appeal and invalidated the unilingual by-laws passed by the city of Moncton.

Relevant Paragraphs:

20 The jurisprudence on the interpretation of rights and freedoms in Canadian constitutional law shows that the Supreme Court of Canada has on several occasions articulated general principles designed to guide our courts in the interpretation of constitutional rights. Generally speaking, the Supreme Court can be said to advocate a large, liberal, dynamic and purposive interpretation of constitutional rights.

21 The requirement of a purposive analysis of Charter rights was laid down very shortly after the adoption of the Charter in 1982. A fairly extensive body of jurisprudence has contributed to the establishment of the basic approach to the definition of Charter rights and freedoms, but two cases in particular appear to me to be highly relevant due to the importance of the historical context of the rights asserted in this case and the arguments advanced by the respondents.

43 If the upshot of this position is that a court which is called upon to decide an issue dealing with the interpretation of sections 17, 18 and 19 of the Charter must adhere to the interpretation already given to section 133, it is obvious that such an approach would be inconsistent with the principles of interpretation of language rights set out in *Beaulac*, *supra*.

44 In this regard, it is important to remember the words of Dickson, C.J. who, dissenting on the constitutional issue, stated in *Société des Acadiens*, at page 561 that despite the similarity between section 133 and subsection 19(2) "we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the Constitution Act, 1867 is not determinative of the interpretation of the Charter".

47 In light of these statements dealing with the principles of interpretation of constitutional rights and in light of recent decisions of the Supreme Court in *Beaulac* and *Arsenault-Cameron*, *supra*, I think that the principle set out by Beetz, J. in *Société des Acadiens* according to which the interpretation of language guarantees under section 133 must be taken into account cannot mean that the purposive analysis of rights established by the cases already cited can be ignored. As stated by the Supreme Court, "the focus on the historical context of language and culture indicates that different interpretative approaches may well have to be taken in different jurisdictions, sensitive to the unique blend of linguistic dynamics that have developed in each province." (See *Reference re Public Schools Act (Man.)*, *supra*, at page 851.) Accordingly, I believe that the decision in *Blaikie No. 2*, while serving as a guide for the interpretation of subsections 17(2), 18(2) and 19(2) of the Charter, must be viewed with prudence by the courts of this province.

Decisions relevant to paragraph 19.(1) before the adoption of the *Official Language Act*

Société des Acadiens v. Assn. of Parents for Fairness in Education, [1986] 1 R.C.S. 549

Summary of the Law: The wording of Section 19 has been borrowed from Section 133 and must therefore receive the same interpretation. Thus, Section 19 of the *Charter* confers the right to use English or French before the courts, but does not comprise the right to be understood by the court officials.

Summary of the Facts: The appellants alleged that their constitutional language rights had been violated when Stratton J., whose comprehension of French is uncertain, heard them as a member of a formation of three judges.

Judgment of Beetz, Estey, Chouinard, Lamer and Ledain JJ.

In his analysis of Section 133 of the *Constitution Act* and 20 of the *Charter*, Beetz J., writing for the majority, determined that given the similarity of Section 19 to 133, this provision should be given the same restrictive interpretation. He then compared Section 19 to Section 20, where the verb “communicate” is used instead of “use”, which implies the right to be understood by the governmental and parliamentary institutions. However, according to him, the use of the verb “use” at Section 19 does not imply the right to be understood in the official language chosen.

For these reasons, the majority dismissed the appeal.

Judgment of Dickson J. (Dissenting)

In his analysis, Dickson J. was concurring for the conclusion to dismiss the appeal. However, he ruled that Section 19 comprised the right to be understood by the court official. According to him, despite the similarities between Section 133 and 19, these two provisions must receive a different interpretation; Section 19 must receive a broad and purposive interpretation.

Relevant Paragraphs:

Judgment of Beetz, Estey, Chouinard, Lamer and Ledain JJ.

47. The issue was different in *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460, where what had to be decided was not the content of the right to choose English or French but in whom the right vested, the issuer or the recipient of a summons issued by a Quebec court. However, in *MacDonald*, submissions were made with respect to communication as a purpose of language rights and with respect to the right to understand judicial processes and proceedings as a requirement of natural justice. These submissions, which are closely related to the issue raised in the case at bar, were considered and discussed in the reasons for judgment. A certain degree

of overlapping between the two cases is accordingly inevitable and therefore it will be necessary to quote in this case from the reasons in *MacDonald*.

48. The other difference between the two cases is that the *MacDonald* case dealt with s. 133 of the *Constitution Act, 1867* whereas the relevant provision in the case at bar is s. 19(2) of the *Canadian Charter of Rights and Freedoms*. In my view however, given the similarities of the two provisions, this difference is only one of form, not of substance.

50. Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133

51. The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.

52. Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.

53. It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with

Case Law Document on Bilingualism in the Judiciary

some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.

55. I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:

13 (1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.

56. Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

60. The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*:

62. While legal rights as well as language rights belong to the category of fundamental rights,

[i]t would constitute an error either to import the requirements of natural justice into...language rights...or vice versa, or to relate one type of right to the other...Both types of rights are conceptually different...To link these two types of rights is to risk distorting both rather than re-enforcing either.

(*MacDonald v. City of Montréal*, reasons of the majority, at pp. 500-501).

63. Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.

65. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to

act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.

72. I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

74. I have no difficulty in holding that the principles of natural justice as well as s. 13(1) of the *Official Languages of New Brunswick Act*

entitle a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties.

75. But in my respectful opinion, no such entitlement can be derived from s. 19(2) of the *Charter*.

Judgment of Dickson J. (Dissenting)

7. In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach: see, for example, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at pp. 366-68; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 499-500. To give effect to a purposive approach in the language context, it is important to consider the constitutional antecedents of the *Charter* language protections, the cardinal values and purpose of the guarantees, the words chosen to articulate the rights, the character and larger objects of the *Charter*, and the purpose and meaning of other relevant *Charter* rights and freedoms. It is to this task that I now turn.

10. Secondly, despite the similarity between s. 133 and s. 19(2), we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of *Charter* provisions.

16. The final two decisions of this Court I wish to discuss are *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460, and *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449, which are being rendered concurrently with this judgment. Both raised the question of whether a unilingual summons for a traffic violation offended the constitutional language provisions. A majority of the Court held in each case that a unilingual summons did meet the constitutional requirements. In my opinion, the outcome in both *MacDonald* and *Bilodeau* was clearly required by the words "... either of those Languages may be used ... in any ... Process ...issuing from any Court".

17. The conclusion in each of these cases does not affect the present appeal. Nor would

MacDonald and *Bilodeau* be determinative of the outcome of an appeal similar to the one at bar arising pursuant to s. 133. Section 133 states clearly that the issuance of process from any court may be in either French or English. In contrast, we are concerned in this case with interpreting the phrase "either of those Languages may be used by any Person ... in ... any Court". This is something quite different from the language used in issuing documents. While s. 133 expressly limits the rights of recipients of court documents by empowering the court to issue documents in a language which the recipient may not understand, no such explicit limitation is to be found with respect to in-court proceedings. In the absence of such a limitation, it is open for the court to conclude that the litigant's right to use either language entails a right to be understood, just as in *Blaikie No. 2*, it entailed a right to bilingual rules of practice.

18. In summary, the jurisprudence of this Court under s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* reveals for the most part a willingness to give constitutional language guarantees a liberal construction, while retaining an acceptance of certain limits on the scope of protection when required by the text of the provisions.

(b) *The Purpose of the Language Rights Protected in the Charter*

19. Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history. The constitutional language protections reflect continued and renewed efforts in the direction of bilingualism. In my view, we must take special care to be faithful to the spirit and purpose of the guarantee of language rights enshrined in the *Charter*. In the words of André Tremblay, in his article "L'interprétation des dispositions constitutionnelles relatives aux droits linguistiques" (1983), 13 *Man. L. J.* 651 at p. 653:

[TRANSLATION] In short, a broad, liberal and dynamic interpretation of the language provisions of the Constitution would be in line with the exceptional importance of their function and would remedy the ills which the new Constitution was undoubtedly meant to address.

20. Sections 16 to 22 of the *Charter* entrench two official languages in Canada. They provide language protection in a broad spectrum of public life, including legislatures, courts, government offices and schools.
23. I should add that the *Charter* was designed primarily to recognize the rights and freedoms of individuals *vis-à-vis* the State. When acting in their official capacities on behalf of the State, therefore, judges and court officials do not enjoy unconstrained language liberties. Rather, they are invested with certain duties and responsibilities in their service to the community. This extends to the duty to give a meaningful language choice to litigants appearing before them.
25. There is no disagreement amongst the members of this Court that the right embodies at a minimum the right to speak and make written submissions in the language of one's choice. Must this right, to be meaningful, extend to the right to be understood, either directly or possibly with the aid of an interpreter or simultaneous translation? In my opinion, the answer must be in the affirmative. What good is a right to use one's language if those to whom one

Case Law Document on Bilingualism in the Judiciary

speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to others. In the courtroom, we speak to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court.

27. Language rights in the courts are, in my opinion, conceptually distinct from fair hearing rights. While it is important to acknowledge this distinction, each category of rights does not occupy a watertight compartment. Just as fair hearing rights are, in part, intimately concerned with effective communication between adjudicator and litigant, so too are language rights in the court. There will therefore be a certain amount of overlap between the two. At the same time, each category of rights will continue to address concerns not touched by the other. For example, whether or not an individual is even entitled to an oral hearing comes under the exclusive rubric of natural justice, not language rights.

29. In my opinion, the right to use either French or English in court, guaranteed in s. 19(2), includes the right to be understood by the judge or judges hearing the case. I reiterate that the techniques or mechanisms which might aid in such understanding, such as the use of interpreters or simultaneous translation, are not before us in this appeal.

The *Official Languages Act (OLA)*²⁰, adopted in 1988, broadens the rights provided at Section 19 of the *Charter* because Section 16 of the *OLA* enacts that the court officials of federal courts must understand the official languages used during the exercise of their judicial powers. In addition, Sections 19 and 20 provide that judicial forms and any final decision, order or judgment determining a question of law of general public interest or importance shall be made available simultaneously in both official languages. The same obligation applies when the proceedings leading to the issuance of the decision were conducted in whole or in part in both official languages.

The *OLA* applies to any federal institution created by a federal law (Section 3) whose objective is to do justice. The administrative tribunals exercising judicial powers are also concerned by the dispositions of the *OLA*.²¹

The word “Pleading” as used in part III includes the oral and written submissions, but does not comprise the evidence filed in court.²²

²⁰ *Official Languages Act*, R.S.C. 1985, c 31, 4th supp.

²¹ Bastarache, *supra* note 1 at 205.

Decisions relevant to para. 19.(1) of the *Charter* and part III of the *Official Languages Act*

***Taire v. Canada (Minister of Citizenship and Immigration)*, [2003] CF 877**

Summary of the Law: The language rights provided at Section 19 of the *Charter* and part III of the *Official Languages Act* must be distinguished from the right to the assistance of an interpreter.

Summary of the Facts: Ms. Taire brought an application for judicial review of the decision of the Refugee Board before the Federal Court. The Board refused her the assistance of an Uvwie-French interpreter because there was no such interpreter available and Ms. Taire could easily communicate in English.

In its analysis, the Court relied on the principles enumerated in *Beaulac* to distinguish the right to the assistance of an interpreter as provided at Section 14 of the *Charter* from the language rights provided at Section 19 and part III of the *OLA*.

For these reasons, the trial judge dismissed the application for judicial review.

Relevant Paragraphs:

[47] In *R. v. Beaulac*, [1999] 1 S.C.R. 768 at page 800, the Supreme Court dealt with this distinction between the right to an interpreter and language rights:

The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the Charter.... Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English....

[48] The respondent submits that the leading case on section 14 of the *Charter* is *R. v. Tran*, [1994] 2 S.C.R. 951. The right to an interpreter is held not only by accused persons, but also by parties in civil actions and administrative proceedings and by witnesses. The respondent argues that the right to an interpreter is therefore not held by counsel involved in the proceedings in question. At page 979 of *Tran*, the Court wrote, "it must be clear that the accused was actually in need of interpreter assistance..., that he or she did not understand or speak the language being used in court."

[49] The respondent points out that in *Bykov v. Canada (M.C.I.)*, [1999] F.C.J. No. 1459 (T.D.)

²² *Ibid* at 209.

Case Law Document on Bilingualism in the Judiciary

(QL), the IRB had been unable to provide a Tchouvache interpreter, but had supplied a Russian interpreter. Mr. Bykov understood Russian and had had ten years of Russian education. Mr. Justice Teitelbaum held that the applicant understood Russian well enough for the purposes of the hearing and that the IRB was not obligated "to provide an interpreter with the exact dialect of the applicant." (paragraph 22)

[51] With respect to language rights, the respondent points out that the rights under section 19 of the *Charter* are reiterated in the OLA, which provides that any person may use either English or French in, or in any pleading in or process issuing from, any federal court [see extract from the Act, attached as Schedule "A"]. The respondent also points out that the IRB is a "federal court" within the meaning of subsection 3(2) of the OLA, and that the rights contained in Part III are available to individuals whether they choose to exercise them or not.

[54] I agree with the respondent's submissions. In my view, the applicant suffered no prejudice because of the fact that English was used at the hearing. The adverse credibility findings are due not to language, but to the content and form of the applicant's testimony. The Board members emphasized that if the applicant did not understand the questions, she should ask for clarification. I am satisfied that the requirements of section 14 of the *Charter* were met.

[55] Furthermore, I am satisfied that the language services guaranteed by the OLA and the *Constitution Act, 1982* were waived by counsel and his client. Accordingly, I reject the applicant's arguments about language rights.

Devinat v. Canada (Immigration and Refugee Board), [2000] 2 CF 212 (French version only)

Summary of the Law: Section 20 of the *Official Languages Act* provides that federal courts must publish their decisions in both official languages.

Summary of the Facts: The appellant asked the Federal Court to rule on the question of the language of the decisions rendered by the Immigration and Refugee Board under Section 20 of the *OLA*.

In its analysis, the Court concluded that when publishing its decisions only in English, the Immigration and Refugee Board violated its linguistic obligations under Section 20. According to the Court, the translation on demand policy did not satisfy the best delay criterion because it meant that the majority of its decisions would never be published in the other official language.

Given the important cost of translating all the previous decisions, the trial judge dismissed the appeal. However, he ruled that for the future, the Board would have to make all of its decisions available in both official languages. This obligation applies to all federal courts (Section 20).

Relevant Paragraphs:

[57] Le juge des requêtes a ensuite conclu [à la page 613]:

À mon avis, les termes de l'article 20 de la *LLO* sont clairs, et ils obligent tous les tribunaux fédéraux, y compris l'intimée, à rendre leurs décisions dans les deux langues officielles dans les meilleurs délais dans la plupart des cas, et simultanément dans les cas prévus à l'alinéa 20(1)a) à moins d'un préjudice grave au public ou d'une injustice ou d'un inconvénient grave à l'une des parties, et dans les cas prévus à l'alinéa 20(1)b).

[58] Le juge des requêtes s'est ensuite demandé si la Commission s'acquitte de son obligation en vertu de l'article 20 de la *LLO*. Il en a conclu [à la page 614]:

À mon avis, l'intimée ne respecte pas l'obligation prévue à l'article 20 de la *LLO*. La politique de traduction sur demande ne rencontre pas les exigences du "meilleur délai", puisqu'elle signifie que la plupart des décisions ne seront jamais rendues dans l'autre langue officielle. Si le législateur avait voulu que les tribunaux fédéraux aient une politique de traduction sur demande, il aurait pu le spécifier.

[59] L'analyse de l'article 20 de la *LLO* et la conclusion à laquelle il en est arrivé nous paraissent irréprochables.

[70] Le Commissaire aux langues officielles dans son rapport intitulé *L'utilisation équitable du français et de l'anglais devant les tribunaux fédéraux et devant les tribunaux administratifs fédéraux qui exercent des fonctions quasi judiciaires*⁴² mentionné plus haut a traité des décisions rendues dans le passé par les tribunaux administratifs. Il a reconnu la portée de l'article 20 de la *LLO*, mais il a aussi noté que certaines des décisions antérieures rendues par l'intimée peuvent n'avoir aucune valeur de précédent. Il est utile de reproduire un extrait des commentaires et recommandations du Commissaire au chapitre de la langue des décisions:

Langue des décisions

Comme l'a montré notre étude, il importe au plus haut point que les jugements et décisions des tribunaux judiciaires et quasi judiciaires fédéraux qui sont significatifs en tant que précédents ou sur le plan des principes soient mis à la disposition du public dans les deux langues officielles. La portée actuelle de l'article 20 de la *Loi* est plus que suffisante pour répondre à cette nécessité. En effet, l'article 20 paraît assez large pour imposer la communication, dans les deux langues officielles, des décisions qui ne font qu'appliquer des principes bien établis du droit à un ensemble de faits connus. Nous parlons ici des décisions qui ne présentent pas un intérêt particulier pour l'évolution du droit ou des lignes de conduite.

[71] L'appelant a également reconnu que les décisions antérieures rendues par l'intimée depuis sa création jusqu'au jour du dépôt de la requête introductive d'instance, le 17 septembre 1996, n'ont pas toutes valeur de précédent. L'émission d'une ordonnance de *mandamus* qui s'appliquerait à toutes les décisions antérieures ne rencontrerait donc pas les objectifs de l'appelant qui n'a intérêt à consulter que celles qui ont cette valeur. Émettre une ordonnance de *mandamus* qui couvrirait toute la portée

Case Law Document on Bilingualism in the Judiciary

de l'article 20 de la *LLO* ne serait donc pas justifié puisque les sommes d'argent dépensées pour les services de traduction ne donneraient aucun résultat pratique.

***Belair v. Canada (Solicitor general)*, [2000] A.C.F. 199**

Summary of the Law: Section 16 of the *Official Languages Act* does not apply to disciplinary tribunals.

Summary of the Facts: The appellant, Mr. Belair, asked the Federal Court to overturn the decision of a disciplinary tribunal finding him guilty of multiple offences to the *Corrections and Conditional Release Act* on the grounds that he did not get a French hearing contrary to Section 16 of the *Official Languages Act*.

In its analysis, the Court admitted that a disciplinary tribunal seemed to exercise judicial functions. However, based on the generous case law, the trial judge ruled that the nature of a disciplinary tribunal is purely administrative.

For these reasons, the trial judge concluded that a disciplinary tribunal was not a federal court for the application of the *Official Languages Act*. Therefore, he dismissed the application for judicial review.

Relevant Paragraphs:

[7] Section 3 of the Act states that a federal court is any "body that carries out adjudicative functions and is established by or pursuant an Act of Parliament". It was not in dispute that the inmate disciplinary tribunal was created pursuant to a federal statute, the *Corrections and Conditional Release Act*.

[8] The only question is whether this tribunal "carries out adjudicative functions", which is the phrase that appears in the English version of the Act.

[9] If this were the first time that the question had arisen, I would consider that the disciplinary tribunal carried out adjudicative functions because of the consequences which the decision of the tribunal entails for inmates, such as a fine, restrictive conditions and so on.

[10] However, the Supreme Court and the Federal Court of Appeal have held that this type of tribunal is an administrative tribunal and so is not a tribunal that carries out adjudicative functions. I refer to *Martineau v. Matsqui Institution Disciplinary Board*, [1978] 1 S.C.R. 118 (*Martineau No. 1*), [1980] 1 S.C.R. 602 (*Martineau No. 2*) and *Hanna v. Mission Establishment*, [1995] F.C.J. No. 1370 (F.C.A.).

ii. Obligations Applicable to Provincial Institutions

Note : According to paragraph 92(14) of the *Constitution Act, 1867*, the provinces have jurisdiction to regulate the language of the proceedings in civil matters. There is a disparity between the obligations of each province because of the fact that Quebec, Manitoba and New Brunswick are subject to constitutional obligations imposing a judicial bilingualism. Some provinces that are not subject to constitutional obligations, for example Ontario, still adopted a complete judicial bilingualism, while some others, like Prince Edward Island and Newfoundland and Labrador, did not take legislative measures for the language of civil matters.²³

a. Quebec

Section 133 of the *Constitution Act, 1867*

Note: This Case law document only applies to the judiciary part of Section 133.

This section reads as follows:

Use of English and French Languages

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

²³ Bastarache, *supra* note 1 at 234.

Interpretation

R v. Beaulac, [1999] 1 S.C.R. 768

Summary of the Law: Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

Summary of the Facts: Mr. Beaulac, a francophone, had his trial for murder in English before the courts of British Columbia contrary to Subsection 530(4) of the *Criminal Code*. Thus, he asked the Supreme Court to order a new trial in French.

In its analysis, the Supreme Court studied the criterion of the “best interests of justice” as found in the article. It determined that in the application of this criterion, the judge must consider the principles of equality of both official languages of Canada and the preservation and development of official language communities in Canada. The Supreme Court also stated that language rights must be interpreted purposively. It drew a clear distinction between language rights in a trial and the universal right to a fair trial, which applies to every accused regardless of the language. Finally, it stated that an administrative inconvenience could not justify the exercise of the judge’s discretionary power because the use of an official language should not be considered an accommodation.

For these reasons, the Court unanimously ordered a new trial in French for Mr. Beaulac. It also allowed, by a 7-2 majority, the interpretative framework proposed by Bastarache J.

Relevant Paragraphs:

20 These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees; see J. E. Oestreich, “Liberal Theory and Minority Group Rights” (1999), 21 *Hum. Rts. Q.* 108, at p. 112; P. Jones, “Human Rights, Group Rights, and Peoples’ Rights” (1999), 21 *Hum. Rts. Q.* 80, at p. 83: “[A] right . . . is conceptually tied to a duty”; and R. Cholewinski, “State Duty Towards Ethnic Minorities: Positive or Negative?” (1988), 10 *Hum. Rts. Q.* 344.

22 The *Official Languages Act* of 1988 and s. 530.1 of the *Criminal Code*, which was adopted as a related amendment by s. 94 of the same *Official Languages Act*, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the *Charter*; see *Simard*, *supra*, at pp. 124-25. The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the *Official Languages Act*. Equality does not have a lesser

Case Law Document on Bilingualism in the Judiciary

meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures were well aware of this when they reacted to the trilogy (*House of Commons Debates*, vol. IX, 1st sess., 33rd Parl., May 6, 1986, at p. 12999) and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

25 Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later.

Decisions relevant to Section 133

MacDonald v. City of Montreal, [1986] 1 S.C.R. 460

Summary of the Law: Section 133 imposes an obligation to not disturb the exercise of language rights conferred by this provision.

Summary of the Facts: Mr. MacDonald received a summons of the Municipal Court of the City of Montreal written exclusively in French. Before the Supreme Court, Mr. MacDonald disputed the legality of the summons under Section 133 of the *Constitution Act*.

Judgment of Beetz, Estey, McIntyre, Lamer and Le Dain JJ.

In his analysis, Beetz J., writing for the majority, determined that Section 133 should receive a restrictive interpretation. He stated that the language rights provided at Section 133 belonged to the lawyers, witnesses, judges and other court officials, and not to the persons they address. Thus, it ruled that the appellant did not have the right to a summons in English because the State had no corresponding duty to facilitate the use of an official language.

For these reasons, the majority dismissed the appeal.

Judgment of Wilson J. (Dissenting)

Case Law Document on Bilingualism in the Judiciary

In her analysis, Wilson J. stated that since Section 133 gave the litigant the right to use the official language of his choice before the courts of justice, the State had the corresponding duty to facilitate the use of this language.

For these reasons, she would have allowed the appeal.

Relevant Paragraphs:

Judgment of Beetz, Estey, McIntyre, Lamer and Le Dain JJ.

58. The appellant's main submission was stated above. That submission is to the effect that s. 133 of the *Constitution Act, 1867* gives to any person, anglophone or francophone, the right to be summoned before any court of Canada and any court of Quebec by a process issued in his own language, at least where the "State" is a party to the proceedings, such as penal or criminal proceedings.
59. This submission is erroneous, in my respectful opinion. It fails to meet the above-quoted reasons of Hugessen A.C.J. in *Walsh* which I find conclusive and with which I agree. Furthermore, it is contrary to the plain meaning of s. 133 as construed by this Court in *Attorney General of Quebec v. Blaikie*, [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), and *Attorney General of Quebec v. Blaikie*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*).
60. Hugessen A.C.J. correctly observed in *Walsh* that the essential words of s. 133 are the same with respect to the language of Parliamentary debates and to the language of court proceedings and should receive the same construction. It is clear that the rights preserved in Parliamentary debates are those of the speaker only. Those who listen to the speaker cannot have a right to be addressed in the language of their choice without defeating the speaker's own right to use the language of his choice and making the constitutional provisions nonsensical. Also, the speaker might be unilingual and find it impossible to address his listeners in the language of their choice. Furthermore, the choice of the listeners might vary, making it impossible to accommodate each of them. The use of interpreters or simultaneous translation which, in any event, has nothing to do with s. 133, would not meet the essential thrust of appellant's submission that he has the right to be addressed in the language of his choice by the very person or body who is purporting to address him.
61. The same reasoning applies to the language spoken in the courts covered by s. 133 and in the written pleadings in and processes of such courts: the language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof. The appellant exercised his constitutionally protected language right when he presented his oral and written argument in

English before Judge Bourassa, and the latter exercised his own right when he delivered judgment partly in French and partly in English. In my view, under s. 133 of the *Constitution Act, 1867*, and apart from other legal principles or statutory provisions such as the *Official Languages Act, R.S.C. 1970, c. O-2*, the appellant was not entitled to a summons in English only, any more than to a judgment in English only, from the Municipal Court or from any court contemplated by s. 133, including this Court.

62. The appellant's main submission is not bolstered by his reference to the "State". Whether or not the State is a person or has rights under s. 133, it was held in *Blaikie No. 1* that the option to use either language under this section extends to the courts themselves in documents emanating from them or issued under their name or under their authority. As I have said above, the summons is a process in or issuing from the Municipal Court. Furthermore, the issuer of the summons in the case at bar had by law to be either the clerk or a judge of the Municipal Court. These are physical persons whose language rights under s. 133 receive the same protection as those of the appellant.

66. Since s. 133 confers no language right to the appellant as the recipient of a summons, it imposes no correlative duty on the State or anyone else.

67. The only positive duty that I can read in s. 133 is the one imposed on the Houses of Parliament of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* at p. 1022. In *Forest v. Registrar of Court of Appeal of Manitoba*, [1977] 5 W.W.R. 347 at p. 355, it seems to have been suggested by Freedman C.J.M. that s. 23 of the *Manitoba Act, 1870*, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.

68. A negative duty is also imposed by s. 133 on everyone not to infringe language rights conferred by the section with respect to the language of Parliamentary debates and court proceedings. These are constitutionally protected rights and it would be unlawful for instance to expel a member of the House of Commons or of the Quebec National Assembly on the ground that he uses either French or English in debates, or for a judge of a Quebec or a federal court to prevent the use of either language in his court. But this duty is not the positive one which the appellant invokes.

103. I respectfully agree with these observations. Section 133 has not introduced a comprehensive scheme or system of official bilingualism, even potentially, but a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism at the option of the speaker in Parliamentary debates and at the option of the speaker, writer or issuer in judicial proceedings or processes. Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing.

104. This incomplete but precise scheme is a constitutional minimum which resulted from a historical compromise arrived at by the founding people who agreed upon the terms of the federal

union. The scheme is couched in a language which is capable of containing necessary implications, as was held in *Blaikie No. 1* and *Blaikie No. 2* with respect to certain forms of delegated legislation. It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional amendment. But it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise.

108. It should be stated at the outset that compliance with s. 133, as this section provides for a minimum constitutional protection of language rights, may very well fall short of the requirements of natural justice and procedural fairness. These requirements protect not language rights but other rights, referred to as legal rights in the *Charter*, which s. 133 was never intended to safeguard in the first place and to which it is entirely unrelated.

114. It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

116. This is not to put the English and the French languages on the same footing as other languages. Not only are the English and the French languages placed in a position of equality, they are also given a preferential position over all other languages. And this equality as well as this preferential position are both constitutionally protected by s. 133 of the *Constitution Act, 1867*. Without the protection of this provision, one of the two official languages could, by simple legislative enactment, be given a degree of preference over the other as was attempted in Chapter III of Title 1 of the *Charter of the French Language*, invalidated in *Blaikie No. 1*. English unilingualism, French unilingualism and, for that matter, unilingualism in any other language could also be imposed by simple legislative enactment. Thus it can be seen that, if s. 133 guarantees but a minimum, this minimum is far from being insubstantial.

Judgment of Wilson J. (Dissenting)

149. In *Blaikie No. 1, supra*, this Court found that s. 133 of the *Constitution Act, 1867* gave persons involved in proceedings in the courts of Quebec the option to use either French or English in any pleading or process, including oral argument, and that this guarantee could not be modified by unilateral act of either the federal or Quebec Legislature. This line of reasoning was taken one step further in *Blaikie No. 2, supra*, in which the Court held that matters of an essentially judicial character such as rules of court were subject to the s. 133 right "by necessary intendment" and that persons would be deprived of the right if rules and prescribed forms for court proceedings and processes were couched in one language only. Quoting from the judgment of the Court at p. 332:

Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

(Emphasis added.)

- 150.** The first submission made by the appellant and by the intervenors on his behalf is that it takes no great conceptual leap (if, indeed, it takes any) to accept that items such as a summons commanding a person to appear in court fall into the category discussed in *Blaikie No. 2*. I agree with the appellant on this issue. There can be no doubt about the "judicial character" of a summons. Indeed, it would be hard to envisage a more "judicial" document than a command or citation issuing from a court requiring the recipient to attend before it. It is, in my view, a "process" of the Court within the meaning of the phrase employed in s. 133 "... or in any Pleading or Process ... issuing from ... any of the Courts of Quebec". Indeed, in *Jowitt's Dictionary of English Law* (2nd ed. by John Burke, 1977, vol. 2) the following definition of "process" is advanced:

Process, the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end; strictly, the summons by which one is cited into a court, because it is the beginning or principal part thereof, by which the rest is directed.

(Emphasis added.)

- 159.** It seems to me then that there is substantial support in legal theory for the appellant's submission that right and duty are correlative terms and I would accept that if s. 133 confers a right on a litigant to use his or her own language in court (which appears to be accepted in *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, and in both *Blaikies*), then there is a correlative duty on the state to respect and accommodate that right.

- 160.** It is argued, however, that no such correlative duty can be imposed on the state under s. 133 because of the antithetical use of the words may/either and shall/both in the section. It is pointed out that shall/both is used in relation to the language of the records and journals of the legislatures of Canada and Quebec and in relation to the language in which the statutes of Canada and Quebec are printed and published. They must be in both languages. But may/either is used in relation to the language of the debates in both Houses and in relation to the language of the courts in both

jurisdictions. These may be in either language. It is submitted that had the legislators intended to compel a particular language to be used in the courts in any given situation it would not have used may/either; it would have used shall/both. How valid is this submission?

161. In my opinion, it has no validity because it fails to take account of the "subject" of the provision, *i.e.*, the person to whom the different parts of the section are addressed. Two parts are addressed to the state and two parts to the citizen. The parts addressed to the state are mandatory; they impose an obligation on the state; you must keep bilingual records and journals of both Houses and you must print and publish your statutes in both languages. Clearly this is mandatory on the state so that the citizens speaking either language can understand them. The parts addressed to the citizen, on the other hand, confer rights on the citizen; you may use your own language, English or French, in parliamentary debates and in court proceedings. The purpose again is to facilitate understanding by the citizen regardless of language. It would be quite inappropriate to use both/shall in conferring rights although perfectly appropriate in imposing obligations. The intention of the legislators was clearly to present the citizen with an option with respect to language in debates and in the courts. Had the legislators intended to require totally bilingual proceedings in the courts it would have aimed the directive at the state (as in the case of records and journals and legislation) and used shall/both. It did not do so. It validated the use of either language and gave the litigant the option. Similarly, with respect to the debates in both Houses it wished to provide an option to the speaker as opposed to giving a directive to the state that both must be used. I do not believe that the use of may/either in relation to the use of language in the courts was intended to provide an option to the state. It was, in my view, intended to provide an option to the citizen. But the provision of that option to the citizen has implications for the state which I have described as its correlative duty.

163. It seems to me that in s. 133 we have an excellent illustration of Coode's point. In relation to the records and journals and the legislation of both jurisdictions the obligation is imposed and it is directed to the state. The right of the citizen is implied. In the case of the debates and language in the courts the right is conferred and it is directed to the citizen; the obligation on the state is implied.

180. Presumably the legislative concern with language disclosed by the foregoing legislative history is the "continuous practice going back almost to the beginning of the British rule" referred to by this Court in *Blaikie No. 2* at p. 330. In 1867, s. 133 of the *Constitution Act* carried forward the either/may language of the C.S.L.C. 1861, thus putting the historical concern with the status of both languages on a constitutional footing. Although the section does not spell out how the determination as to the appropriate language is to be made, the legislative history seems to me to demonstrate clearly that the focus of concern was meaningful access to the judicial system by users of both languages. The provisions in the early statutes dealing with the adequacy of notice, trial by a jury which could understand the defence, dual publication of writs in French and English language newspapers, the translation of unilingual statutes, the short-lived flirtation with official bilingualism, the provision for the appointment and payment of translators, and, particularly interesting, the very early provision in 1785 requiring the issuance of a summons *in the language of the defendant* all indicate that it was the needs of the persons subject to the court's process that was at the core of the various enactments, repeals and re-enactments. This is hardly surprising. It would appear to go without saying that a judicial system exists to meet the needs of the individual

Case Law Document on Bilingualism in the Judiciary

in society and is not an end in itself. Section 133, in my view, recognizes the linguistic duality in the Province of Quebec and assures both French and English speaking citizens that their linguistic rights will be protected by the state in a meaningful fashion.

183. I take no issue with this Court's conclusion in *Blaikie No. 1* that under s. 133 documents, judgments and other materials issued by Quebec courts are valid in either language. It does not, however, follow from this that a French speaking litigant may be dealt with in English and an English speaking litigant in French. The purpose of the provision, it seems to me, goes beyond validating the use of both languages. It validates them for a reason and that reason is that the person before the Court will be dealt with in the language he or she understands. To say otherwise is to make a mockery of the individual's language right. Regardless of whether a judge acting in his or her official capacity retains the right as an individual to write judgments in the language of his or her choice, this cannot, in my view, detract from the state's duty to provide a translation into the language of the litigant.

Attorney General of Quebec v. Blaikie et al., [1981] 1 S.C.R. 312

Summary of the Law: Section 133 of the *Constitution Act* applies to the courts rules of practice enacted by judicial and quasi judicial tribunals of the federal government and the province of Quebec.

Summary of the Facts: The Attorney general of Quebec asked the Supreme Court to rule on the application of Section 133 to regulations enacted by the Government and municipal and school bodies by-laws.

In its analysis, the Supreme Court ruled that the rules of practice of the courts rules of practice enacted by judicial and quasi judicial tribunals must be bilingual given their judicial character.

For these reasons, the Court unanimously allowed the appeal.

Relevant Paragraphs:

Court rules of practice

Page 332 Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.

The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to

Case Law Document on Bilingualism in the Judiciary

address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.

Page 333 Furthermore, and as was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.

We accordingly reach the conclusion that, given the nature of their subject-matter, rules of court stand apart and are governed by s. 133 of the *B.N.A. Act*.

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016

Summary of the Law: Section 133 is enshrined in the Constitution and is not only forbidding modification by unilateral action of Parliament or the Quebec Legislature but also providing a guarantee to litigants before the Courts of Canada or Quebec that they are entitled to use French or English in their written or oral submissions.

Summary of the Facts: The Attorney general of Quebec appealed before the Supreme Court from a decision of the Court of Appeal of Quebec declaring *ultra vires* of Section 133 of the *Constitution Act* the dispositions of Chapter III, Title I of the *Charter of the French Language*, making French the only official language of Quebec.

In its analysis, the Court ruled that according to the principles set out in *Jones*, the rights provided at Section 133 are a minimum constitutional protection and cannot be modified by the Quebec Legislature or Parliament.

For these reasons, the Court unanimously dismissed the appeal and affirmed the decision of the Court of appeal.

Relevant paragraphs:

Page 1022 So, too, is there incompatibility when ss. 11 and 12 of the *Charter* would compel artificial persons to use French alone and make it the only official language of "procedural documents" in judicial or quasi-judicial proceedings, while section 133 gives persons involved in proceedings in the

Courts of Quebec the option to use either French or English in any pleading or process. Whether s. 133 covers the processes of "bodies discharging judicial or quasi-judicial functions", whether it covers the issuing and publication of judgments of the Courts and decisions of "judicial or quasi-judicial" tribunals, and also whether it embraces delegated legislation will be considered later.

Page 1023 The central issue in this case, reflected in the question posed for determination by this Court, is whether the Legislature of Quebec may unilaterally amend or modify the provisions of s. 133 in so far as they relate to the Legislature and Courts of Quebec. It was the contention of the appellant that the language of the Legislature and of the Courts of Quebec is part of the Constitution of the Province and hence is within the unilateral amending or modifying authority of the Legislature under s. 92(1). Emphasis was, understandably, placed on the words in s. 92(1) "notwithstanding anything in this Act".

Page 1025 In *Jones v. Attorney-General of New Brunswick*^[7], which concerned the validity of the federal *Official Languages Act*, the Court had this to say about s. 133 (at pp. 192-3):

... Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North America Act* (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.

Page 1026 The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* refer-able to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribed . . .

What the *Jones* case decided was that Parliament could enlarge the protection afforded to the use of French and English in agencies and institutions and programmes falling within federal legislative authority. There was no suggestion that it could unilaterally contract the guarantees or requirements of s. 133. Yet it is contraction not enlargement that is the object and subject of Chapter III, Title I of the *Charter of the French language*. But s. 133 is an entrenched provision, not only forbidding modification by unilateral action of Parliament or of the Quebec Legislature.

Case Law Document on Bilingualism in the Judiciary

Morand c. Québec (Procureur général), [2000] QCCA 2218 (French version only)

Summary of the Law: Section 133 of the *Constitutional Act* and the general right to equality do not confer the corresponding duty upon the courts to render and publish their decisions in both official languages.

Summary of the Facts: Before the Court of Appeal of Quebec, the appellants alleged the uncertainty of the judicial value of a decision rendered and published in only one official language.

In its analysis, the Court ruled that Section 133 of the *Constitution Act* did not confer the corresponding duty to put in place an institutional bilingualism. The Court also determined that a general right to equality could not create a language right that is not already provided at Section 133, because fundamental rights must be conceptually distinguished from language rights.

For these reasons, the Court unanimously dismissed the appeal.

Relevant Paragraphs:

[7] CONSIDÉRANT que la Cour, dans l'arrêt Pilote précité, a rejeté l'argument fondé sur l'article 10 de la *Charte québécoise des droits et libertés de la personne*, le juge Brossard, pour la Cour, écrivant :

L'appelant est incapable d'identifier quelque disposition que ce soit de la *Charte québécoise des droits et libertés de la personne* qui serait susceptible d'imposer à l'État l'obligation de fournir une traduction d'un jugement dans la langue de la partie qui l'exigerait.

Les droits linguistiques ne font pas partie des libertés fondamentales énumérées à l'article 3. Ils ne sont pas non plus mentionnés au chapitre III traitant des droits judiciaires, si ce n'est qu'à l'article 28, de portée limitative, on stipule que toute personne a le droit d'être informée «dans une langue qu'elle comprend», des motifs d'une arrestation ou d'une détention. L'appelant ne saurait donc s'appuyer que sur l'article 10, mais dans la mesure où il faudrait alors interpréter cet article comme signifiant que le fait pour le juge de prononcer son jugement en anglais, à l'égard d'une partie francophone, constituerait, par ses effets, une discrimination fondée sur la langue. Or, dans mon opinion, une telle interprétation de l'article 10 équivaldrait à lui donner une portée dont l'effet serait de contredire l'article 133 de la *Loi constitutionnelle*.

[8] Et plus loin:

Il me paraîtrait, de fait, qu'obliger l'État québécois, en vertu des articles 9.1 ou 10 de la *Charte québécoise*, à fournir des traductions authentifiées dans une langue donnée des jugements écrits dans l'autre langue, équivaldrait incontestablement à améliorer, ajouter ou modifier le compromis constitutionnel historique exprimé dans l'article 133 de la *Loi constitutionnelle de 1867*.

Enfin, disons en terminant sur ce point, comme nous le soumet le Procureur général du Québec, que le Gouvernement du Québec fournit effectivement un service de traduction de la langue anglaise à la langue française et vice versa, sur demande d'une partie au litige. Il ne s'agit pas d'une traduction authentifiée, non plus que d'une traduction automatique jointe à l'original. Ce service, cependant, me paraît suffisant pour répondre à toute exigence de la *Charte québécoise des droits et libertés de la personne*, même si nous en venions à la conclusion que la *Charte* confère aux parties le droit d'exiger une telle traduction, ce que je ne suis pas personnellement prêt à affirmer.
(p.2438)

[9] CONSIDÉRANT que la portée du droit d'utilisation de la langue anglaise ou française à

Case Law Document on Bilingualism in the Judiciary

l'occasion de la rédaction d'un jugement est clairement définie et le juge Brossard, au nom de la Cour, l'a ainsi résumée :

Bref, quel que soit l'angle sous lequel on analyse l'article 133 de la *Loi constitutionnelle de 1867*, la jurisprudence me paraît très claire à l'effet que c'est au juge que cette disposition confère le droit constitutionnel d'utiliser à son choix la langue française ou anglaise dans la rédaction de son jugement alors que cette même disposition n'impose aucune obligation à l'État de fournir une traduction authentifiée.

[10] CONSIDÉRANT que les appelants confondent liberté d'expression et droits linguistiques garantis, ce qui est erroné, la Cour suprême ayant exprimé l'avis que "la liberté générale de s'exprimer dans la langue de son choix et les garanties spéciales de droits linguistiques dans certains secteurs d'activité ou de compétence gouvernementale – la législature et l'administration, les tribunaux et l'enseignement – sont des choses tout à fait différentes" (Ford c. Québec (Procureur général), 1988 CanLII 19 (CSC), [1988] 2 R.C.S. 712);

[11] CONSIDÉRANT que les appelants ne peuvent prendre appui sur la règle du droit au procès équitable pour soutenir leurs prétentions car les droits linguistiques et la garantie de l'équité du procès sont deux droits distincts tant par leur origine que par leur rôle et leur objet (MacDonald c. Ville de Montréal, 1986 CanLII 65 (CSC), [1986] 1 R.C.S. 460 et Beaulac c. La Reine, 1999 CanLII 684 (CSC), [1999] 1 R.C.S. 768);

[12] CONSIDÉRANT, en conséquence, que l'obligation de fournir une traduction des jugements ne peut découler que de la loi, ce que la Province a prévu à l'article 9 de la Charte de la langue française, (L.R.Q. c. C-11). (Voir sur l'effet de cette disposition: Société des Acadiens c. Association of Parents for Fairness in Education, [1986] 1 R.C.A. 549 et Pilote, précité);

[13] CONSIDÉRANT que le pourvoi est mal fondé;

Chapter III of the *Charter of the French Language*²⁴

The *Charter* provides that French is the language of the legislature and the courts in Québec subject to the obligations conferred upon the province by Section 133 of the *Constitution Act*.

²⁴ *Charter of the French language*, RSQ 2011, c C-11

Decisions relevant to the *Charter of the French Language*

Att. Gen. of Quebec v. Blaikie et al., [1979] 2 S.C.R. 1016

Law Summary: Section 133 is entrenched in the Constitution and is not only forbidding modification by unilateral action of Parliament or the Quebec Legislature but also providing a guarantee to litigants before the Courts of Canada or Quebec that they are entitled to use French or English in oral or written submissions.

Summary of the Facts: The Attorney general of Quebec appealed before the Supreme Court from a decision of the Court of Appeal of Quebec declaring *ultra vires* of Section 133 of the *Constitution Act* the dispositions of Chapter III, Title I of the *Charter of the French Language*, making French the only official language of Quebec.

In its analysis, the Court ruled that according to the principles set out in *Jones*, the rights provided at Section 133 are a minimum constitutional protection and cannot be modified by the Quebec Legislature or Parliament.

For these reasons, the Court unanimously dismissed the appeal and affirmed the decision of the Court of appeal.

Relevant paragraphs:

Page 1022 So, too, is there incompatibility when ss. 11 and 12 of the *Charter* would compel artificial persons to use French alone and make it the only official language of "procedural documents" in judicial or quasi-judicial proceedings, while section 133 gives persons involved in proceedings in the Courts of Quebec the option to use either French or English in any pleading or process. Whether s. 133 covers the processes of "bodies discharging judicial or quasi-judicial functions", whether it covers the issuing and publication of judgments of the Courts and decisions of "judicial or quasi-judicial" tribunals, and also whether it embraces delegated legislation will be considered later.

Page 1023 The central issue in this case, reflected in the question posed for determination by this Court, is whether the Legislature of Quebec may unilaterally amend or modify the provisions of s. 133 in so far as they relate to the Legislature and Courts of Quebec. It was the contention of the appellant that the language of the Legislature and of the Courts of Quebec is part of the Constitution of the Province and hence is within the unilateral amending or modifying authority of the Legislature under s. 92(1). Emphasis was, understandably, placed on the words in s. 92(1) "notwithstanding anything in this Act".

Page 1025 In *Jones v. Attorney-General of New Brunswick*^[71], which concerned the validity of the federal *Official Languages Act*, the Court had this to say about s. 133 (at pp. 192-3):

... Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if

Case Law Document on Bilingualism in the Judiciary

its provisions are respected there is nothing in it or in any other parts of the *British North America Act* (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.

Page 1026 The words of s. 133 themselves point to its limited concern with language rights; and it is, in my view, correctly described as giving a constitutionally based right to any person to use English or French in legislative debates in the federal and Quebec Houses and in any pleading or process in or issuing from any federally established Court or any Court of Quebec, and as imposing an obligation of the use of English and French in the records and journals of the federal and Quebec legislative Houses and in the printing and publication of federal and Quebec legislation. There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. On its face, s. 133 provides special protection in the use of English and French; there is no other provision of the *British North America Act* refer-able to the Parliament of Canada (apart from s. 91(1)) which deals with language as a legislative matter or otherwise. I am unable to appreciate the submission that to extend by legislation the privileged or required public use of English and French would be violative of s. 133 when there has been no interference with the special protection which it prescribed ..

What the *Jones* case decided was that Parliament could enlarge the protection afforded to the use of French and English in agencies and institutions and programmes falling within federal legislative authority. There was no suggestion that it could unilaterally contract the guarantees or requirements of s. 133. Yet it is contraction not enlargement that is the object and subject of Chapter III, Title I of the *Charter of the French language*. But s. 133 is an entrenched provision, not only forbidding modification by unilateral action of Parliament or of the Quebec Legislature **page 1027** but also providing a guarantee to members of Parliament or of the Quebec Legislature and to litigants in the Courts of Canada or of Quebec that they are entitled to use either French or English in parliamentary or legislative assembly debates or in pleading (including oral argument) in the Courts of Canada or of Quebec.

b. Ontario

Courts of Justice Act

The *Courts of Justice Act*²⁵ does not apply to administrative tribunals.

²⁵ *Courts of Justice Act*, RSO 1990, c C-43

Case Law Document on Bilingualism in the Judiciary

Sections 125 and 126 of the *Courts of Justice Act* provide that the hearings will be held in English subject to the right of a party to the proceedings who speaks French to require that the hearing be conducted as a bilingual proceeding, with all the linguistic obligations applicable.

Sections 125 and 126 apply to individuals and legal entities.²⁶

Decisions relevant to sections 125 and 126 of the *Courts of Justice Act*

Belende v. Patel, [2008] ONCA 148

Summary of the Law: The right to a bilingual trial under Section 126 of the *Courts of Justice Act* is mandatory.

Summary of the Facts: Before the Court of Appeal of Ontario, the appellant disputed a decision of a unilingual Anglophone judge. The judge refused to adjourn the hearing to a date where a bilingual judge would be available as provided at Section 126 of the *Courts of Justice Act*.

In its analysis, the Court studied *R v. Beaulac* and *Ndem v. Greenspoon* to determine that the right to a bilingual trial is a particular right and not only a procedural right. According to the Court, English and French are the official languages of the courts of Ontario and it belongs to the courts to ensure the respect of the language rights provided at Section 126.

For these reasons, the Court of Appeal unanimously allowed the appeal and remitted the case to the Superior Court of Justice.

Relevant Paragraphs:

Did the judge have the jurisdiction to deny the right to a bilingual proceeding?

[18] However, the right in s. 126 is not qualified by any grant of judicial discretion. Although it is true that the court has the inherent jurisdiction to control the conduct of the proceedings, it is also clear that the court's jurisdiction cannot be exercised in a manner that would conflict with the express provisions of a statute.

[20] In light of the foregoing, in my view, the motion judge should have adjourned the motions to a date when a bilingual judge was available.

[22] The right to a bilingual hearing is a particular kind of right. It is not a procedural right put

²⁶ Bastarache, *supra* note 1 at 249.

Case Law Document on Bilingualism in the Judiciary

into place to ensure respect for the principles of fundamental justice or the right to a fair trial. As indicated by the Supreme Court of Canada in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 41:

Language rights have a totally distinct origin and role [when compared with the right to a fair trial]. They are meant to protect official language minorities in this country and to insure the equality of status of French and English.

[23] In *Ndem v. Greenspoon* [2004] O.J. No. 3269 (C.A.), at para. 15, this court stated: Where, as in this case, the appellant has met the procedural requirements to trigger a right to a bilingual hearing, this right is more than purely procedural, it is substantive and the appropriate remedy is to set aside the order.

[24] Therefore, in my view, the appropriate disposition is to set aside the order and to refer the matter back to the court below. English and French are the official languages of the courts in Ontario, and the court has a responsibility to ensure compliance with language rights under s. 126 of the *Courts of Justice Act*. A proper interpretation of this provision is one that is consistent with the preservation and development of official language communities in Canada and with the respect and preservation of their cultures: see *Beaulac*, at paras. 25, 34 and 45. Violation of these rights, which are quasi-constitutional in nature, constitutes material prejudice to the linguistic minority. A court would be undermining the importance of these rights if, in circumstances where the decision rendered on the merits was correct, the breach of the right to a bilingual proceeding was tolerated and the breach was not remedied.

R c. Boutin [2002], ONSC 2245 (French version only)

Summary of the Law: The *Courts of Justice Act* does not require that the information declared under oath by a police officer be given in both official languages.

Summary of the Facts: The Crown appealed before the Superior Court of Justice of Ontario of a decision determining that the charges written only in English in a bilingual information form with a translation provided by the Crown must be null and void on the grounds that the hearing was in French.

In its analysis, the Superior Court determined that the negative rights provided at Section 133 of the *Constitution Act* should have an influence on the interpretation of the *Courts of Justice Act*. On this basis, the Court concluded that the *Courts of Justice Act* did not require the charges to be bilingual. According to the Court, the right to a bilingual information form rather flows from the right to a fair trial.

Case Law Document on Bilingualism in the Judiciary

For these reasons, the trial judge allowed the appeal and ruled that the information declared under oath by a police officer does not need to be bilingual.

Relevant Paragraphs:

9 En outre, en vertu de l'article 126 de la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, c. C.43, une partie à une instance qui parle français a le droit d'exiger que l'instance soit instruite en tant qu'instance bilingue. En ce qui concerne une instance bilingue, les paragraphes 4, 5 et 6 de l'article 126 stipulent :

- (4)

Documents - Un document déposé par une partie avant l'audience dans une instance devant la Cour de la famille de la Cour supérieure de justice, la Cour de justice de l'Ontario ou la Cour des petites créances peut être rédigé en français.

- (5)

Acte de procédure - Un acte de procédure délivré dans une instance criminelle ou dans une instance devant la Cour de la famille de la Cour supérieure de justice ou de la Cour de justice de l'Ontario, ou qui y donne naissance, peut être rédigé en français.

- (6)

Traduction - À la demande d'une partie, le tribunal fournit la traduction en français ou en anglais des documents ou des actes de procédure visés au paragraphe (4) ou (5) qui sont rédigés dans l'autre langue.

20 La cause *Simard* correspond presque en tous points à ces affaires et à mon avis, elle constitue une jurisprudence valable, que ce tribunal et le tribunal de première instance doivent respecter.

21 Si le parlement, dans sa sagesse, cherche à pousser encore plus l'égalité linguistique, il lui revient, et non aux tribunaux, de le faire, car les tribunaux ne sont pas équipés pour prendre les mesures délicates de compromis politique nécessaires afin d'équilibrer les nombreux droits concurrents, dont certains ont été exposés ci-dessus.

Wittenberg v. Fred Geisweiller/ Locomotive Investments Inc., [1999] ONSC 626

Summary of the Law: Section 126 of the *Courts of Justice Act* confers the right to a bilingual trial before any court of Ontario.

Summary of the Facts: The appellant disputed a decision of the Small Claims Court before the Superior Court of Justice of Ontario. The trial judge refused to hear the appellant's arguments in French on the grounds that he should have made an official request under Section 126 of the *Courts*

Case Law Document on Bilingualism in the Judiciary

of Justice Act.

In its analysis, the Superior Court determined that every party to the proceedings had the right to request a bilingual proceeding in accordance with the *Act*. Although the Small Claims Court must proceed in an efficient manner to minimize the costs and simplify the proceedings, this mandate should not deprive a party from the right to a bilingual proceeding.

Given the important violation of the appellant's language rights, the trial judge allowed the appeal and ordered a new bilingual trial under Section 126 of the *Courts of Justice Act*.

Relevant Paragraphs:

[4] The right conferred upon Francophone citizens in Ontario pursuant to s. 126 of the *Courts of Justice Act* is a substantive right

[5] The defendant clearly was entitled to require that the trial be conducted as a bilingual proceeding. Although his request was for "the case to be heard in French", I am satisfied that this constituted a valid request for a bilingual proceeding.

[8] The right conferred by s. 25 is an important linguistic right intended to afford Francophones the opportunity to present their cases in their language. Section 25 gives direction to Small Claims Court judges to hear cases in a manner which will keep costs low and procedure simple. I do not believe, however, that s. 25 is to be applied at the expense of the linguistic rights found in s. 126. There are important historical, political and social reasons for legislation which protects linguistic rights of the Francophone population in Ontario. Section 126 is one example of such legislation and it should be given a broad interpretation.

[11] To deny a party the right to a bilingual proceeding under s. 126 of the *Courts of Justice Act* is a substantial wrong which requires that a new trial take place.

c. Western Provinces

Historical Context

Historically, Section 110 of the *North-West Territories Act* protected language rights before the creation of the western provinces.

Case Law Document on Bilingualism in the Judiciary

This provision reads as follows:

110. Either the English or the French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings of the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

In the case of *R v. Mercure*,²⁷ the Supreme Court ruled that the language rights provided at section 110 had not been enshrined in the Constitution and could therefore be modified unilaterally by the province of Saskatchewan. In Alberta, the same question has been raised in the case of *R v. Paquette*.²⁸ According to the Supreme Court, since the provisions of the *Alberta Act* pertaining to the *North-West Territories Act* were the same as the language provisions in Saskatchewan, the conclusions made in *Mercure* applied to Alberta. Thus, the province of Saskatchewan repealed section 110 and adopted the *Language Act*. The province of Alberta repealed the *North-West Territories Act* and replaced it by the *Languages Act*.²⁹

Alberta

Languages Act

The *Languages Act*³⁰ of Alberta limits the use of French to oral submissions.

The relevant provision of the *Languages Act* of Alberta reads as follows:

²⁷ *R v. Mercure* [1988] 1 S.C.R. 234. [*Mercure*]

²⁸ *R v. Paquette* [1990] 2 S.C.R. 1103. [*Paquette*]

²⁹ Bastarache, *supra* note 1 at 267.

³⁰ *Languages Act*, RSA 2000, c L-6

Case Law Document on Bilingualism in the Judiciary

4(1) Any person may use English or French in oral communication in proceedings before the following courts:

(a) The Court of Appeal of Alberta;

(b) The Court of Queen's Bench of Alberta;

(c) Repealed

(d) The Provincial Court of Alberta.

(2) The Lieutenant Governor in Council may make regulations for the purpose of carrying this section into effect, or for any matters not fully or sufficiently provided for in this section or in the rules of those courts already in force.

Decisions relevant to the *Languages Act*

R. v. Caron, [2009] ABQB 745

Note: In this case, the Court of Appeal of Alberta heard the appeal of the decision of the Court of Queen's Bench during the hearing of April 22nd and 23rd, 2013, but did not render a decision in this case yet. The Court of Appeal of Alberta was asked to rule on whether the Royal Proclamation of 1869, a constitutional agreement which aimed to reassure French-speaking inhabitants of the western provinces that their rights would be maintained within Canada, had been enshrined in the Canadian Constitution. If the Court Appeal reaches this conclusion, the western provinces would be required to enforce the linguistic obligations provided in the Royal Proclamation.³¹

Summary of the Law: The language rights provided in the Royal Proclamation of 1869 were not enshrined in the Canadian Constitution.

Summary of the Facts: The defendant, Mr. Gilles Caron, whose mother tongue is French, was charged with violating Subsection 34(2) of the *Use of Highway and Rules of the Road Regulation*. Mr. Caron only filed a Notice of Constitutional Question in which he submitted that the law he broke is unconstitutional because it was not published in French.

In Provincial Court, the trial judge determined that the language rights were included in the

³¹ Guylaine Loranger, "The Caron Case and the Royal Proclamation of 1869" (April 25th 2013), online: Language Rights Support Program < http://www.padl-lrsp.uottawa.ca/index.php?option=com_content&view=article&id=156%3Athe-caron-case-and-the-royal-proclamation-of-1869&catid=52%3Ablog&Itemid=96&lang=en >

Case Law Document on Bilingualism in the Judiciary

expression *all your civil rights* at Section 5 of the *Royal Proclamation of 1869*. Relying on Condition 15 of the *Order of Her Majesty in Council admitting Rupert's Land and the North-West Territory into the Union* and the historical context of its creation, he then concluded that the Proclamation was a constitutional document. Therefore, he ruled that *all your civil rights* were constitutional. However, the trial judge made a limited declaration that Section 3 of the *Languages Act* infringed the respondents' language rights and acquitted Mr. Caron.

In Court of Queen's Bench, the trial judge declared that the changes which led to the creation of the province of Manitoba did not apply to the rest of the territories, because neither the *Royal Proclamation* nor the *1870 Order* had the effect of enshrining the language rights in the Constitution. On the contrary, the trial judge determined that the Annexation of the Western territories conferred to the Parliament of Canada the power to legislate in the era of language rights in the territories subject to Section 133. The trial judge therefore concluded that at the time of the creation of Alberta in 1905, there was no constitutional obligation to publish the provincial legislation in both official languages.

For these reasons, the trial judge allowed the appeal and set aside the verdicts of acquittal. He also ordered that the defendant appear again before the court for sentencing purposes.

Relevant Paragraphs:

Historical Context

[93] It should be noted that no language rights were specifically included in the 1870 Order for the rest of the North-West Territories. However, judicial and legislative bilingualism did continue in the North-West Territories after annexation in 1870 because of the initial joint administration of Manitoba and the territories: Trial Judgment, at paras. 323-54. The lieutenant-governor of Manitoba was also initially the governor of the North-West Territories: *Manitoba Act, 1870*, ss. 26, 35 and 36.

[105] The *Alberta Act* contains no section analogous to section 133 of the *Constitution Act, 1867* or section 23 of the *Manitoba Act, 1870* with respect to the use of English or French. Nonetheless, the Supreme Court of Canada ruled in *R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234 and *R. v. Paquette* 1987 ABCA 188 (CanLII), (1987), 81 A.R. 12 (C.A.) aff'd 1990 CanLII 37 (SCC), [1990] 2 S.C.R. 1103, that section 110 was still in effect in Saskatchewan and Alberta. However, the majority of the Supreme Court also ruled that, since this section was not part of the Constitution, it could be amended through the normal legislative process.

[106] In 1988, in response to these judgments, the Legislative Assembly of Alberta enacted the *Languages Act* in both languages to amend section 110. The *Languages Act* provides at section 2(1) that "Acts, Ordinances and regulations enacted before July 6, 1988 are declared valid notwithstanding that they were enacted, printed and published in English only". Sections 3 to 5 of

Case Law Document on Bilingualism in the Judiciary

the *Languages Act* govern the use of English and French in legislation, before the courts and in the Legislative Assembly of Alberta

[107] Since the Province of Alberta was established, no legislation has ever been enacted or published in French except for the *Languages Act*.

[108] In Saskatchewan, section 110 also remained in force after the establishment of this Province. However, when neighbouring Saskatchewan changed its language legislation, it opted instead for a more generous approach regarding legislation in French. The acts enacted in French and in English, numbering approximately 50 to date, are equally authoritative: *Language Act*, Statutes of Saskatchewan, 1988-89, c. L-6.1, s. 10. Their Rules of Court were also enacted in both languages. Moreover, the Saskatchewan *Language Act* allows the use of French in both written documents filed and oral submissions before the court.

Analysis

Did the right to the publication of legislation in English and French exist in Rupert's Land and the North-Western Territory prior to annexation?

[123] For the following reasons, I am of the opinion that the inhabitants of Rupert's Land and the North-Western Territory had the statutory right to have local ordinances published in French and English. However, this right did not extend to all the legislation in effect in this territory. The inhabitants were British subjects, and the general laws of England, which were published only in English, were also supplementary to the local ordinances.

[130] The evidence shows that the Company had the power to issue ordinances regarding local matters and that it did exercise this power. However, this local law was only part of the applicable law. It must be kept in mind that certain parts of British law, which was obviously only in English, also applied.

[131] I am therefore of the view that, prior to annexation, the ordinances enacted by the Company concerning the use of French for the publication of ordinances created statutory obligations for the Company. However, there were no obligations beyond the ordinances. Clearly, the Parliament of Great Britain was not required to publish anything in French, even though parts of English law applied in the North-West.

Was the right to the publication of legislation in English and French entrenched upon annexation?

Preliminary issue: Mercure

[143] In my view, the Supreme Court's decision in *Mercure* does not answer the issue raised at trial and in this appeal.

[144] In the context of this case, the historical evidence was much more extensive than that presented in *Mercure*. However, more fundamentally, I am of the view that *Mercure* is not directly applicable to the resolution of this case, since the issue in this appeal is whether constitutional protection was provided for in the annexation conditions negotiated in 1870. The issue is not whether section 110 and its language obligations became constitutionally entrenched in 1905. The issue is different, it requires an analysis of what occurred 35 years earlier.

General submissions on the Royal Proclamation of 1869 and the 1870 Order

Royal Proclamation of 1869

Analysis

[167] In my view, in summary, the Proclamation of 1869, by itself, did not entrench language rights, for two reasons, which I will explain in greater detail in the following paragraphs. Firstly, based on the evidence before me, the Proclamation was never passed into law by the British Parliament. Even if it had been, an ordinary statute would not have constitutionalized rights. Secondly, although the Crown had the authority to exercise its constituent power over settlements prior to the granting of a legislature, I am of the view that this was not done through the Royal Proclamation of 1869. This Proclamation does not grant a legislature, affect the organization of the courts or refer to anything comparable to a constituent power. A reading of the Proclamation of 1869 leads me to conclude that its purpose was to calm the people about the annexation. This Proclamation, in my view, was a political gesture and had no legal force.

[173] The Crown therefore generally does not have the power to legislate, but it does retain constituent power until a legislature has been established. Thus, in my view, the Crown did not have the power in this case to legislate by proclamation in 1869 except to exercise its constituent power. It might also do so in an emergency, but the statute would merely be an ordinary statute, in any case. Parliament of course could have passed a law enacting the Proclamation which would have given it force of law although with no constitutional power. However, nothing before me demonstrates that this occurred.

[174] I must therefore determine whether the Royal Proclamation of 1869 was issued under the Crown's constituent power, which would bind the Crown in the future.

[176] The Royal Proclamation of 1869 reflects those tumultuous times and the British Crown's desire to ease tensions prior to annexation. Indeed, the language used in the Proclamation clearly shows that the goal was to defuse tensions to allow for the impending transfer. The wording of the Proclamation does not provide for a mechanism for transferring the territories, nor does it create a legislature or courts. In other words, there is no transfer of power. The words "that on the union with Canada" and "your Country will be governed" refer to the forthcoming transfer.

[179] In my view, the Royal Proclamation was a document that played an important political role in bringing about the annexation, but, in and of itself, it was not a constitutional document that

Case Law Document on Bilingualism in the Judiciary

created the North-West Territories or the Province of Manitoba. It is a political document that served to diffuse the conflict in face of the annexation. Although the Crown played a political role through the Proclamation; it did not exercise its constituent power. Consequently, this Proclamation does not have the force of law.

[183] My finding that the Royal Proclamation of 1869 is not a constitutional promise is supported by the fact that this Proclamation is not expressly listed among the constitutional documents recognized in Canada.

[187] In my view, the Royal Proclamation of 1869 amounted to a political promise with no legal consequences, intended to calm the people by reminding them of the state of the law regarding the transfer. It is therefore not necessary in this case to deal with the argument that the expression “civil and religious rights and privileges” found therein included the language right to publish local legislation in French and English.

1870 Order

Incorporation of the Royal Proclamation of 1869 into the 1870 Order

[198] More particularly, the 1870 Order provides the following at condition 15:

The Governor in Council is authorized and empowered to **arrange any details** that may be necessary to carry out the above terms and conditions. And the Right Honourable Earl Granville, one of Her Majesty's Principal Secretaries of State, is to give the necessary directions herein accordingly. [Emphasis added.]

[199] Relying on this provision, the trial judge held that the Royal Proclamation of 1869 was “a measure” (or detail) that was necessary to carry out the conditions and as such it took on a constitutional nature. Given my finding that this Proclamation had no legal force, it is not open to me to hold that it constituted a “detail” necessary for annexation. In any case, in my view, a reading of the 1870 Order clearly demonstrates that condition 15 applies only to the essentially commercial conditions remaining to be carried out to finalize the transfer of Rupert’s Land. In other words, condition 15 refers only to the 14 enumerated conditions, and not to any condition extrinsic to this list.

[200] Accordingly, I find that the Proclamation of 1869 was not constitutionally incorporated by condition 15 of the 1870 Order.

[202] In my view, in summary, and as I will explain in greater detail in the following paragraphs, the 1870 Order did not have the effect of entrenching a right of access to local legislation in both languages in the newly established North-West Territories. In contrast, in the new Province of Manitoba, the Manitobans were granted constitutional protection to have all their laws, provincial and federal, printed in English and in French as a result of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*. Further, p. 133 also guaranteed language rights at the federal level for all the new Canadians. I base my finding that the 1870 Order did not constitutionally entrench the right to provincial legislation in both languages in the future Province of Alberta for the

Case Law Document on Bilingualism in the Judiciary

following three reasons:

- The constitutional framework governing the annexation of the territories in question includes not only the 1870 Order, but also the *Constitution Act, 1867*; the *Manitoba Act, 1870*, enacted the same day as the 1870 Order and the *Constitution Act, 1871*, enacted the following year. Language rights are expressly protected in two of these constitutional statutes, while the 1870 Order is silent with respect to such rights in the new territories. If the intent had been to accord constitutional protection to language rights in the new North-West Territories, wording similar to section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act, 1870* could have been used to state these as a condition of annexation. Instead, no express language protection was provided for in the 1870 Order.
- The wording of the 1867 Address that deals with the respect of “legal rights” does not include language rights, as language rights are completely distinct from “legal rights”. Language rights cannot be interpreted as being included in the term “legal rights” used in the 1867 Address. It was well established then, as it is today, that language rights were and are a particular kind of right, distinct from other rights.
- Within the constitutional framework of the annexation, the Parliament of Canada was conferred the freedom to legislate or not to legislate on language rights in the new North-West Territories without any constitutional limitations.

Conclusion

[285] There is little doubt that the inhabitants of Rupert’s Land and the North-Western Territory enjoyed the protection of certain language rights prior to the annexation of these territories. Indeed, all of their local legislation was published in French and English. It is also clear that these language rights were of fundamental importance to the population at that time, which was equally divided between Anglophones and Francophones.

[286] Most of the initial negotiations regarding the annexation took place between Great Britain, Canada and the Company. Later, the inhabitants also took part in the negotiations, and certain changes were made as a result of their demands. These changes led to the creation of Manitoba, where language rights were constitutionally entrenched, but in my view they did not lead to similar constitutional protection in the new territories. Neither the Royal Proclamation of 1869, nor the 1870 Order, had the effect of constitutionalizing language rights in the remaining territories. As a result of the annexation, the Canadian Parliament was granted full power and authority to legislate on language rights in the territories, subject to section 133 of the *Constitution Act, 1867*. Accordingly, when the Canadian Parliament created the Province of Alberta and established its constitution in 1905, there was no constitutional condition requiring it to include in the Province’s constitution an obligation to publish provincial legislation in English and French.

[287] In my view, the Province of Alberta has the power to legislate or not to legislate on language rights in the Province, as it did with the *Languages Act* wherein English is permitted as the

Case Law Document on Bilingualism in the Judiciary

language of publication for provincial legislation. Accordingly, there is no obligation, constitutionally or otherwise presently, to publish the *Traffic Safety Act*, its regulations, or issue traffic tickets in French in Alberta. In my view, therefore, the language rights of the respondents Caron and Boutet have not been violated.

***R v. Pooran*, [2011] ABPC 77**

Summary of the Law: Section 4 of the *Languages Act* confers the right to the litigants to be understood in the official language of their choice without the services of an interpreter.

Summary of the Facts: Before the Provincial Court of Alberta, the applicants charged under the *Traffic Safety Act* asked to be tried in French without the services of an interpreter under Section 4 of the *Languages Act*.

In its analysis, the Court relied on the principles of *Beaulac* to give a generous interpretation of Section 4 of the *Languages Act*.

For these reasons, the trial judge accepted the request. He ordered a new trial in French before a Francophone judge with a Francophone Crown Prosecutor.

Relevant Paragraphs:

Law Applied to section 4, *Languages Act*

[20] On June 22, 1988, the Attorney General of Alberta made a ministerial statement in the Legislative Assembly to introduce the *Languages Act* Bill; as well as the legislative history behind the Bill and a summary of the *Mercure* decision, the statement included these remarks:

Following the passage of the *Languages Act* a new standing order will be recommended which will provide that English and French may be used in the Assembly. The official publications of the Assembly will record matters in either English or French. Hansard will record in either English or French without translation. Members may use languages other than English and French in the Assembly subject to the approval of the Speaker. Prior written notice and an English translation of the remarks will be given to the Speaker, and the translation will be shown in the records. Mr. Speaker, the federal government has introduced an amendment to the Criminal Code of Canada which makes it mandatory for all provinces, including Alberta, to conduct criminal trials in either English or French by 1990. Alberta must, therefore, undertake further measures to comply with the federal requirements. Individuals will have the right, if they so choose, to a judge, jury, and prosecutor who speak either English or French, depending on the language of the accused. In addition, the accused and legal counsel may use either English or French, depending on the language of the accused. In addition, the accused and legal counsel

Case Law Document on Bilingualism in the Judiciary

may use either English or French in any proceedings relating to the preliminary inquiry or trial of the accused.

...

With regard to civil courts every participant in court proceedings will be entitled to speak either English or French. If necessary, an interpreter will be provided. The court proceedings will be recorded in the language spoken. In the area of provincial offences, individuals will also be entitled to speak either English or French. Similarly, the court proceedings will be recorded in the language spoken. The development of a language policy for education is a high priority for the government of Alberta. The policy will . . . have four major components. One: we have fully recognized the unique rights of Francophones who qualify under section 23 of the Charter of Rights and Freedoms in the new School Act. The provision for the Lieutenant Governor in Council to establish regulations in this area reflects the importance that this government places on establishing appropriate policies and procedures for ensuring that the rights of Francophones are met. [Emphasis added.]

[21] If litigants are entitled to use either English or French in oral representations before the courts yet are not entitled to be understood except through an interpreter, their language rights are hollow indeed. Such a narrow interpretation of the right to use either English or French is illogical, akin to the sound of one hand clapping, and has been emphatically overruled by *Beaulac*.

[22] The Crown Respondent assertion that the rights in the *Languages Act* are met by the provision of an interpreter amounts to a sloughing of the language rights of the litigant to the *Charter* legal right to due process, natural justice and a fair trial. As to the reference in the June 22, 1988, ministerial statement, to the provision of an interpreter if necessary, I infer from those words that the interpreter is to be provided for witnesses who do not speak the language, English or French, in which the trial is being conducted.

[23] It is clear from the ministerial statement that in three significant arenas of interaction between individuals and the province, the Legislative Assembly, courts and schools, the languages that may be used are English and French.

Conclusion

[24] Therefore, for the following reasons, I have concluded that the Applicants are entitled to have their *Traffic Safety Act* trials in French, with a French-speaking judge and French-speaking prosecutor:

Language rights are to be given a liberal and purposive interpretation; (*Beaulac*)

Language rights are distinct from legal rights; (*Beaulac*)

Alberta recognizes the unique rights of Francophones; (ministerial statement, June 22, 1988, *Alberta Hansard*)

The languages of the courts in Alberta are English and French; (section 4(1), *Languages Act*)

Case Law Document on Bilingualism in the Judiciary

and, the language rights enunciated in section 4 of the *Languages Act* are not eroded by the failure of the provincial government to enact regulations to hone their delivery.

Saskatchewan

Language Act

The provisions of the *Language Act*³² considerably limit the language rights formerly provided at Section 110 of the *North-West Territories Act*.

The relevant provisions of the *Language Act* read as follows:

Courts and tribunals

11(1) Any person may use English or French in proceedings before the courts entitled as: (a) the Court of Appeal; (b) the Provincial Court of Saskatchewan; (c) Her Majesty's Court of Queen's Bench for Saskatchewan; (d) Repealed. 2001, c.9, s.12. (e)The Traffic Safety Court of Saskatchewan; or (f) Repealed. 2001, c.9, s.12.

2) The courts mentioned in subsection (1) may make rules for the purpose of carrying into effect the provisions of this section or for the purpose of providing for any matters not fully or sufficiently provided for in this section or in their rules already in force. (3) Where the courts mentioned in subsection (1) make rules pursuant to subsection (2), those rules shall be printed and published in English and French.(4) The rules of the courts mentioned in subsection (1) and the rules of tribunals are declared valid notwithstanding that they were made, printed and published in English only.(5) The rules of the courts mentioned in subsection (1) shall be printed and published in English and French not later than January 1, 1994.(6) Before the date mentioned in subsection (5), the courts mentioned in subsection (1) may cause to be printed and published their rules, other than rules made pursuant to subsection (2), in English only.(7) Where the rules of a court mentioned in subsection (1) are printed and published in English and French, the English version and the French version are equally authoritative.

Decisions relevant to the *Language Act*

R c. Rottiers, [1995] SKCA 4003 (French version only)

Summary of the Law: The *Language Act* is constitutional.

Summary of the Facts: Before the Court of Appeal of Saskatchewan, Mr. Rotters, who was accused of speeding, alleged that the *Language Act* of Saskatchewan could not replace Section 110

³² *The Language Act*, SS 1988-89, c L-6.1

Case Law Document on Bilingualism in the Judiciary

of the *Northwest Territories Act*, of federal jurisdiction, and was therefore *ultra vires*.

In its analysis of the constitutionality of the *Language Act*, the Court ruled that the *Mercure* case created a precedent on which the inferior courts must rely.

For these reasons, the Court unanimously declared the *Language Act* constitutional and dismissed the appeal.

Relevant Paragraphs:

1. Est-ce que la *Loi linguistique* de la Saskatchewan est *ultra vires*?

[6] L'appelant fait valoir que l'article 110 de l'*Acte des Territoires du Nord-Ouest*, 1891 (R.S.C.) est encore en vigueur et que la *Loi linguistique* de la Saskatchewan est, à cet égard, *ultra vires*. Il soutient que la Cour suprême du Canada avait tort dans l'affaire *Mercure* parce qu'elle n'a pas pris en considération le fait que la modification de l'article 110 fait en 1891, est différente en français et en anglais. D'après l'appelant, la version française de cette modification était limitée dans le temps, et devenait inopérante à la dissolution de l'Assemblée législative en question, avec le résultat que l'article 110 de l'*Acte des Territoires du Nord-Ouest* aurait retrouvé sa formulation première. Donc, compte tenu du fait que la version française de la modification a la même valeur officielle que la version anglaise, aux fins d'interprétation, la Cour suprême avait tort quand elle a statué que l'article 110 n'était pas une loi constitutionnelle et que le gouvernement de la Saskatchewan avait le pouvoir de l'abroger. La Cour suprême a statué que l'article 110 était en vigueur au moment de l'affaire *Mercure* et que l'Assemblée législative de la Saskatchewan avait le pouvoir de l'abroger. Suite à cette décision, l'Assemblée législative de la Saskatchewan a abrogé cette loi par la *Loi linguistique*. Nous sommes régis par l'arrêt de la Cour suprême et nous statuons que le gouvernement de la Saskatchewan a abrogé la loi en vertu de l'article 16 de la *Loi sur la Saskatchewan*, S.C.1905, 1905, c. 42. La *Loi linguistique* n'est pas *ultra vires* et nous, en conséquence, rejetons les arguments de l'appelant basés sur l'interprétation de l'*Acte des Territoires du Nord-Ouest*, 1891. Ce moyen d'appel est, donc rejeté.

Manitoba

Section 23 of the *Manitoba Act*, 1870³³

Note: This Case law document only applies to the judiciary part of Section 23.

³³ *Manitoba Act*, 1870, 33 Victoria, c 3

Case Law Document on Bilingualism in the Judiciary

Given the similarity of Section 23 to Section 133, courts have ruled that this provision only conferred negative rights.³⁴ This provision does not confer the right to be understood without the assistance of an interpreter.³⁵ In *Bilodeau v. A.G.(Man.)*,³⁶ the Supreme Court ruled that the province of Manitoba was not required to deliver summons in either both official languages or the official language chosen by their recipient.

This provision reads as follows:

23. Either the English or the French language may be used by any person in the debates of the Houses of the Legislature and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province, The Acts of the Legislature shall be Printed and published in both those languages.

The courts concerned by this provision comprise all the judicial tribunals of Manitoba³⁷ and probably the administrative tribunals exercising judicial functions.³⁸ The word “Process” has the same meaning as in Section 133 of the *Constitution Act, 1867*.

Decisions relevant to Section 23

Re Manitoba Language Rights, [1985] 1 S.C.R.721

Summary of the Law: The purpose of Section 23 of the *Manitoba Act, 1870* is to ensure equal access to courts for Francophones and Anglophones.

Summary of the Facts: In this case, the Supreme Court ruled on the extent of the linguistic obligations provided at Section 23 of the *Manitoba Act*.

In its analysis, the Supreme Court ruled that given the similarity of Section 23 to Section 133 of the *Constitution Act*, this provision created the constitutional obligation for the province of Manitoba to adopt, print and publish its legislation in both official languages.

For these reasons, the Supreme Court unanimously invalidated the Manitoba laws adopted in English only since 1890.

³⁴ Bastarache, *supra* note 1 at 181.

³⁵ *Ibid.*

³⁶ *Bilodeau v. A.G. (Man.)*, [1986] 1 S.C.R. 449 [*Bilodeau*]

³⁷ Bastarache, *supra* note 1 at 181.

³⁸ *Northwest Child and Family Services Agency v. E.L.* [1992], 79 Man. R. (2d) 88 [*B.R. Man.*]

Case Law Document on Bilingualism in the Judiciary

Relevant Paragraphs:

31. If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, which was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike. The fundamental guarantees contained in the sections in question are constitutionally entrenched and are beyond the power of the provinces of Quebec or Manitoba to amend unilaterally: *Blaikie No. 1, supra*; *Attorney General of Manitoba v. Forest, supra*. Those guarantees would be meaningless and their entrenchment a futile exercise were they not obligatory.
43. Given the similarity of the provisions, the range of application of s. 23 of the *Manitoba Act, 1870*, should parallel that of s. 133 of the *Constitution Act, 1867*. All types of subordinate legislation that in Quebec would be subject to s. 133 of the *Constitution Act, 1867*, are, in Manitoba, subject to s. 23 of the *Manitoba Act, 1870*.

R. v. Rémillard (R.) et al., [2009] MBCA 112

Summary of the Law: According to Part 9 of the *City of Winnipeg Charter*, the offence notices must be fully bilingual in the bilingual communities enumerated in the *Charter*.

Summary of the Facts: The defendants living in Riel, Winnipeg, received bilingual offence notices to the *Traffic Act* that were only checked in English. Before the Court of Appeal of Manitoba, they disputed their validity under Subsection 456(1) of Part 9 of the *City of Winnipeg Charter*, which provides that the offence notices must be fully bilingual.

In its analysis, the Court of Appeal highlighted that language rights must be interpreted generously and purposively according to *Beaulac*.

For these reasons, the Court affirmed the decision of the trial judge to declare the offence notices null and void and dismissed the appeal.

Relevant Paragraphs:

- 32 It is also important to recall that, at this stage of my analysis, and, again, within the context of its s. 830 appeal, the Crown has not succeeded in convincing me that the trial judge erred in point of law alone, nor that he exceeded his jurisdiction. The final question in issue must be examined in light of the following conclusions of the trial judge:

- 1) the offence notices, issued under the image-capturing enforcement system, are subject

to Part 9 of the *Charter* and must be fully bilingual;

- 2) the City failed in its obligations under Part 9 of the *Charter* by permitting a discrepancy in the level of language service that gives French a secondary and reduced status as regards offence notices;
- 3) the City did not take all of the reasonable measures in the circumstances to comply with its linguistic obligations;
- 4) the measures that the City needs to take in order to comply with its linguistic obligations as regards offence notices issued under the image-capturing enforcement system are not unreasonable; and
- 5) s. 452(3) does not release the City from its obligation to deliver fully bilingual offence notices to the residents of Riel.

38 I reject the Crown's submission that the only available remedy was the complaint process set out at s. 463 for three reasons. Firstly, s. 463 confers on any person who considers that the City has failed to meet its obligations the right to make a complaint to the ombudsman. The respondents could have made a complaint under this section, but they instead chose to challenge the validity of the Offence Notices in court. Section 463 does not limit the remedies available to a judge who hears a quasi-criminal matter such as the case at bar.

39 Secondly, s. 7(1) of *The Summary Convictions Act* provides for several remedies. The judge may acquit the respondents or reprimand them, "where a minimum fine is prescribed, impose a fine that is less than the minimum," "suspend the sentence" or "grant a conditional or absolute discharge." Moreover, the judge may quash "the proceedings under an offence notice" where there is an irregularity (see s. 17(9) of *The Summary Convictions Act*). There are obviously a number of remedies available to a judge.

41 In the case at bar, the trial judge chose a remedy from among several. The decision to quash the Offence Notices is a remedy that was available to him in law. The choice of remedy is a discretionary power conferred on the trial judge. Again, when a judge exercises a discretionary power (in the context of an appeal governed by s. 830), this court may not intervene unless the decision is wrong in law.

46 It is important to remember the context in which the trial judge had to decide the question: the appropriate remedy for non-compliance with a language obligation. The trial judge chose the nullification remedy because "the City [had] failed in its obligation to provide in an equal manner the presence of French and English on offence notices" (at para. 103) as required by Part 9 of the *Charter*. It was imperative that the principles applicable to language matters be considered by the trial judge in determining the appropriate remedy.

47 The law in this area has greatly evolved in the last decade. The Supreme Court of Canada has repeatedly restated the principles applicable to the interpretation of legislation on language rights: in *Beaulac* in 1999; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), 2000 SCC 1, [2000] 1 S.C.R. 3; *Solski (Tutor of) v. Quebec (Attorney*

General), 2005 SCC 14 (CanLII), 2005 SCC 14, [2005] 1 S.C.R. 201; *Charlebois v. Saint John (City)*, 2005 SCC 74 (CanLII), 2005 SCC 74, [2005] 3 S.C.R. 563; and recently in *DesRochers v. Canada (Industry)*, 2009 SCC 8 (CanLII), 2009 SCC 8, [2009] 1 S.C.R. 194. In *DesRochers*, Charron J. summarized these principles as follows (at para. 31):

Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768, at para. 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras. 22, 24 and 25; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1 (CanLII), 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation.

48 In the case at bar, the trial judge’s reasons reflect his awareness of the applicable principles (at para. 42):

.... However, as a case involving the interpretation of language rights, my interpretation must not only remain mindful of the concept of substantive equality, but it must also be compatible “with the preservation and development of official language communities in Canada.”

49 In 2002, the City elected to provide French-language services to certain areas of the City. Drawing its inspiration from the concept of territorial bilingualism, it specified that its linguistic commitments were limited to the residents of the “designated area” of Riel (the St. Boniface, St. Vital and St. Norbert wards). Indeed, the area that the City designated as bilingual is identical to the area designated by the Province of Manitoba in its own policy on French-language services, adopted in 1999. The Province’s designation of bilingual areas is based on a demographic and linguistic reality or, as the statement of policy puts it, “where the French-speaking population is concentrated.”

50 In addition, it is clearly established, in relation to the designated bilingual areas, that English and French are the official languages (see s. 451(2)), and that, through its by-law, the City is committed to:

- 1) normalizing the use of the French language in the delivery of municipal services within the designated area; and
- 2) providing French language services that are equally accessible and of comparable quality to those available in the English language.

51 In my view, the above statement reflects the framers’ intent to implement a form of

Case Law Document on Bilingualism in the Judiciary

bilingualism that respects the principle of substantive equality in the designated bilingual area. It appears to me to be equally clear that this commitment by the City is confined to the designated area and that the City is not bound by it in other Winnipeg wards.

52 It is in this specific context that the trial judge was required to adjudicate. In my opinion, he applied the rules of interpretation set forth by the Supreme Court of Canada in language matters, he interpreted the *Charter* in a manner consistent with its underlying objects, and he correctly decided to quash the Offence Notices.

54 Furthermore, as Charron J. stated earlier this year in *DesRochers* “the exercise of language rights is not to be considered a request for accommodation” (at para. 31). Here, the trial judge took the same approach as Charron J. He was aware of this concern, and he did not accept that the respondents should have been content with the service received (even in the absence of substantive equality between this service and that received by the other official language community) because the City had made some efforts to provide services in French.

British Columbia

“1731 Act” and Rule 22-3 of the *Supreme Court Civil Rules*

The “1731 Act” is an ancient English Act that has been incorporated in the colonial law of British Columbia under Section 2 of the *Law and Equity Act*³⁹ and Rule 22-3 of the *Supreme Court Civil Rules*⁴⁰ of British Columbia. The provisions of these acts require that the proceedings and the documents filed in court be in English.

Decisions relevant to the ‘1731 Act’ and Rule 22-3 of the *Supreme Court Civil Rules*

Conseil scolaire francophone de la Colombie-Britannique v. British Columbia, [2013] SCC 42

Summary of the Law: All the documents and the evidence filed in court proceedings in British Columbia must be prepared in English or accompanied by a translation in this language.

Summary of the Facts: The appellants asked the Supreme Court to rule on the residual discretionary power of the courts of British Columbia to accept documents prepared in another language than English and not accompanied by a translation in this language.

³⁹ *Law and Equity Act*, RSBC 1996, c 253, s 2

⁴⁰ *Supreme Court Civil Rules* BC Reg.168/2009, rule 22-3

Judgment of Wagner, McLachlin, Rothstein and Moldaver JJ.

Wagner J., writing for the majority, dismissed the appeal under the *1731 Act* and Rule 22-3 of the *Supreme Court Civil Rules*. He determined that these acts excluded the residual discretionary power of the courts of British Columbia to accept documents in French and required that the judicial trials in BC be held in English.

The majority dismissed the appeal but awarded the costs to the appellants throughout.

Judgment of Karakatsanis, LeBel and Abella JJ. (Dissenting)

According to Karakatsanis J., writing for the dissent, the judges of the Supreme Court of BC have the discretionary power to accept documents written in French, but not prepared for a future use before the Court. She also stated that when a judge receives this form of request, he should consider the fundamental importance of Canadian bilingualism as stated at Section 16 of the *Charter*.

Karakatsanis J. would have allowed the appeal and remitted the matter to the B.C. Supreme Court.

Relevant Paragraphs:

Judgment of Wagner, McLachlin, Rothstein and Moldaver JJ.

[1] Each of the provinces has the power under the Constitution, subject to certain restrictions, to make laws governing the language to be used in its courts. This power derives from the provinces' jurisdiction over the administration of justice. The British Columbia legislature has exercised its power to regulate the language to be used in court proceedings in that province by adopting two different legislative provisions which require civil proceedings, including exhibits attached to affidavits filed as part of those proceedings, to be in English.

[13] British Columbia has advanced two legislative rules as a result of which, it says, the documents at issue in this case may not be admitted into evidence: the *1731 Act* and Rule 22-3 of the *Supreme Court Civil Rules*. In my view, both of these rules apply, and their effect is that documents submitted to British Columbia courts must either be in English or be accompanied by an English translation.

[17] There are two criteria for an English statute to be received into law in British Columbia: (1) it must have been in force in England on November 19, 1858; and (2) it must be applicable to local circumstances. Further, in interpreting any received law, a court must consider whether that law has been modified by legislation having the force of law in British Columbia. I will

Case Law Document on Bilingualism in the Judiciary

return to these issues after discussing the scope of the *1731 Act* itself.

[18] As a preliminary matter, the appellants allege that even if the *1731 Act* is applicable in British Columbia, it does not have the effect of requiring that documentary evidence be presented in English. With respect, I cannot agree. It is clear from the words of the *1731 Act* that it applies to a specific set of listed documents, but also to all “proceedings”, which includes the admission of evidence.

[26] In conclusion, if the *1731 Act* applies in British Columbia, I am of the view that it has the effect of requiring that all documents filed in court proceedings be in English or be accompanied by an English translation.

[35] In my view, whether a received statute is applicable must be assessed as of the date it was received, which was November 19, 1858 in British Columbia. To accept the appellants’ argument that a statute’s applicability should be reassessed each time a party attempts to rely on it would be to introduce an unacceptable level of uncertainty into the law and to impose significant and unnecessary burdens on litigants. Moreover, it would be inconsistent with the approach Canadian courts have generally adopted for assessing applicability.

[41] It seems clear from an assessment of the applicability — understood to mean suitability — of the *1731 Act* as of November 19, 1858 that this statute was not “from local circumstances inapplicable”. At that time in British Columbia, the government operated in English. Immigration to the province was coming largely from the United States as a result of the Fraser Canyon gold rush, which meant that English was the common language of settlers. Given that I have rejected the appellants’ purposive approach to the assessment of applicability, it is irrelevant that the problems the *1731 Act* was meant to address (the use of archaic languages in court proceedings) never existed in British Columbia. Nothing about the circumstances in the province would have made a rule requiring that court proceedings be conducted in English unsuitable. The *1731 Act* was therefore received into law in British Columbia and is now in force there, subject to any modifications, which I will discuss below.

[42] The *1731 Act* has not been modified in respect of civil proceedings in British Columbia. It is common ground that the British Columbia legislature has not expressly repealed or modified the *1731 Act*. What remains at issue is whether the *1731 Act* has been *implicitly* modified. Although the parties to this case appear to disagree about the test for implied modification, a closer reading of the authorities reveals that both the appellants and the respondents propose a test based on the concept of occupation of the field. Applying this test, I am unable to conclude that any legislation has “occupied the field” of the *1731 Act* with respect to civil proceedings to the extent required for a finding of implied modification.

[56] However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country’s official

languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of English and French. In my view, therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada's underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.

[57] This being said, in light of s. 16(3) of the *Charter*, which specifically provides that provincial legislatures may advance the equality of status of English and French, it would be open to the British Columbia legislature to enact legislation, like that proposed in 1971, to authorize civil proceedings in French. Such legislation would no doubt further the values embodied in s. 16(3), which protects legislative initiatives intended to increase the equality of the official languages but does not, as this Court has already held, confer any rights. However, given the absence of any such initiative by the British Columbia legislature, it is not possible for this Court to impose one on it.

[58] Even if the *1731 Act* were not applicable to British Columbia or if it had been modified, Rule 22-3 of the *Supreme Court Civil Rules* requires that exhibits attached to affidavits and filed in court be in English. The respondents advanced this as an alternative argument, and it was accepted by both of the courts below.

[59] Although the appellants argue that the exhibits attached to the affidavits were not prepared for use in court, because they were prepared in the usual course of their business, it is my view that once the exhibits were attached to the affidavits, they became part of a document prepared for use in court. It cannot be possible to circumvent the rule by moving information on which a party seeks to rely from the body of the affidavit into an exhibit. If the appellants wish to rely on the content of the exhibits, as opposed to their existence or their authenticity, the exhibits must comply with the rule, since an exhibit that is relied upon for its content is effectively incorporated into the affidavit.

[61] However, Rule 22-3 does introduce a certain discretion to admit documents that do not comply with the rule if their nature would render compliance "impracticable". The word "document" is defined in the rules to include photographs, films, sound recordings and "information recorded or stored by means of any device": Rule 1-1(1). Rule 22-3 requires not only that documents be in English, but also that they be "legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper". In light of the expanded definition of "document", it seems clear that the impracticability exception was intended to apply to items such as photographs, films, receipt books or business ledgers, to which the formatting requirements cannot logically apply.

[62] Where, as in the instant case, the documents at issue are written in French, it is clear that there is nothing inherent in them that would render it impracticable to have them translated into English. As the chambers judge found that there was “no basis upon which I can hold that the nature of the documents exhibited to the affidavits in this case renders it impracticable that they be translated into the English language” (para. 58), I do not accept that the large volume of documents in question can change “the nature of the document[t]” so as to render compliance with the rule impracticable.

Judgment of Karakatsanis, LeBel and Abella JJ. (Dissenting)

[69] With respect, and for the reasons that follow, I do not accept that either the received 1731 English statute — *An Act that all Proceedings in Courts of Justice within that part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language*, 1731, (U. K.), 4 Geo. II, c. 26 (“the 1731 Act”) — or the *British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/2009 (“the Civil Rules”), preclude a superior court judge from accepting as exhibits documents that were prepared in French in the course of business well before litigation was contemplated. I conclude that the British Columbia legislature has not ousted the inherent jurisdiction of the courts to do so.

[78] I agree with the majority’s view that the 1731 Act was not “from local circumstances inapplicable” in colonial British Columbia upon its reception.

[79] In my view, the central interpretive question is whether the 1731 Act addresses a language requirement for the exhibits that the appellant seeks to admit in French.

[82] The 1731 Act states that proceedings are to be conducted in English. With respect to the contrary view of Wagner J., however, this is not the end of the inquiry. The purpose behind the enactment appears to have been an access to justice measure such that ordinary people could understand the administration of justice, abolishing the use of foreign languages and requiring proceedings to be conducted in the language of the realm.

[83] On my reading, however, the prohibition on foreign languages in “proceedings” — no matter how broadly “proceedings” is defined — would not necessarily preclude the tendering or receipt of *physical evidence* or a document as *original* evidence in a language other than English, for example, in order to prove authenticity or intention or a position taken at the time the document was written. Furthermore, while there is an extensive list of items to which the 1731 Act refers, it does not refer to exhibits in particular or to evidence in general. Finally, the scope of application of the 1731 Act itself is not clear. For one, the 1731 Act did not apply universally to the courts of equity. Thus, while the 1731 Act says that “proceedings” are to be conducted in English, and certain enumerated legal documents — prepared by counsel for the proceedings — are to be submitted only in English, nothing on the face of the 1731 Act specifically addresses the language of exhibits filed

as evidence. There is nothing explicit in the statute that prohibits filing a document written in another language even if the oral evidence is in English, or translated into English.

[84] As noted by Cory, Iacobucci and Bastarache JJ. in *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 133, inherent jurisdiction can only be ousted by clear and precise statutory language. Thus, any uncertainty resolves in favour of the court's inherent jurisdiction to control its processes for an orderly and fair trial. As a result, I conclude that the *1731 Act* does not preclude the exercise of inherent jurisdiction to allow pre-existing non-litigation documents originally written in French to be filed as exhibits.

[85] Given my conclusion on the scope of the *1731 Act*, it is not necessary in this case to consider whether the Act has been "modified and altered by all legislation that has the force of law in British Columbia", as provided in s. 2 of the *Law and Equity Act*. However, I do not agree with the majority's approach to this issue.

[89] The *1731 Act* has been clearly modified, for example, by ss. 530 and 530.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which permit French proceedings for criminal trials. As far as the language of civil proceedings, the *1731 Act* has not been *explicitly* modified or altered by legislation that has the force of law in British Columbia. However, that still leaves the question of whether it has been *implicitly* modified by current legislation such as the quasi-constitutional *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which recognises French as an official language of Canada, or by the official language rights enshrined in the *Charter* and their underlying values. I would not foreclose the possibility that these important enactments have modified or altered the *1731 Act*, allowing courts to exercise their inherent discretion to permit the use of French not only in exhibits, but also in aspects of court proceedings beyond the scope of this appeal.

[93] Rule 22-3(2) expressly addresses the language of documents *prepared for use in the court*. I read this as requiring any pleadings, notices of motions, and affidavits, among others, to be prepared in the English language and in a certain format using specified paper (unless doing so would be impracticable, which is not applicable here).

[94] While exhibits of original documents are *used* in court, they are often not *prepared for use* in court. Indeed, in this case, the motion judge found that the exhibits in question were not *prepared* for litigation purposes (2011 BCSC 1043, 21 B.C.L.R. (5th) 62).

[95] It seems to me, based upon the ordinary meaning of the words of the text, that Rule 22-3 does not apply to documents that were not prepared for use in court.

[99] Thus, in my view, Rules 22-3(2) and (3), based upon their express terms, do not preclude the B.C. Supreme Court from exercising its inherent jurisdiction to accept the documents in

Case Law Document on Bilingualism in the Judiciary

their original form if they were not prepared for use in court.

[104] In my view, the British Columbia legislature has not clearly addressed the language in which documents *not prepared for use in court* must be filed. Coupled with the role of bilingualism in the Canadian constitutional context as I will discuss below, I conclude that the B.C. Supreme Court may exercise its inherent jurisdiction to admit French documents if doing so would uphold, protect, and fulfil the “judicial function of administering justice ... in a regular, orderly and effective manner” (Jacob, at p. 28).

[106] Sections 16 and 23 of the *Charter* affirm the fundamental importance of bilingualism in the Canadian constitutional fabric. Section 16(1) of the *Charter* declares that English and French are the two official languages of Canada.

[107] The *Official Languages Act* manifests the fundamentally bilingual character of Canada. This Court has recognized it as a quasi-constitutional statute: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23. While aspects of s. 16 and the *Official Languages Act* require the equal status and equal treatment of each language in federal institutions, the commitment and the aspiration to express Canada’s bilingualism is evident. The Preamble of the *Official Languages Act* makes this clear

[109] Thus, the motion judge should consider relevant constitutional values in exercising his or her inherent jurisdiction. These include the status of French as an official language in Canada, the protection of official language minority rights, and the constitutional commitment to safeguarding and promoting both the French and English languages.

[111] Here, the Conseil was established by enacted statute of the British Columbia legislature. By virtue of s. 23 *Charter* rights, the Conseil operates primarily in French. The trial judge, and all parties and their lawyers, except the Province of British Columbia, understand the French language. The British Columbia government must also have some institutional capacity to understand French (particularly as it is mandated under the *Criminal Code* to provide French trials). Furthermore, the underlying litigation is about constitutional French language rights.

d. Atlantic Provinces

New Brunswick

Section 16.1 of the *Canadian Charter of Rights and Freedoms* and Sections 3 to 5 of the *Official Languages Act* of New Brunswick

Section 16.1 reads as follows:

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Sections 3 to 5 of the *Official Languages Act* of New Brunswick, which indicate that the right interpretation to give the Act must endeavour the equality of status and use of English and French, are an extension of Section 16.1 of the *Charter*.

Decisions relevant to Section 16.1 of the *Charter*

Charlebois v. Mowat, [2001] NBCA 117

Summary of the Law: Section 16.1 of the *Charter* confers the obligation upon the provincial government to take positive measures in order to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community.

Summary of the Facts: Mr. Charlebois appealed before the Court of Appeal of New Brunswick of a decision dismissing his application to quash the city of Moncton by-laws passed only in English under para. 16(2) and 18(2) and Section 16.1. of the *Charter*.

In its analysis, the Court adopted a large and generous interpretation of the provisions raised by the appellant under the principles enumerated in *Beaulac*. In its analysis of the extent of Section 16.1, the Court ruled that this provision confers the obligation upon the provincial government to take positive measures in order to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community.

The Court also ruled that the other provisions raised by the appellant required the adoption of the city by-laws in both official languages.

Case Law Document on Bilingualism in the Judiciary

For these reasons, the Court unanimously allowed the appealed and invalidated the city by-laws of Moncton.

Relevant Paragraphs:

- [7] New Brunswick is officially bilingual. In fact, it is the only officially bilingual province in Canada. Other provinces recognize some language rights and are subject to various obligations arising from legislative or constitutional provisions, but no other province has proclaimed itself bilingual. Legally speaking, the Province of New Brunswick is bilingual because in its legislation and in the Constitution it confers the status of official language on two languages, English and French. It also entrenches therein the principle of equality of the two official languages.
- [8] Indeed, the recent history of the last thirty years shows that successive New Brunswick governments have, on four separate occasions during that period, enacted language rights legislation or have entrenched language rights in the Canadian Constitution which collectively provide the province with a constitutional language regime quite peculiar to New Brunswick and unique in the country. Obviously, these legislative and constitutional provisions impose obligations on the province which are also peculiar to New Brunswick.
- [10] The bilingualism regime established by law in New Brunswick is not personal bilingualism as its purpose is not to ensure that individuals will be proficient in both official languages. Rather, it establishes institutional bilingualism aiming for the use of both languages by the province and some of its institutions in the provision of public services. Under such a regime, individuals have the choice to use either English or French in their dealings with government institutions. On the other hand, certain state activities must necessarily be performed in both languages, legislative bilingualism being a case in point.
- [62] One cannot understand the scope of the language guarantees afforded by the *Charter* without taking into account the fundamental principle which embodies both the language policy implemented in New Brunswick and the commitment of the government to bilingualism and biculturalism. The constitutional principle of the equality of official languages and the equality of the two official linguistic communities and of their right to distinct institutions is the linchpin of New Brunswick's language guarantees regime.
- [63] Indeed, subsection 16(2) constitutionalizes the principle of the equality of status of English and French and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick. Subsection 16(3) states that nothing in the *Charter* limits the authority of the Parliament of Canada or a provincial legislature to adopt measures to advance the equality of status or use of English and French. Even though this provision does not impose a positive obligation on the Parliament of Canada or the provinces, it nonetheless recognizes the possibility for the lawmaker to create language rights other than those entrenched in the *Charter*. Finally, subsection 16.1(1) declares, on the one hand, that the English linguistic community and the French linguistic community have

equality of status and equal rights and privileges and, on the other hand, that they have the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities. Subsection 16.1(2) recognizes the role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection 16.1(1). In short, this section constitutionalizes the principles of *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*, *supra*. The equality provided under section 16.1 is based, not on the equality of the languages as provided for in subsection 16(2), but on the equality of New Brunswick's English linguistic community and French linguistic community. Unlike subsection 16(2), this provision therefore includes collective rights whose holders are the linguistic communities themselves.

[78] Lastly, we have to consider the scope of section 16.1. To the same extent as subsection 16(2), the principle of the equality of the English linguistic community and the French linguistic community in New Brunswick entrenched in section 16.1 of the *Charter* is a telling indication of the purpose of language guarantees and a source of guidance in the interpretation of other *Charter* provisions, including subsection 18(2). By deciding in 1993 to entrench the principle of the equality of the two communities in the *Charter* as a fundamental characteristic of the province, the framers intended to show their commitment towards the equality of official language communities. This provision reaffirms and embodies the commitment made by the lawmakers of this province in 1981 when they enacted *An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick*. (See *Journals of the Legislative Assembly of the Province of New Brunswick*, 1992 Session, December 4, 1992, at pages 4708 to 4721.)

[79] As I have already noted, section 16.1 includes, as opposed to subsection 16(2), a collective and community component as it seeks the equality of communities. Equally, it expressly acknowledges the role of the legislature and government to preserve and promote the equality of official language communities. As a result, it is a unique set of constitutional provisions quite peculiar to New Brunswick which places the province on a unique plane among Canadian provinces.

[80] In my opinion, the interpretation of section 16.1 is related to the interpretation of subsection 16(2) and the conclusions set out by the Supreme Court in *Beaulac* as to the nature and scope of the principle of equality are applicable to section 16.1. Its purpose seems clear to me. While different rights flow from the collective aspect of the equality guaranteed, its purpose is similar to that which the courts have ascribed to section 16. The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes on the provincial government an obligation to take positive measures to ensure that the minority official language community has equality of status and equal rights and privileges with the majority official language community. The obligation imposed on the government derives both from the remedial nature of subsection 16.1(1), in recognition of past inequalities that have gone unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language communities. The

Case Law Document on Bilingualism in the Judiciary

principle of the equality of the two language communities is a dynamic concept. It implies provincial government intervention which requires at a minimum that the two communities receive equal treatment but that in some situations where it would be necessary to achieve equality, that the minority language community be treated differently in order to fulfill both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.

Paragraph 19.(2) of the *Canadian Charter of Rights and Freedoms* and Sections 16 to 26 of the *Official Languages Act* of New Brunswick

Paragraph 19.(2) reads as follows:

19. Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Sections 16 to 26 of the *Official Languages Act (OLA)*,⁴¹ which has been adopted in 1973 and sanctioned in 2002, are an extension of para.19.(2) of the *Charter* and apply to provincial courts and administrative tribunals. The OLA reiterates the obligations applicable to federal institutions under the federal *Official Languages Act*.

Decisions relevant to para. 19.(2) of the *Charter* and Sections 16 to 26 of the *Official Languages Act*

Société des Acadiens v. Assn. of Parents for Fairness in Education, [1986] 1 S.C.R. 549

Summary of the Law: Par.19.(2) of the *Charter* confers the right to use English or French before the courts, but does not include the right to be understood by the court officials.

Summary of the Facts: The appellants alleged that their constitutional language rights had been violated when Stratton J., whose comprehension of French is uncertain, heard them as a member of a formation of three judges.

Judgment of Beetz, Estey, Chouinard, Lamer and Ledain JJ.

⁴¹ *Loi sur les langues officielles*, LN-B 2002, c O-0.5

Case Law Document on Bilingualism in the Judiciary

In his analysis of Section 133 of the *Constitution Act* and 20 of the *Charter*, Beetz J., writing for the majority, determined that given the similarity of Section 19 to 133, this provision should be given the same restrictive interpretation. He then compared para. 19.(2) to Section 20, where the verb “communicate” is used instead of “use”, which implies the right to be understood by the governmental and parliamentary institutions. However, according to him, the use of the verb “use” at para. 19.(2) does not imply the right to be understood in the official language chosen.

For these reasons, the majority dismissed the appeal.

Judgment of Dickson J. (Dissenting)

In his analysis, Dickson J. was concurring for the conclusion to dismiss the appeal. However, he ruled that para. 19.(2) comprised the right to be understood by the court official. According to him, despite the similarities between Sections 133 and 19, these two provisions must receive a different interpretation; para.19. (2) must receive a broad and purposive interpretation.

Relevant Paragraphs:

Judgment of Beetz, Estey, Chouinard, Lamer and Ledain JJ.

47. The issue was different in *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460, where what had to be decided was not the content of the right to choose English or French but in whom the right vested, the issuer or the recipient of a summons issued by a Quebec court. However, in *MacDonald*, submissions were made with respect to communication as a purpose of language rights and with respect to the right to understand judicial processes and proceedings as a requirement of natural justice. These submissions, which are closely related to the issue raised in the case at bar, were considered and discussed in the reasons for judgment. A certain degree of overlapping between the two cases is accordingly inevitable and therefore it will be necessary to quote in this case from the reasons in *MacDonald*.
48. The other difference between the two cases is that the *MacDonald* case dealt with s. 133 of the *Constitution Act, 1867* whereas the relevant provision in the case at bar is s. 19(2) of the *Canadian Charter of Rights and Freedoms*. In my view however, given the similarities of the two provisions, this difference is only one of form, not of substance.
50. Subject to minor variations of style, the language of ss. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 133 of the *Constitution Act, 1867* of which no French version has yet been proclaimed pursuant to s. 55 of the *Constitution Act, 1982*. It would accordingly be incorrect in my view to decide this case without considering the interpretation of s. 133

51. The somewhat compressed and complicated statutory drafting exemplified in s. 133 has been shortened and simplified in ss. 17 to 19 of the *Charter*, as befits the style of a true constitutional instrument. The wording of the relevant part of s. 133 ("may be used by any Person or in any Pleading or Process in or issuing from ... all or any of the Courts of") has been changed to "may be used by any person in, or in any pleading in or process issuing from, any court of". I do not think that anything turns on this change, which is one of form only.
52. Furthermore, in my opinion, s. 19(2) of the *Charter* does not, anymore than s. 133 of the *Constitution Act, 1867*, provide two separate rules, one for the languages that may be used by any person with respect to in-court proceedings and the languages that may be used in any pleading or process. A proceeding as well as a process have to emanate from someone, that is from a person, whose language rights are thus protected in the same manner and to the same extent, as the right of a litigant or any other participant to speak the official language of his choice in court. Under both constitutional provisions, there is but one substantive rule for court processes and in-court proceedings and I am here simply paraphrasing what has been said on this point in the *MacDonald* case, in the reasons of the majority, at p. 484.
53. It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.
54. I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language.
55. I am further reinforced in this view by the fact that those who drafted the *Charter* had another explicit model they could have used had they been so inclined, namely s. 13(1) of the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1:
- 13 (1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.

56. Here again, s. 13(1) of the Act, unlike the *Charter*, has expressly provided for the right to be heard in the official language of one's choice. Those who drafted s. 19(2) of the *Charter* and agreed to it could easily have followed the language of s. 13(1) of the *Official Languages of New Brunswick Act* instead of that of s. 133 of the *Constitution Act, 1867*. That they did not do so is a clear signal that they wanted to provide for a different effect, namely the effect of s. 133. If the people of the Province of New Brunswick were agreeable to have a provision like s. 13(1) of the *Official Languages of New Brunswick Act* as part of their law, they did not agree to see it entrenched in the Constitution. I do not think it should be forced upon them under the guise of constitutional interpretation.

60. The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing. It is a broader and more universal right than language rights. It extends to everyone including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*:

62. While legal rights as well as language rights belong to the category of fundamental rights,

[i]t would constitute an error either to import the requirements of natural justice into...language rights...or vice versa, or to relate one type of right to the other...Both types of rights are conceptually different...To link these two types of rights is to risk distorting both rather than re-enforcing either.

(*MacDonald v. City of Montréal*, reasons of the majority, at pp. 500-501).

63. Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination.

65. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights.

72. I do not think the interpretation I adopt for s. 19(2) of the *Charter* offends the equality provision of s. 16. Either official language may be used by anyone in any court of New Brunswick or written by anyone in any pleading in or process issuing from any such court. The guarantee of language equality is not, however, a guarantee that the official language used will be understood by the person to whom the pleading or process is addressed.

74. I have no difficulty in holding that the principles of natural justice as well as s. 13(1) of the *Official Languages of New Brunswick Act*

entitle a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties.

75. But in my respectful opinion, no such entitlement can be derived from s. 19(2) of the *Charter*.

Judgment of Dickson J. (Dissenting)

7. In interpreting *Charter* provisions, this Court has firmly endorsed a purposive approach: see, for example, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at pp. 366-68; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 155-56; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 499-500. To give effect to a purposive approach in the language context, it is important to consider the constitutional antecedents of the *Charter* language protections, the cardinal values and purpose of the guarantees, the words chosen to articulate the rights, the character and larger objects of the *Charter*, and the purpose and meaning of other relevant *Charter* rights and freedoms. It is to this task that I now turn.

10. Secondly, despite the similarity between s. 133 and s. 19(2), we are dealing with different constitutional provisions enacted in different contexts. In my view, the interpretation of s. 133 of the *Constitution Act, 1867* is not determinative of the interpretation of *Charter* provisions.

16. The final two decisions of this Court I wish to discuss are *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460, and *Bilodeau v. Attorney General of Manitoba*, [1986] 1 S.C.R. 449, which are being rendered concurrently with this judgment. Both raised the question of whether a unilingual summons for a traffic violation offended the constitutional language provisions. A majority of the Court held in each case that a unilingual summons did meet the constitutional requirements. In my opinion, the outcome in both *MacDonald* and *Bilodeau* was clearly required by the words "... either of those Languages may be used ... in any ... Process ...issuing from any Court".

17. The conclusion in each of these cases does not affect the present appeal. Nor would *MacDonald* and *Bilodeau* be determinative of the outcome of an appeal similar to the one at bar arising pursuant to s. 133. Section 133 states clearly that the issuance of process from any court may be in either French or English. In contrast, we are concerned in this case with interpreting the phrase "either of those Languages may be used by any Person ... in ... any Court". This is something quite different from the language used in issuing documents. While s. 133 expressly limits the rights of recipients of court documents by empowering the court to issue documents in a language which the recipient may not understand, no such explicit limitation is to be found with respect to in-court proceedings. In the absence of such a limitation, it is open for the court to conclude that the litigant's right to use either language entails a right to be understood, just as in *Blaikie No. 2*, it entailed a right to bilingual rules of practice.

18. In summary, the jurisprudence of this Court under s. 133 of the *Constitution Act, 1867* and

s. 23 of the *Manitoba Act, 1870* reveals for the most part a willingness to give constitutional language guarantees a liberal construction, while retaining an acceptance of certain limits on the scope of protection when required by the text of the provisions.

(b) *The Purpose of the Language Rights Protected in the Charter*

19. Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history. The constitutional language protections reflect continued and renewed efforts in the direction of bilingualism. In my view, we must take special care to be faithful to the spirit and purpose of the guarantee of language rights enshrined in the *Charter*. In the words of André Tremblay, in his article "L'interprétation des dispositions constitutionnelles relatives aux droits linguistiques" (1983), 13 *Man. L. J.* 651 at p. 653:

[TRANSLATION] In short, a broad, liberal and dynamic interpretation of the language provisions of the Constitution would be in line with the exceptional importance of their function and would remedy the ills which the new Constitution was undoubtedly meant to address.

20. Sections 16 to 22 of the *Charter* entrench two official languages in Canada. They provide language protection in a broad spectrum of public life, including legislatures, courts, government offices and schools.

23. I should add that the *Charter* was designed primarily to recognize the rights and freedoms of individuals *vis-à-vis* the State. When acting in their official capacities on behalf of the State, therefore, judges and court officials do not enjoy unconstrained language liberties. Rather, they are invested with certain duties and responsibilities in their service to the community. This extends to the duty to give a meaningful language choice to litigants appearing before them.

25. There is no disagreement amongst the members of this Court that the right embodies at a minimum the right to speak and make written submissions in the language of one's choice. Must this right, to be meaningful, extend to the right to be understood, either directly or possibly with the aid of an interpreter or simultaneous translation? In my opinion, the answer must be in the affirmative. What good is a right to use one's language if those to whom one speaks cannot understand? Though couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social. We speak and write to communicate to others. In the courtroom, we speak to communicate to the judge or judges. It is fundamental, therefore, to any effective and coherent guarantee of language rights in the courtroom that the judge or judges understand, either directly or through other means, the language chosen by the individual coming before the court.

27. Language rights in the courts are, in my opinion, conceptually distinct from fair hearing rights. While it is important to acknowledge this distinction, each category of rights does not occupy a watertight compartment. Just as fair hearing rights are, in part, intimately concerned with effective communication between adjudicator and litigant, so too are language rights in the court. There will therefore be a certain amount of overlap between the two. At the same time, each category of rights will continue to address concerns not touched by the other. For

Case Law Document on Bilingualism in the Judiciary

example, whether or not an individual is even entitled to an oral hearing comes under the exclusive rubric of natural justice, not language rights.

29. In my opinion, the right to use either French or English in court, guaranteed in s. 19(2), includes the right to be understood by the judge or judges hearing the case. I reiterate that the techniques or mechanisms which might aid in such understanding, such as the use of interpreters or simultaneous translation, are not before us in this appeal.

***Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563**

Summary of the Law: The word “institution”, as found at Section 22 and defined at section one of the *Official Languages Act* does not include the municipalities.

Summary of the Facts: Mr. Charlebois asked the Supreme Court of Canada to declare Section 22 of the *OLA* applicable to the city of Saint John as an institution.

Judgement of Charron, McLachlin, Major, Fish and Abella JJ.

In its interpretation of the word “institution”, the majority adopted a restrictive interpretation framework. The Court concluded that since the word “municipality” did not figure in the list of institutions given in its definition, it would be incoherent to declare that Section 22 includes the municipalities.

For these reasons, Charron J., writing for the majority, dismissed the appeal.

Judgement of Bastarache, Binnie, LeBel and Deschamps JJ. (Dissenting)

Bastarache J., writing for the majority, determined that based on the legislative framework of the *OLA*, the presumption of respect of the *Charter* and the decision *Charlebois v. Moncton (City)*, the majority should have chosen a broad and purposive approach.

For these reasons, the dissent would have partially allowed the appeal. It would have declared Section 22 of the *OLA* applicable to municipalities.

Relevant Paragraphs:

Judgement of Charron, McLachlin, Major, Fish and Abella JJ.

12 Relying on the reasoning in *Charlebois v. Moncton (City)* (2001), 242 N.B.R. (2d) 259, 2001 NBCA 117, where the New Brunswick Court of Appeal, in reasons penned by himself, had concluded that New Brunswick municipalities are institutions of the government for *Charter* purposes, Daigle J.A. found it “plausible” that the definition of “institution”, on its face, includes municipalities and cities. As I will explain later, the weight that should be given to the decision in *Charlebois v. Moncton* lies at the heart of my disagreement with the analysis of Bastarache J. Daigle J.A., for his part, found the interpretation, based on the finding in *Charlebois v. Moncton*, “inconclusive and the analysis incomplete” (para. 27). He therefore proceeded to determine

“whether this plausible interpretation [was] consistent both with the purpose and overall scheme of the *Act* and the intention of the Legislature” (para. 27). For reasons I will outline, he concluded that it was not.

13 In its preamble, the *OLA* proclaims the purposes of the Act are expressly tied to the language guarantees and obligations enshrined in the Canadian Constitution. There is no dispute that the *OLA* is the province’s legislative response to its obligations under the *Canadian Charter of Rights and Freedoms* in relation to institutional bilingualism in New Brunswick. For ease of reference, I reproduce here the *Charter* provisions on official languages that specifically target the province of New Brunswick

14 In *Charlebois v. Moncton*, Mr. Charlebois, the same litigant as in this case, challenged the validity of a municipal by-law which was enacted only in English. The specific question before the New Brunswick Court of Appeal was whether s. 18(2) of the *Charter* included municipal by-laws. On a remedial and purposive reading of the *Charter* language guarantees, the court held that it was appropriate to include municipal by-laws in the province of New Brunswick’s constitutional obligation to enact its statutes in both English and French. In the course of its analysis on this question, the court also expressed its opinion that municipalities are “institutions of the legislature and government of New Brunswick” within the meaning of s. 16(2) of the *Charter*. By way of remedy, the court declared the unilingual by-laws invalid but suspended the effect of the declaration of invalidity for one year to enable the City of Moncton and the Government of New Brunswick to comply with the constitutional obligations set out in the court’s reasons. The court also provided some guidance on how the province may choose to meet its obligations.

15 Bastarache J. finds that it would have been more appropriate for the New Brunswick Court of Appeal in this case “to take a positive stance and see whether it was necessary to limit the scope of the newly defined term in light of the difficulties posed by the drafting of the *OLA*” (para. 32 (emphasis added)). I disagree. First, it is noteworthy that *Charlebois v. Moncton* dealt with s. 18(2) of the *Charter*; hence, the court’s finding that municipalities are “institutions” for the purpose of s. 16(2) is *obiter dictum*. The question as to whether municipalities are institutions within the meaning of s. 16(2) has never been determined by this Court, it is not before us on this appeal, and I express no opinion on whether or not this interpretation is correct. Second, it is also noteworthy that the province’s constitutional obligations, even as defined in *Charlebois v. Moncton*, do not mandate a single specific solution. As aptly noted by the court in the above-noted excerpt, there is room for flexibility. The current *OLA* is the province’s legislative response to its constitutional obligations. It would be inappropriate to pre-empt the analysis with a blanket presumption of *Charter* consistency. Daigle J.A. therefore was quite correct in pursuing the analysis. This brings us back to the question of statutory interpretation that occupies us: what approach did the province of New Brunswick adopt in respect of its municipalities to meet its constitutional obligations?

16 A reading of the *OLA* reveals two main structural features. First, the word “institution”, as defined in s. 1, acts as a central provision that identifies those public bodies on which the Legislature imposes particular language obligations in other provisions of the *OLA*. I will review those obligations shortly. Second, the *OLA* groups under various headings different areas of activity or services which fall under the purview of the public administration of the province and imposes

specific language obligations under each heading. “Municipalities” (which by definition includes cities, towns and villages) is one such heading.

19 If all municipalities, as institutions, are obliged to print and publish their by-laws in both official languages under s. 29, why would it matter what percentage was represented by the official language minority population in any given municipality? Likewise, what would be the sense of prescribing by regulation those services and communications required to be offered in both official languages if all municipalities, as institutions, were required under ss. 27 to 30 to provide them all? What is left for a municipality to declare itself bound under s. 37 if it is already bound by the general obligations imposed on institutions? Those are the “incoherent and illogical consequences” that Daigle J.A. found determinative in the search for the Legislature’s intent. I agree, particularly because, if the opposite interpretation is adopted and “institution” is read as not including municipalities, the internal coherence is restored. Bastarache J. would read the specific obligations set out under the heading “Municipalities” as exceptions to the general provisions applying to institutions. With respect, this approach would require much reading in and reading out, none of which is consistent with the limited role that *Charter* values can play as an interpretative tool.

22 Bastarache J. is of the view that if the definition of “institution” excluded municipalities this would give rise to an incongruity in the fact that a bilingual city like Moncton, or one subject to specific obligations regarding the provision of its services in both official languages like Saint John, would be obliged under s. 20(1) to adopt the language of any person prosecuted under a by-law but would be free to use either official language in any civil proceeding to which it was a party. With respect, if there is any incongruity in the fact that a municipality may have different language obligations depending on whether it is prosecuting under a by-law or is a party to a civil proceeding, this situation has been in existence since 1982 when the choice of official language of a defendant in quasi-criminal proceedings was first accorded special recognition by the Legislature in New Brunswick and no similar provision was adopted in respect of civil proceedings. However, it is my view that the different nature of the proceedings removes any incongruity. The requirements of natural justice are not necessarily the same in quasi-criminal and civil proceedings. I find nothing incongruous in the choice of a blanket provision such as s. 20(1) to meet the exigencies of justice in a quasi-criminal setting, while leaving justice to be achieved on a case-by-case application of s. 18 in civil proceedings involving municipalities that have not opted in pursuant to s. 37. Section 18 provides that “[n]o person shall be placed at a disadvantage” by reason of his or her choice of official language.

24 In the context of this case, resorting to this tool exemplifies how its misuse can effectively pre-empt the judicial review of the constitutional validity of the statutory provision. It risks distorting the Legislature’s intent and depriving it of the opportunity to justify any breach, if so found, as a reasonable limit under s. 1 of the *Charter*. In this respect, Daigle J.A. properly instructed himself and rightly found, at para. 58, that the contextual and purposive analysis of the *OLA* “removed all ambiguity surrounding the meaning of the word ‘institution’”. Absent any remaining ambiguity, *Charter* values have no role to play.

Judgement of Bastarache, Binnie, LeBel and Deschamps JJ. (Dissenting)

36 This approach is not new. It is now a template for the interpretation of language rights,

specially, as just demonstrated, where there is apparent conflict and ambiguity. Under it, the first step is not to read down the protections to eliminate inconsistencies, but to make sense of the overall regime in light of the constitutional imperative of approaching language rights purposefully, with a view to advancing the principles of equality and protection of minorities. Institutional bilingualism is achieved when rights are granted to the public and corresponding obligations are imposed on institutions (see *Beaulac*, at paras. 20-22). No rights are given as such to institutions. Any interpretation of the *OLA* must take this into account. The real issue here is whether the apparent inconsistency between ss. 27 and 36 is such that the institutional obligations recognized *a priori* in s. 22 must of necessity be read down.

37 In the particular context of this case, I find quite incongruous the fact that a bilingual city like Moncton, or one subject to specific obligations regarding the provision of its services in both official languages like Saint John, is obliged to adopt the language of any person alleged to have committed an offence under a by-law pursuant to s. 20(1), but should be entitled, under the interpretation given by the Court of Appeal, to adopt the language other than that chosen by a party to a civil action against it pursuant to s. 22. The Union of Municipalities of New Brunswick, an intervener, argued that it would be more onerous for municipalities to comply to s. 22 than to s. 20(1) because municipal governments often proceed without lawyers in civil cases, and that the distinction between regulatory offences and civil actions is determinative of legislative intention. I do not think this argument is convincing; even if it were, it is hard to understand why the Legislature would impose the much more onerous task of providing bilingual services to a city or municipality and not impose on it the obligations of s. 22 because they are more onerous than those in s. 20(1). More importantly, I do not think the position of the intervener is reflective of a generous approach to interpretation, an approach consistent with the intent to achieve equal access to the courts, and in particular with the principle set out in s. 18 of the *OLA*

38 As mentioned earlier, the principles of interpretation applicable here are clearly developed in *Beaulac*, a case dealing specifically with the interpretation of a statute creating language rights that exceed those that are mandated by the Constitution. In my view, where the Legislature is extending the protection of minority rights, the Court must not adopt a restrictive interpretation in order to eliminate apparent inconsistencies in the law. It must, rather, search for a meaning consistent with the protection of minorities and the achievement of equal rights for the two official languages and language communities that can be reconciled with the wording of the legislation whenever possible. The pronouncements of this Court at paras. 20 and 24 of *Beaulac* are rather apt in a province where the equality of language communities has been enshrined in the Constitution (see s. 16.1 of the *Charter*).

41 In *Beaulac*, this Court clearly stated that in the context of institutional bilingualism, language provisions should not be read as creating accommodation or privileges, but as creating positive rights giving rise to a duty to provide the means for their implementation (para. 24). The Court said, at para. 22: “Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada.” Obviously, this will apply only once the rights are recognized, but the interpretative rule is by its very nature inconsistent with the approach suggested by the Union of Municipalities of New Brunswick and the City of Saint John. The Court must be guided by the need to give meaning to institutional bilingualism.

44 Policing services have already been defined as institutions of the government in *R. v. Gautreau* (1989), 101 N.B.R. (2d) 1 (Q.B.), overturned on other grounds in (1990), 109 N.B.R. (2d) 54 (C.A.), and *R. v. Haché* (1993), 139 N.B.R. (2d) 81 (C.A.). There also appears to be no need to read down the obligations resulting from that interpretation in order to implement s. 31 of the *OLA*; in fact, s. 32 affirms this. Health services are dealt with in s. 33. Section 33(1) extends the definition of “institution” in that case. As noted earlier, s. 4 restricts the meaning of “institution” with regard to educational and cultural institutions, in conformity with s. 16.1 of the *Charter*. In my view, the above provisions are a clear indication that the definition of “institution” in s. 1 must be wide and comprehensive. There is no clear reason to believe it should be more restrictive than the definition given by the Court of Appeal in *Charlebois*, in 2001. The respondent alluded to the fact that the legislation of the Northwest Territories and Nunavut specifically exempts municipalities; Ontario also exempts municipalities expressly. In my view, this only goes to show that the word “institution” would normally apply to municipalities.

50 The normal rules of statutory interpretation provide for a contextual approach. One major factor to be considered in the present appeal is the proposition that the Legislature’s intention is to implement the rights defined in the *Charter* as interpreted by the Court of Appeal in 2001, and that it wants to extend the minimum constitutional protections in the spirit of s. 16(3) of the *Charter*. The Court must therefore favour the extension of rights and obligations and acknowledge that general obligations must be limited, for specific institutions, only where such limitations are clearly spelled out, as in s. 4, or implicitly spelled out, as in the case where there is a conflict between general and specific provision, as for ss. 27 to 29 and 36. But there is no valid reason to limit obligations under s. 22 by reading down the definition of the term “institution” when there is no direct conflict between ss. 22 and 36. In reality, a restrictive approach to interpretation, founded solely on the rule of uniformity of expression, applied mechanically, cannot be responsive to the legislative intent revealed by the preamble of the *OLA* and the simple fact that the government has decided to implement the 2001 decision in *Charlebois* defining the term “institution” rather than to lodge an appeal before this Court. Reading down the definition of “institution” is not only unnecessary, it is also contrary to principle. The AJEFNB suggests that ss. 27, 28 and 36 can be read together so that all municipalities be required to respond to a communication, this obligation not being one specified in s. 36, but that only those municipalities required to provide services under s. 36 be subject to the obligation regarding services in ss. 27 and 28. This, says the AJEFNB, is a better method for applying the rule of internal consistency. I agree. Internal consistency is not only about uniformity of expression; it is mostly interested in coherence of the *OLA* with regard to its objects and its effects.

Nova Scotia

French-language Services Act

In its purpose to contribute to the preservation and growth of the Acadian and francophone community and provide for the delivery of French-language services by public institutions, the

Case Law Document on Bilingualism in the Judiciary

province of Nova Scotia adopted the French-language Services Act,⁴² which allows the Minister to make regulations designating the courts of justice that have an obligation to provide French-language services.

Note: To date, there is no relevant case law available for this act.

e. Territories

Northwest Territories

Official Languages Act, section 110 of the North-West Territories Act and Judicature Act

Note: The *Official Languages Act* only applies to judicial tribunals.

Sections 9 of the *Official Languages Act*⁴³ and 110 of the *North-West Territories Act* provide that any person has the right to use French or English before the courts of justice of the Northwest Territories and in the proceedings that flow from. In addition, the *Judicature Act*⁴⁴ provides that the Court offers simultaneous interpretation at its own expense.

Section 10 of the *Official Languages Act* also provides that the courts decisions must be fully bilingual when the case is important in the public interest or when trial has been primarily conducted in both official languages.

Note: To date, there is no relevant case law available for these provisions in the judiciary.

Yukon

Languages Act

⁴² *French-language Services Act*, SNS 2004, c 26

⁴³ *Official Languages Act*, RSNWT 1988, c O-1

⁴⁴ *Judicature Act*, RSNWT 1988, c J-1

Case Law Document on Bilingualism in the Judiciary

Section 5 of the *Languages Act*⁴⁵ provides that any person has the right to use French or English before the courts of justice of Yukon and in the proceedings that flow from.

Decisions relevant to the *Languages Act*

R v. T.D.M., [2008] YKCA 16

Summary of the Law: Section 5 of the *Languages Act* provides that a witness has the right to use the official language of his choice before the courts of justice of Yukon.

Summary of the Facts: The Crown disputed the decision of the Supreme Court of Yukon to refuse the right to her witness whose mother tongue is French to use this language during an English trial before the Court of Appeal of Yukon.

In its analysis, the Court of Appeal relied on its interpretation of the French and English versions of Section 5 of the *Languages Act* to determine that a witness has the right to use the official language of his choice before the courts of justice of Yukon.

However, the Court then relied on the principles established in *Vézeau v. The Queen* and *R v. Morin* to determine that the fact that the witness had used English did not cause a serious harm to the issue of the trial.

For these reasons, the Court unanimously dismissed the appeal.

Relevant Paragraphs:

Effect of the *Languages Act*

[26] The English version of s. 5 uses the expression “may be used”, which could be interpreted as permissive only. However, when read together with the French version – “chacun a le droit d’employer” – it is clear that the legislature intended to confer, amongst other things, a “right” to testify in either official language. Although in *Kilrich Industries Ltd.*, Huddart J.A. does not discuss interpreting bilingual legislation, it is evident that she concluded that s. 5 of the *Languages Act* confers certain rights with respect to the use of English and French: paras. 71, 72. Also of note is the fact that the words used in both versions of s. 5 are identical to those used in s. 19 of the *Charter*, which deals with the right to use English and French in courts established by Parliament and by New Brunswick.

[35] In my view, *Jones* stands for the proposition that, subject to the paramountcy doctrine,

⁴⁵ *Languages Act*, RSY 2002, c 133

Case Law Document on Bilingualism in the Judiciary

the authority to enact legislation with respect to the “administration of justice” vested by s. 92(14) of the *Constitution Act, 1867*, confers on the provinces the power to enact legislation giving a witness the right to use either French or English in a criminal proceeding. This proposition also holds true for language rights legislation enacted by Yukon in the exercise of the authority delegated to it by Parliament through s. 18(1)(k) of the *Yukon Act*.

[43] To summarize, I have reached the following conclusions:

- (a) s. 5 of the *Languages Act* gives a witness a right to testify in either English or French in federal criminal proceedings before Yukon courts;
- (b) there is no conflict or incompatibility between s. 5 and Part XVII of the *Criminal Code*; and
- (c) the trial judge erred in denying G.A. his statutory right to testify in French.

[44] As the trial judge erred in law in directing G.A. to testify in English, it must now be decided whether a new trial should be ordered pursuant to s. 686(4)(b)(i) of the *Criminal Code*. The Crown accepts that the standard it must meet to obtain a new trial is that set out by Chief Justice McLachlin in *R. v. Sutton*, 2000 SCC 50 (CanLII), [2000] 2 S.C.R. 595, 2000 SCC 50:

2 The parties agree that acquittals are not lightly overturned. The test as set out in *Vézéau v. The Queen*, 1976 CanLII 7 (SCC), [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. In *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345, this Court emphasized that “the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty” (p. 374).

[46] In reviewing the transcript I did not find anything that suggests that G.A. had any linguistic difficulty in describing the incident he said he witnessed. Further, and more significantly, I did not find anything to support the contention that G.A. had any linguistic difficulty in answering questions put to him in cross-examination with respect to inconsistencies in his evidence, or regarding why he did not tell anyone about the alleged incident for several weeks. The trial judge’s concerns with respect to G.A.’s veracity were grounded in the substance of his testimony. In light of the completeness of G.A.’s evidence, these concerns would have existed even if G.A. had testified in French. In other words, the outcome of the trial was not affected by the fact that G.A. was directed to testify in English.

***Kilrich Industries Ltd. v. Halotier*, [2007] YKCA 12**

Summary of the Law: Sections 4 and 5 of the *Languages Act* require the printing and publishing of the laws of Yukon in both official languages, but Sections 4, 5 and 6 do not impose positive obligations upon the State to ensure the respect of the language rights provided in these provisions.

Summary of the Facts: Before the Court of appeal of Yukon, Mr. Halotier, whose mother tongue is

Case Law Document on Bilingualism in the Judiciary

French, claimed that his language rights provided in the *Languages Act* had been violated because he did not get access to the *Rules of Court* in French and therefore had been unable to communicate in French and be understood in this language during the hearing.

In its analysis, the Court of Appeal determined that Sections 4 and 5 of the *Languages Act* required that the *Rules of Court* be printed and published in both official languages. However, the Court also determined that Sections 5 and 6 did not impose any positive obligation upon the courts of Yukon or the Registry of the Supreme Court of Yukon.

For these reasons, the Court unanimously concluded that the appellant was entitled to a remedy under Section 9 of the *Languages Act*. The Court allowed the appeal and ordered a new trial before the Supreme Court of Yukon. It also declared the *Rules of Court* invalid and gave 12 months to the the Supreme Court and the government of Yukon to comply with the requirements of Section 4 of the *Languages Act*.

Relevant Paragraphs:

[22] While these issues do not require an extensive historical review, the evolution of French language rights in the Yukon Territory provides a useful backdrop for their analysis. The advent of official bilingualism in the Yukon is a relatively recent development and largely parallels the process in the Northwest Territories (see *Fédération franco-ténoise c. Procureure générale du Canada*, 2006 NWTSC 20 (CanLII), 2006 NWTSC 20, [2006] N.W.T.J. No. 33, (S.C.)(QL)) and, to a lesser extent, that in Saskatchewan and Alberta (see *R. v. Mercure*, 1988 CanLII 107 (SCC), [1988] 1 S.C.R. 234 (“*Mercury*”)).

[32] Although the *Languages Act* represents a relatively recent development in terms of official bilingualism, its history, the circumstances of its enactment, and as will become apparent, its terms, suggest it was a compromise that sought both to place Canada’s two official languages on a quasi-constitutional footing in the Yukon and to afford protections similar in principle to the language rights contained in the *Canadian Charter of Rights and Freedoms* and s. 133 of the *Constitution Act, 1867*.

Should the Languages Act be given a large, liberal and purposive interpretation in accordance with Canada’s commitment to the protection of minority language rights?

[46] It is apparent from this survey that the restrained approach supported by the intervenor no longer has any place in the consideration of statutory minority language rights. Moreover, as the appellant points out, this broad and purposive approach to language rights is buttressed by the Constitution’s underlying concern with the protection of minority rights, about which the Supreme Court reflected in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 (“*Re Quebec Secession*”) at para. 80:

. . . we highlight that even though those provisions were the product of negotiation

and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter's* provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342.

[Emphasis added.]

[51] I would, however, add one cautionary note arising from the respondent's submission and the majority opinion in *Charlebois, supra*, where the Supreme Court of Canada held that a broad, purposive interpretation does not permit the court to disregard the ordinary rules of statutory interpretation. That case concerned the meaning of the word "institution" in the New Brunswick *Official Languages Act*. The respondent City had filed pleadings in English, which, the appellant argued, contravened that Act. Section 22 required Her Majesty or an "institution," when a party to a civil matter, to use the official language chosen by the other party. The question was whether municipalities fell within the meaning of the term institution. In dismissing the appeal, Charron J. (for the majority) (at para. 23) referred to the continued salience of *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559 and cautioned against interpretations that would eschew the ordinary approach to statutory interpretation:

In the context of this case, resorting to this tool [*Charter* values] exemplifies how its misuse can effectively pre-empt the judicial review of the constitutional validity of the statutory provision. It risks distorting the Legislature's intent and depriving it of the opportunity to justify any breach, if so found, as a reasonable limit under s. 1 of the *Charter*. ...

[52] As Charron J. suggests, this Court must be mindful of the limits of the *Languages Act* and avoid pre-empting judicial review of the constitutional status of language rights in the Yukon Territory. This is particularly so where, as in the present case, the Yukon government has not been given the opportunity to justify an alleged breach in accordance with s. 1 of the *Charter*.

Are authorities interpreting similar statutory and constitutional provisions regarding language rights applicable to the interpretation of the Languages Act?

[53] To the extent the wording of the provisions in the *Languages Act* is similar to language used in the *Charter* and s. 133 of the *Constitution Act, 1867*, it follows naturally from their similar purpose that the interpretation of those constitutional provisions will provide considerable guidance in the interpretation of the *Languages Act*. Nevertheless, the interpretation in other decisions cannot be determinative. This Court's task is to interpret the *Languages Act* taking a broad and purposive

approach, but in the unique context of the Yukon and with the caution from *Charlebois* firmly in mind.

Does the phrase “Acts of the Legislative Assembly and regulations made thereunder” in s. 4 of the Languages Act include the Rules of Court, forms, practice directives, and notices to the profession such that they must be published in both official languages?

[56] Nor do I agree with the intervenor’s response that s. 4 does not require the printing and publication of the *Rules of Court* in French because they are excluded by the definition of “regulation” in the *Regulations Act*, R.S.Y. 2002, c. 195 (the “*Regulations Act*”). I consider the *Rules of Court* must be published in English and French because they are established by the *Judicature Act* and their publication is necessary to give meaning and effect to ss. 4 and 5 of the *Languages Act*.

[63] Because the Legislative Assembly chose to use language in s. 4 of the *Languages Act* that tracks that in s. 18 of the *Charter*, s. 133 of the *Constitution Act, 1867* (*Société des Acadiens, supra* at 573), s. 23 of the *Manitoba Act, 1870*, and s. 110 of the *North-West Territories Act*, I am persuaded it should be read as imposing the same obligation on the Yukon government. (See *Re Manitoba Language Rights, supra* at 744 and *Mercure, supra* at 273). In my view, all enactments, including delegated legislation, are to be published in both languages; so, too, are the rules of court made by judges.

[69] In my view, as a result of the method the Legislature used to establish them, the *Rules of Court* are statutory in effect. They are legislative acts that must be printed and published in both French and English and include the forms prescribed by those rules and all practice directives issued by the judges of the Supreme Court to amend the *B.C. Rules* as permitted by s. 38 of the *Judicature Act*, all of which have the force of law and are effectively delegated legislation. That variations in the *Rules of Court* are made by practice directive is a question of form, not substance.

What rights flow from s. 5 of the Languages Act?

[72] Consideration of some of the claimed rights is straight-forward. The right to file documents with the registry in French and the right to use French in communicating orally or in writing with the registry flow naturally from the language of s. 5 of the *Languages Act*. When proceedings are required by law to be recorded, a person using either French or English has the right to have his words recorded in that language (*Mercure, supra* at 275-6). It follows that any transcript of such a proceeding should include testimony in the language (if French or English) in which it was given. Otherwise, as La Forest J. noted in *Mercure*, the right to use one’s chosen language would be seriously truncated, particularly if the proceedings continued on to the Court of Appeal. And consistent with my view of s. 4, for the right to use English or French in a court proceeding to have any meaning, the court must make its rules (including forms and practice) available to the public in French in the same way it does in English.

[73] The other rights the appellant claims are more difficult of analysis, particularly those that

imply a positive obligation on the court, such as the obligation to provide a bilingual judge, clerk or officer of the court, or an interpreter. However desirable these services may be, I am not persuaded s. 5 imposes an obligation to provide them.

[74] To begin, the Supreme Court of Canada has refused to find the imposition of any positive duty in the comparable language of s. 133 of the *Constitution, 1867*, or s. 19(2) of the *Charter*. In *Société des Acadiens, supra*, Beetz J. (for the majority) explained at 574:

It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in *MacDonald*, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.

[Emphasis added.]

[80] Almost inevitably, the implication of construing s. 5 as including positive obligations would be to pre-empt constitutional review and the opportunity for the government to justify its decision under s. 1 of the *Charter*—something which Charron J. warned against in *Charlebois, supra*.

[81] A final reason for rejecting a more expansive interpretation of s. 5 is that courts have unequivocally recognized that the right to speak and be understood is protected by the requirements of natural justice and the right to a fair hearing. Important for the Yukon, in particular, is the explanation offered by Bastarache J. at para. 41 of *Beaulac*:

...The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions. Thus, in *MacDonald v. City of Montreal, supra*, Beetz J., at pp. 500-501, states that:

It would constitute an error either to import the requirements of natural justice into . . . language rights . . . or vice versa, or to relate one type of

right to the other. . . . Both types of rights are conceptually different. . . . To link these two types of rights is to risk distorting both rather than reinforcing either.

[83] In summary, as I see it, the right to registry services in French and English is to be considered under s. 6 of the *Languages Act*. The right to be understood directly or through an interpreter, and the right to a transcript that includes interpretation of the original French or English voices are left to the discretion of the trial judge who is obliged to conduct a fair trial, with full regard for the right of every person in a Yukon court to speak and produce documents in French or English and to other rights guaranteed by the *Charter*, including the right to an interpreter under s. 14, and the need to give “true meaning” to the principle of equality which Bastarache J. noted in *Beaulac* (at para. 22).

In the alternative, is the Senior Judge required to assign a judge who speaks and understands French to preside at a trial where a litigant wishes to speak in French?

[85] For the reasons I rejected the submission that s. 5 of the *Languages Act* imposes such an obligation, I do not accept this submission. It seems to me that this is another way of seeking to impose an obligation to communicate or be understood in French, which, as I have said, does not follow from the language of s. 5.

Does s. 6 of the Languages Act apply to the Yukon Supreme Court as the central office of an institution of the Yukon Legislative Assembly or the Government of the Yukon?

[88] The *Languages Act*, unlike the New Brunswick *Official Languages Act* at issue in *Charlebois*, does not define the term “institution”. However, to me it is self-evident that the Supreme Court must fall within the meaning of the term, as it is an organized body established by the Yukon Legislative Assembly. It is enough to look to the ordinary meaning of the word as used in the authorities cited on this appeal to decide the Legislative Assembly intended to include Superior Courts within its meaning. The Supreme Court of Canada has referred time and again to the court as an “institution” and to the importance of the “institutional independence” of the courts. Likewise, given its administrative arrangements, the registry in Whitehorse has to be seen as the court’s “central office”.

[95] In my view, s. 6 of the *Languages Act*, when read with its object and purpose, requires the registry to provide the same assistance to self-represented French-speaking litigants as it provides to self-represented English speaking litigants. A simple example of a comparable service would be to answer the telephone with a bilingual greeting (“Bonjour/Hello”), followed by a transfer to the bilingual counter clerk if the caller responds in French.

Application to this proceeding

Case Law Document on Bilingualism in the Judiciary

[96] In my view, M. Halotier has established a breach of his language rights that entitles him to a remedy under s. 9 of the *Languages Act*:

Anyone whose rights under this Act have been infringed or denied may apply to a court of competent jurisdiction to obtain any remedy the court considers appropriate and just in the circumstances.

[97] Without the ability to obtain a complete and current copy the *Rules of Court* in French, M. Halotier could not effectively exercise the right granted him by s. 5 of the *Languages Act* and use French throughout this proceeding, in pleadings, at the settlement conference, and at the summary trial. For this reason alone, I would allow the appeal, set aside the order of Gower J. and remit the matter for a new trial. Although I note this remedy typically follows from a breach of procedural fairness, (see *Bilodeau* and *Mercure*, *supra*), it is appropriate in light of the overall circumstances of this case and the language of s. 9.

Nunavut

Official Languages Act

The provisions of the *Official Languages Act* of the Northwest Territories also apply to Nunavut under Sections 29 and 38 of the *Nunavut Act*.⁴⁶

Note: To date, there is no relevant case law available for this act in the judiciary.

Section 110 of the North-West Territories Act and section 12 of the Consolidation of Official Languages Act of the Northwest Territories

According to Section 110 of the *North-West Territories Act*, any person has the right to use French or English before the courts of the Territories and in all proceedings that flow from.

In addition, Section 12 of the *Consolidation of Official Languages Act*⁴⁷ provides that any person has the right to simultaneous interpretation when the trial is in the public interest.

Note: To date, there is no relevant case law available for these provisions in the judiciary.

⁴⁶ *Nunavut Act*, SC1993, c 28

⁴⁷ *Consolidation of Official Languages Act*, RSNWT 1988, c O-1

Official Languages Policy (Northwest Territories)

According to the *Official Languages Policy*,⁴⁸ the courts decisions must be fully bilingual when the case is important in the public interest or when the proceedings leading to the issuance of the decision were conducted in whole or in part in both official languages.

Note: To date, there is no relevant case law available for this policy in the judiciary.

II. Criminal Matters

Despite the fact that prosecutions are engaged before the provincial courts, the federal government has jurisdiction to legislate regarding the criminal procedure. Therefore, the government adopted part XVII of the *Criminal Code*,⁴⁹ which describes the language rights of the accused.

According to Section 530 of the *Criminal Code*, the accused has the right to choose to have his trial in the official language of his choice and the trial judge must inform him of this right. Subsection 530(4) provides that where an accused fails to apply for an order, the judge must determine if it is in the best interests of justice that the accused be tried in the official language of his choice.

In addition, upon request by the accused, the prosecutor is required to provide a translation of the parts of the denunciation applicable and the indictment written in the other official language.

⁴⁸ *Official Languages Policy*, Guideline n° 11 1997

⁴⁹ *Criminal Code*, R.S.C. 1985, c C-46

Decisions relevant to criminal matters

R v. Beaulac, [1999] 1 S.C.R. 768

Summary of the Law: The purpose of Section 530 of the *Criminal Code* is to provide equal access to courts in the official language of the accused and the non-compliance with this provision must lead to a new trial.

Summary of the Facts: Mr. Beaulac, whose mother tongue is French, had his trial in English before the courts of British Columbia. Before the Supreme Court, he asked for a new trial in French under Subsection 530(4) of the *Criminal Code*.

In its analysis, the Supreme Court studied the criterion of the “best interests of justice” as found in the article. It determined that in the application of this criterion, the judge must consider the principles of equality of the two official languages of Canada and the preservation and development of official language communities in Canada. The Supreme Court also stated that language rights must be interpreted purposively. It drew a clear distinction between language rights in a trial and the universal right to a fair trial, which applies to every accused regardless of the language. Finally, it stated that an administrative inconvenience could not justify the exercise of the judge’s discretionary power because the use of an official language should not be considered an accommodation.

For these reasons, the Court unanimously ordered a new trial in French for Mr. Beaulac. It also allowed, by a 7-2 majority, the interpretative framework proposed by Bastarache J.

Relevant Paragraphs:

28 Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with. The interpretation given here accords with the interpretative background discussed earlier. It is also an important factor in the interpretation of s. 530(4) because that subsection simply provides for the application of the same right in situations where a delay has prevented the application of the absolute right in subs. (1). One of the main questions facing this Court is the interpretation of this scheme when it interacts with the requirement of a new trial. In reading s. 530, I am left with the impression that the drafters of the section did not consider the particular situation of the retried accused. This leaves the courts with a very unsatisfactory set of rules to apply in such a case. Nevertheless, we must endeavour to provide a solution that will not only respect as much as possible the words of the provision, but most importantly its spirit.

31 The object of s. 530(1) is to provide an absolute right to a trial in one's official language, providing the application is timely.

34 The solution to the problem, in my view, is to look at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity; *Ford, supra*, at p. 749. The language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language. I note that s. 530(2) will apply to individuals who do not speak either of the two official languages. An accused's own language, for the purposes of s. 530(1) and (4), is either official language to which that person has a sufficient connection. It does not have to be the dominant language. If the accused has sufficient knowledge of an official language to instruct counsel, he or she will be able to assert that that language is his or her language, regardless of his or her ability to speak the other official language. The Crown may challenge the assertion made, but it will have the onus of showing that the assertion is unfounded. The court, in such a case, will not inquire into specific criteria to determine a dominant cultural identity, nor into the personal language preferences of the accused. It will only satisfy itself that the accused is able to instruct counsel and follow the proceedings in the chosen language.

37 In order to determine the proper definition that is applicable, the object of s. 530 must again be considered. Since the rule is the automatic access to a trial in one's official language when an application is made in a timely manner, and a discretionary access when such an application is not timely, the trial judge should therefore consider, foremost, the reasons for the delay. The first inquiry that comes to mind is directed at the knowledge of the right by the accused. When was he or she made aware of his or her right? Did he or she waive the right and later change his or her mind? Why did he or she change his or her mind? Was it because of difficulties encountered during the proceedings? It is worth mentioning at this point that the right of the accused to be informed of his or her right under s. 530(3) is of questionable value because it applies only when the accused is unrepresented. The assumption that counsel is aware of the right and will in fact advise his or her client of that right in all circumstances, absent a duty to do so, is unrealistic, as confirmed by the report of the Commissioner of Official Languages of Canada, *The Equitable Use of English and French Before the Courts in Canada* (1995), at p. 105.

39 I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there

Case Law Document on Bilingualism in the Judiciary

was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.

***R. v. Musasizi*, [2010] QCCM 17**

Summary of the Law: Sections 530 and 530.1 of the *Criminal Code* require the holding of a trial in the official language chosen by the accused and necessitate that the prosecutor be able to speak and understand the official language chosen.

Summary of the Facts: The accused, whose mother tongue is English, asked for a trial in English under Sections 530 and 530.1 of the *Criminal Code*. Before the Municipal Court of the City of Montreal, he disputed the holding of a bilingual trial in which the pleadings were partly in French.

In its analysis, the Court relied on *Beaulac* to give a broad and purposive interpretation of Sections 530 and 530.1. It also relied on *R v. Dow* to determine that the trial judge and the Crown prosecutor had the obligation to use the official language chosen by the accused.

For these reasons, the trial judge allowed the appeal and ordered a new trial in French.

Relevant Paragraphs:

[31] In the case of *R. v. Beaulac*, Justice Bastarache defines the linguistic rights pursuant to section 530 (1) in these unequivocal terms in paragraph 28 :

“28 Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with.”

[32] About the administrative inconveniences to insure the equal use of the two official languages of Canada, again, Justice Bastarache in *Beaulac* states at paragraph 39 :

“39 I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As

mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.”

- [33] In *R. v. Dow*, the Court of Appeal insisted on the obligation for the presiding judge and the prosecutor to use one of the official languages chosen by the defendant for the entirety of the proceedings, including the discussions on some matters of law and the delivery of interlocutory decisions.

“89 In any event, in this instance the trial judge and Crown counsel misapprehended the purpose for which an interpreter is present at the trial of an English-speaking accused. The only reason for an interpreter is because one or more French-speaking witnesses will testify. The proper role of the interpreter is thus limited to interpreting the questions of counsel from English to French for a French-speaking witnesses and the answers of such witnesses from French to English. The presence of an interpreter is for the benefit of French-speaking witnesses, the accused and the jury, but not for that of the trial judge and Crown counsel, who must conduct themselves as if there was no interpreter present in the Courtroom. This is the only conclusion to be drawn from the absence of reference to the trial judge and Crown counsel in sub-section 530.1(f) Cr. C.

93 Just as the Crown as a party must provide a counsel to a case before an English-speaking jury who is both able and willing to speak the language chosen by the accused during the duration of a criminal jury trial, so too should those responsible for the assignment of judges to cases of an English-speaking accused ensure that such judges are both able and willing to speak the language chosen by the accused for the duration of the trial. This certainly extends to the delivery of oral interlocutory judgments during the trial, which can be every bit as significant to an accused as the delivery of the trial judge's jury instructions.”

- [39] Section 530 and section 530.1 of the *Criminal Code* do not set out any particular formalities that need to be followed when a defendant invokes any of the rights provided by the above sections. It can therefore be in writing or more often, verbally.
- [40] One condition must however be observed: an application must be made not later when the trial date is set.
- [41] Considering the various rights that section 530 *Cr.C.* enumerates, the application must set forth and express in clear terms which rights the defendant is invoking.
- [47] It is the absolute right of the defendant to have a unilingual trial. But it is also his absolute obligation to apply timely for it and in clear terms.

Case Law Document on Bilingualism in the Judiciary

[57] Concerning the right pursuant to section 530.1 (f) *Cr.C.* (right for the assistance of an interpreter), defence counsel was right to object to the use of French language and the use of the interpreter by the Crown prosecutor while debating the motion of non-suit. The use of the interpreter was solely for the benefit of the defendant, his counsel or witnesses, not for the benefit of the presiding judge or the Crown prosecutor.

McCulloch Finney v. Canada (Attorney General), [2009] QCCS 4646

Summary of the Law: The right to the assistance of an interpreter only applies to criminal matters under Section 530 of the *Criminal Code*.

Summary of the Facts: Before the Superior Court, Ms. Finney, whose mother tongue is English, argued that the right to a fair trial in civil matters required the State to provide an interpreter at its own expense.

In its analysis, the Superior Court ruled that the right to the free assistance of an interpreter only applies to criminal matters under Section 530 of the *Criminal Code*. The Court also specified that the right to the assistance of an interpreter under Section 14 of the *Charter* does not create a positive obligation upon the Crown to defray the costs.

For these reasons, the trial judge dismissed the appeal.

Relevant Paragraphs:

[23] It is now well settled that the guarantees offered by sections 7 and 14 are applicable in matters dealing with criminal or quasi-criminal issues and, as a result, have caused the adoption of sections 530, 530.1, 530.2, 531, 532, 533 and 533.1 C.Cr. which specifically deal with this same issue in criminal matters. It does not appear, however, that these sections apply to civil proceedings. Hence the present "constitutional challenge". Mrs. Finney may, on the other hand, always have the right to an interpreter in a civil matter, but at her own cost and not at the cost of the collectivity.

[27] The inherent costs of translating documents, pleadings or testimonies have always been supported by the party requesting same. Provinces of Canada have enacted legislation to provide legal aid or legal assistance for those who are in need but for all others, who do not qualify, legal costs and disbursements are their own. Mrs. Finney has not alleged that she was needy and that the exercise of her legal rights were in jeopardy by reason of the refusal of the two levels of government to provide her with free translation and interpreter services. In short, her "life liberty and security" are clearly not at stake here.

[86] This certitude proceeds from the fact that, amongst other arguments, there is no equivalent in civil matters to sections 530 to 533.1 of the *Criminal Code of Canada*, which settle

Case Law Document on Bilingualism in the Judiciary

the question in the field of criminal law. There, the right of an accused to free translation and interpreter services is clearly established.

[89] Access to justice is one thing. The question of the costs involved to have access to the judicial system is another question. In a non-criminal or penal situation, there is no legal principle or rule which could allow this Court to impose upon either level of government the obligation to assume the costs of translation or interpreter services as a general principle.

Dow v. R, [2009] QCCA 478

- **The authorization for appeal before the Supreme Court has been dismissed**

Summary of the Law: It is not necessary to make a request under Section 530 of the *Criminal Code* to have a trial in the official language of his choice and the waiver of this right must be formal.

Summary of the Facts: Before the Court of Appeal, the appellant disputed the holding of a trial in English on the grounds that the judge and the prosecutors communicated partly in French without the assistance of an interpreter.

In its analysis, the Court determined that some provisions of Section 530.1 of the *Criminal Code* had not been respected and the lack of interpretation called for a study of the right to an interpreter under Section 14 of the *Charter*. First, the Court ruled that in the province of Quebec, it is not necessary that the accused make a request to have his trial conducted in the official language of his choice. Then, the Court relied on *R v. Tran* to rule that the waiver of the language rights provided in the *Criminal Code* and the right to the assistance of an interpreter under Section 14 of the *Charter* must be formal to be valid.

For these reasons, the Court unanimously concluded that the rights provided at Section 530.1 of the *Criminal Code* and Section 14 of the *Charter* had been violated. Therefore, the Court allowed the appeal, set aside the conviction and ordered the holding of a new trial.

Relevant Paragraphs:

[53] Subject to the issue of waiver, the absence of any interpretation at all would necessarily engage consideration of section 14 of the *Canadian Charter* and the judgment of the Supreme Court of Canada in *R v. Tran*. In that case it was held, amongst other conclusions, that the failure to provide an accused with a complete translation of the proceedings in a judge-alone trial from English to Vietnamese violated his section 14 *Canadian Charter* rights, and a new trial was ordered.

[54] It is obvious that Mr. Dow's two trial counsel were unaware of the extent of the rights he enjoyed under section 530.1 *Cr. C.* Unlike the defence counsel in *Potvin*, they not only failed to insist on having his rights respected during the trial, but actively participated in undermining them

on their own.

[59] First, although Mr. Dow's counsel brought no formal application pursuant to section 530(1) *Cr.C.*, it is apparent when all of the circumstances are examined that its provisions and those of section 530.1 *Cr. C.* applied.

[60] As Salhany points out in his treatise on criminal procedure, the sections of the *Criminal Code* upon which Mr. Dow relies were adopted in 1978 and "imposed upon the courts the obligation to grant to an accused, whose language is one of the official languages of Canada, the right to be tried by a justice, provincial court judge, judge sitting alone or judge and jury who speak one of those languages", and placed "the onus [...] upon an accused to apply for such a trial" within the timeframe set out in sub-sections (a) and (b).

[61] These amendments were remedial in nature, and were adopted at a time when the enhancement of minority language rights in Canada at the federal level was a matter of governmental and parliamentary concern. In addition, they have the advantage of giving full effect to the right of an accused to be "present in court during the whole of his or her trial", as section 650(1) *Cr.C.* requires. An accused who does not understand a language being used during a trial may be physically present, but such presence is illusory without the necessary understanding of the language used during the proceedings.

[62] Whatever may have been the ability of a member of the Francophone linguistic minority in other Canadian provinces or territories before the adoption and coming into force of the amendments to obtain a jury trial before a judge who spoke French, a Crown counsel who spoke French and a jury composed of Francophones, Quebec has had a long, rich and salutary tradition of providing English language criminal jury trials to Anglophones that pre-dates the adoption and coming into force of sections 530 and 530.1 *Cr. C.* Such trials have always occurred as a matter of course when the accused was an Anglophone, and without the need for a formal application.

[71] A literal reading of section 530(1) *Cr. C.* would mean that absent an application thereunder and an order granting same, the trial of an accused should take place in the official language of the province's linguistic majority. Again, whatever may be the practice outside Quebec, it has never been necessary to make such an application in Quebec for the trial of an Anglophone to take place before an English-speaking jury with a trial judge and Crown prosecutor able to fully participate by using the English language. In Quebec, therefore, the object of section 530(1) *Cr. C.* is achieved insofar as jury trials are concerned without the need for a formal application under the auspices of that provision.

[73] If Crown counsel is correct in her assertion that the absence of a formal application means the rights provided for in section 530.1 *Cr.C.* do not apply, then it is a logical consequence of that contention that Mr. Dow's trial should have been before a French-speaking jury, and that the

trial of a unilingual Anglophone accused such as Mr. Dow can take place without any of the guarantees of section 530.1 *Cr.C.* being available to the accused. Such propositions cannot be seriously entertained, especially in light of the objective of substantive equality for members of Canada's linguistic minorities that sections 530 and 530.1 *Cr.C.* was designed to secure.

[75] Although the Superior Court record does not contain a specific indication of a direction to the Sheriff to summon an array of English-speaking jury candidates, at some point in the process the Sheriff would have been so instructed. This would necessarily have been done with the knowledge of the Crown and Mr. Dow's counsel.

[76] It is also a matter of common knowledge that such decisions are often taken and noted at the opening of the assizes, or at the pre-trial conference that must take place pursuant to section 625.1(2) *Cr. C.* and sections 39 and following of the *Rules of Practice of the Superior Court in Criminal Matters*. Section 44(m) of these *Rules* contemplates a decision being taken as to the date when the jurors will be summoned. Unless the decision relating to the language of the jurors has been made previously, one must necessarily be made at the pre-trial conference in order to allow the Sheriff to properly constitute an array of jurors pursuant to sections 14 and 25 of the *Jurors Act*.

[77] I conclude that to the extent section 530(1) *Cr.C.* speaks of an "application", that criterion is satisfied once the Sheriff is instructed to summon English-speaking jurors. It follows that despite the absence of a formal application under section 530(1) *Cr.C.*, Mr. Dow was entitled to the respect of the rights mentioned in section 530.1 *Cr.C.*

[78] I would also add that it is generally recognized that the fulfillment of the language guarantee available to an accused is better served by consecutive rather than simultaneous interpretation, which is the only way to make it possible to have a transcript in both languages. Hill, J. of the Ontario Superior Court of Justice recently put it this way in the case of accused where there was an issue as to the adequacy of interpretative services in the Russian language:

156 Consecutive interpretation "is the better practice as compared to simultaneous interpretation": *Tran*, at 249-50; *Sidhu*, at para. 310; *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (the Cole/Gittens Report)*, December 1995, at 247. "Simultaneous interpretation is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained": *Tran*, at 249. Advantages of consecutive interpretation include making "it easier to assess on the spot the accuracy of the interpretation" and minimizing the interference of "distraction": *Tran*, at 249-50. "[A]lthough consecutive interpretation effectively doubles the time necessary to complete the proceedings", it best protects the s. 14 *Charter* right: *Tran*, at 249-250. [...]"

[85] The law is clear that for a renunciation to language rights at a criminal trial to be valid, assuming it is possible to do so, an accused must know and understand what rights he or she is

waiving, as well as the consequences of such waiver. Of particular significance are the following comments of Lamer, C.J. in *Tran*:

In light of the fact that the right to interpreter assistance is not only a fundamental constitutional guarantee in its own right, but also an important means of ensuring a full, fair and public hearing, something which is separately protected under ss. 7 and 11(d) of the *Charter*, it follows that s. 14 *Charter* rights will be more difficult to waive than may formerly have been the case under the common law and under statutory instruments, such as the *Criminal Code* and the *Canadian Bill of Rights*. Indeed, there will be situations where the right simply cannot,^[44] in the greater public interest, be waived. This has already been recognized under the common law in the two early cases of *Kwok Leung, supra*, and *Lee Kun, supra*. In both cases, the courts imposed definite restrictions on the possibilities for valid and effective waivers of the right to an interpreter, whether or not the accused was represented by counsel. Gompertz J. in *Kwok Leung*, at pp. 174-75, explained the rationale for so limiting waiver as follows:

... while in civil cases the rules of evidence may be waived by consent of the parties, in a criminal case, these rules are matters *publici juris* and cannot be so dispensed with. On a criminal trial not merely the single person accused has an interest at stake, but every other subject of the Crown is concerned in seeing that the prisoner is not deprived of life or liberty, except under the whole of the safeguards prescribed by law.

In other words, it is simply beyond the bounds of a civilized society such as ours to permit a person charged with a criminal offence and facing deprivation of liberty who genuinely cannot speak and/or understand the language of the proceedings to dispense either wittingly or unwittingly with the services of an interpreter.

Where waiver of the right to interpreter assistance is possible, the threshold will be very high. In *Korponay v. Attorney General of Canada*, 1982 CanLII 12 (SCC), [1982] 1 S.C.R. 41, this Court made it clear *per* Lamer J. (as he then was) that to be valid, waiver of a statutory procedural right has to be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights. This standard for a valid waiver has subsequently been adopted in the context of the *Charter*, specifically with respect to s. 10(b), which guarantees the right to retain and instruct counsel upon arrest or detention: see, e.g., *R. v. Evans*, 1991 CanLII 98 (SCC), [1991] 1 S.C.R. 869, *per* McLachlin J., at pp. 892-94. In the specific case of waiver of the s. 14 right to interpreter assistance, I would add to existing safeguards the following condition. The waiver should be made personally^[45] by the accused, if necessary following an inquiry by the court through an interpreter to ensure that the accused truly understands what it is he or she is doing, unless counsel for the accused is fluent in the accused's language or has communicated with the accused through an interpreter before coming to court and satisfies the court that the nature of the right and the effect on that right of waiving it have been explained to the accused.^[46]

[Emphasis added]

Case Law Document on Bilingualism in the Judiciary

[100] In my opinion there is no justification for not intervening when the object of the language guarantees is considered. As the case law I have reviewed from this Court, the Ontario Court of Appeal and the Supreme Court of Canada makes clear, that object is substantive equality between those of the linguistic majority and those of the linguistic minority in each Canadian province and territory. Moreover, the failure to respect the rights flowing from the applicability of section 530 *Cr. C.* constitutes "a substantial wrong and not a procedural irregularity".

[101] In this instance, substantive equality means at the very least that an accused who is a member of one of Canada's linguistic minorities within a Canadian province or territory should have a trial judge and prosecutor assigned to his or her case who is not only able but also willing to speak the language of that accused throughout the trial, on the same basis as if the accused was a member of that province's or territory's linguistic majority. It also means that the trial judge in any Canadian province or territory should not seek to have such an accused waive his rights, or acquiesce to any purported waiver of his rights, for reasons of convenience to others involved in the trial.

[107] This is the third time since 2005 that the Court has allowed an appeal and ordered a new trial because of the failure to respect the language rights of an accused.[53] Trial judges and Crown counsel therefore have every interest in being alert to the existence of these rights by acting to protect them to avoid orders for new trials, even if, as in the case of Mr. Dow, defence counsel do not fully assert them.

***R v. T.D.M.*, [2008] YKCA 16**

Summary of the Law: Subsection 530.1*c*) of the *Criminal Code* provides that a witness has the right to testify in the official language of his choice.

Summary of the Facts: Before the Court of Appeal of Yukon, the Crown disputed a decision of the Supreme Court of Yukon to refuse a witness the right to testify in his mother tongue, French, during a trial conducted in English.

In its analysis, the Court of Appeal interpreted the French and English versions of Section 5 of the *Languages Act* to rule that a witness has the right to testify in the official language of his choice before the courts of Yukon. The Court also specified that according to Subsection 530.1 *c*) of the *Criminal Code*, a witness has the right to testify in the official language of his choice despite the fact that the accused chose the other official language.

However, the Court then relied on the principles enumerated in *Vézéau v. The Queen* and *R v. Morin* to conclude that the fact that the witness testified in English did not cause any serious harm to the trial.

Case Law Document on Bilingualism in the Judiciary

For these reasons, the Court unanimously dismissed the appeal.

Relevant Paragraphs:

[39] Nor can it be said that permitting a witness to testify in the official language of his or her choice would frustrate Parliament's purpose in enacting Part XVII of the *Code*. As discussed by Bastarache J. in *Beaulac* (at para. 34), Part XVII was enacted "to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity". This is because "the language of an accused is very personal in nature; [and] is an important part of his or her cultural identity". Providing a witness with the right to choose in which official language to testify only serves to strengthen this purpose, as it increases the number of persons able to assert which official language is their own in the context of a criminal proceeding. Choice of language is as important to the cultural identity of a witness, as it is to the cultural identity of an accused.

[43] To summarize, I have reached the following conclusions:

- (a) s. 5 of the *Languages Act* gives a witness a right to testify in either English or French in federal criminal proceedings before Yukon courts;
- (b) there is no conflict or incompatibility between s. 5 and Part XVII of the *Criminal Code*; and
- (c) the trial judge erred in denying G.A. his statutory right to testify in French.

[44] As the trial judge erred in law in directing G.A. to testify in English, it must now be decided whether a new trial should be ordered pursuant to s. 686(4)(b)(i) of the *Criminal Code*. The Crown accepts that the standard it must meet to obtain a new trial is that set out by Chief Justice McLachlin in *R. v. Sutton*, 2000 SCC 50 (CanLII), [2000] 2 S.C.R. 595, 2000 SCC 50:

2 The parties agree that acquittals are not lightly overturned. The test as set out in *Vézéau v. The Queen*, 1976 CanLII 7 (SCC), [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. In *R. v. Morin*, 1988 CanLII 8 (SCC), [1988] 2 S.C.R. 345, this Court emphasized that "the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty" (p. 374).

[46] In reviewing the transcript I did not find anything that suggests that G.A. had any linguistic difficulty in describing the incident he said he witnessed. Further, and more significantly, I did not find anything to support the contention that G.A. had any linguistic difficulty in answering questions put to him in cross-examination with respect to inconsistencies in his evidence, or regarding why he did not tell anyone about the alleged incident for several weeks. The trial judge's concerns with respect to G.A.'s veracity were grounded in the substance of his testimony. In light of the

Case Law Document on Bilingualism in the Judiciary

completeness of G.A.'s evidence, these concerns would have existed even if G.A. had testified in French. In other words, the outcome of the trial was not affected by the fact that G.A. was directed to testify in English.

Denver-Lambert c. R., [2007] QCCA 1301 (French version only)

- The authorization for appeal before the Supreme Court has been dismissed

Summary of the Law: Section 530 of the *Criminal Code* provides that an accused has the right to claim that either French or English is the language of his choice.

Summary of the Facts: Before the Court of Appeal, the Appellant disputed the decision of the trial judge to dismiss his late request for a trial in French under Subsections 530(1) and (4) of the *Criminal Code*. The trial judge dismissed the request on the ground that his language skills in English allowed him to have his trial in English.

In its analysis, the Court of Appeal relied on *Beaulac* for the discretionary power of the judge to accept a late request for a unilingual trial. The Court ruled that the trial judge erred in concluding that the appellant's request was not serious. It also specified that *Beaulac* establishes the right of an accused to claim that either French or English is the language of his choice. Finally, the Court determined that the trial judge erred in requiring that the accused show that it was in the "best interests of justice" to have his trial conducted in English.

For these reasons, the Court of Appeal unanimously allowed the appeal, set aside the conviction and ordered a new trial in French.

Relevant Paragraphs:

[19] Le paragraphe 530(1) C.cr. accorde à l'accusé un droit strict d'obtenir un procès dans sa langue. En l'espèce, l'appelant n'était dans aucune des situations prévues à ce paragraphe. Sa demande, faite bien après la date où le procès a été fixé, tombait donc sous la portée du paragraphe 530(4) C.cr.

[20] L'article 530 C.cr. a été interprété par la Cour suprême dans l'arrêt *R. c. Beaulac*[2]. Le juge Bastarache, s'exprimant pour la majorité, a synthétisé la méthode d'application du paragraphe 530(4) C.cr. qui doit être privilégiée :

Les tribunaux doivent donner effet à l'art. 530 du *Code* en tenant compte de son

caractère réparateur, de sa nature substantielle et de son objet, qui vise d'abord et avant tout à aider les membres des collectivités des deux langues officielles à obtenir un accès égal à des services particuliers, dans des tribunaux particuliers, dans leur propre langue. En l'absence de preuve établissant qu'il ne parle pas la langue choisie, l'accusé est libre de choisir la langue officielle que devront utiliser le juge ou le jury devant lesquels il subira son procès, s'il agit à temps. L'exercice par le juge du pouvoir discrétionnaire prévu au par. 530(4) du *Code* est fondé sur les difficultés supplémentaires causées par une demande tardive et les raisons du retard. Les inconvénients administratifs ne sont pas un facteur pertinent, pas plus que ne le sont les aptitudes linguistiques de l'accusé dans la langue officielle qu'il n'a pas choisie; l'équité du procès n'est pas une question de droits linguistiques. Toute privation du droit prévu au par. 530(4) est exceptionnelle et doit être justifiée; le fardeau de justifier une telle privation incombe au ministère public.[3]

[21] La première étape dans l'application du paragraphe 530(4) C.cr. consiste à déterminer la « langue de l'accusé ». Dans *Beaulac* la Cour suprême consacre le droit de l'accusé d'affirmer que l'une ou l'autre langue officielle est la sienne. Le seul critère applicable et celui de savoir si l'accusé a une connaissance suffisante de la langue officielle choisie pour donner des directives à son avocat et suivre le déroulement des procédures dans cette langue « indépendamment de sa capacité de parler l'autre langue officielle »[4].

[22] En l'espèce, le juge du procès a jugé que la demande de l'appelant n'était pas sérieuse à cause, notamment, de ses compétences linguistiques en français et du fait que les procédures, y compris l'enquête préliminaire, s'étaient jusqu'alors déroulées en français. Or, un tel critère a été expressément répudié par la Cour suprême au motif fondamental que les droits linguistiques accordés par l'article 530 C.cr. ont une origine et un rôle distincts du droit à un procès équitable. Les droits linguistiques visent à protéger les minorités de langue officielle du Canada et à assurer l'égalité de statut du français et de l'anglais[5] :

Les droits linguistiques ne sont pas une sous-catégorie du droit à un procès équitable. Si le droit de l'accusé d'employer sa langue officielle dans une instance judiciaire était limité en raison de ses aptitudes linguistiques dans l'autre langue officielle, il n'y aurait pas en réalité de droit linguistique distinct.

[23] L'affirmation par l'accusé qu'une des deux langues officielles est la sienne peut être contestée par le ministère public mais il lui incombe alors de démontrer que cette affirmation est sans fondement. Dans ce cas, la Cour suprême interdit de façon spécifique au juge du procès d'entreprendre l'examen de critères particuliers en vue de déterminer une identité culturelle dominante ou de faire l'étude des préférences linguistiques personnelles de l'accusé. Il ne peut que vérifier que l'accusé est en mesure de donner des directives à son avocat et de suivre le déroulement des procédures dans la langue choisie[6].

Case Law Document on Bilingualism in the Judiciary

[24] Au paragraphe 60 de sa décision, le juge du procès reproche à l'appelant de ne pas avoir commenté « sa vie familiale, personnelle, scolaire, ses loisirs, le milieu qu'il fréquentait, et, d'une manière générale, son mode de vie et la langue parlée alors qu'il était domicilié au Québec ». Ce faisant, le juge a non seulement mis la charge de justifier son choix sur les épaules de l'appelant plutôt que sur le ministère public, mais il a également privilégié des critères qui n'étaient pas admissibles.

[34] En l'espèce, ce n'est pas sur le ministère public mais bien sur l'appelant que le juge du procès a imposé la charge de prouver qu'il était dans les meilleurs intérêts de la justice d'accueillir sa demande d'un procès dans la langue officielle qu'il a choisie.

R v. Olynyk, [2006] BCSC 85

Summary of the Law: In the context of a joint trial, the language rights provided at Sections 530 and 530.1 of the *Criminal Code* are not absolute.

Summary of the Facts: Before the Supreme Court of British Columbia, the three accused, who chose to have a bilingual trial under Section 530 of the *Criminal Code*, asked that the jury instructions be communicated in both official languages. The Crown prosecutor suggested that the instructions be given in the language of the presentation of proof that is in both languages, but without repetition. He further suggested that the services of an interpreter be provided to the counsels and the accused.

In its analysis, the Court relied on the *Sarrazin* case, in which the Court decided that the language rights provided at Sections 530 and 530.1 of the *Criminal Code* are not absolute, to order that the jury instructions be bilingual.

For these reasons, the trial judge dismissed the request of the co-accused.

Relevant Paragraphs:

[15] This trial is bilingual and will be heard by a bilingual jury. The process of choosing the jury is much more complicated in such a context. Indeed, each of the persons summoned to serve as a juror may be challenged for cause on the grounds that they do not speak the two official languages of Canada. If the order anticipates a judge and a jury who speak the two official languages, it is precisely, amongst other reasons, to avoid the scenario proposed by counsel for the defence. It is not necessary that the jury hear the instructions twice. Such a situation would doubtless create confusion and impose a heavy burden on the jury. The accused have an interpreter at their disposal which obviously constitutes a necessary component of a bilingual trial.

[23] The argument of Mr. Lepage is similar to that in *Sarrazin* except that here, all counsel have agreed to a bilingual trial. They did not in *Sarrazin*. However, each of the accused maintains that he must not be required to hear my charge, or any part of it, in the official language that is not his own. According to the accused, this type of bilingual trial implies that certain parts of the charge

Case Law Document on Bilingualism in the Judiciary

be in English and certain other parts in French; and proceeding in this way would prejudice them and violate their substantive right to a trial in the language of their choice. Thus, according to them, I must give my charge to the jury twice: once completely in French – and formulating specifically in French a review of all the elements of proof which are presented in English; and a second time completely in English. I disagree and adopt the reasoning in *Sarrazin* (at para. 61):

The linguistic rights provided by ss. 530 and 530.1 are important and fundamental rights in the context of the administration of justice and the preservation of minority linguistic and cultural rights. Like all rights, however - even Charter as opposed to statutory rights - they are not absolute. They must be balanced against other values and principles in society if the circumstances warrant such a balancing exercise. There is no principle of law that an accused's statutory language rights under ss. 530 and 530.1 trump severance considerations in all cases, in my view.

[29] The application made by Mr. Benning is not reasonable in this case. Fundamentally, the goal of the administration of justice in criminal matters is to ensure as far as possible a fair and equitable trial for each of the accused. Here, the trial is bilingual. In the context of such a trial, there must be a balance between the linguistic rights of the three accused and the interests of the administration of justice.

[30] As the trial judge, I must recognize the important linguistic rights of Mr. Lepage, and those of the two other accused and try to avoid errors of law.

[32] The Crown also suggests that my final instructions be in English where they concern the testimony given in English, and in French where they concern testimony given in French. My instructions on the law could be given in both languages, but without repeating the same thing in both languages. I would have the discretion to address the jury in either language. I agree with the suggestion of the Crown. It is consistent with the manner in which the trial judge in *Sarrazin* conducted that trial. I conclude that the procedure suggested by the Crown is logical and reasonable.

R v. Sarrazin, [2005] ONCA 257

Summary of the Law: In the context of a joint trial, the language rights provided at Sections 530 and 530.1 of the *Criminal Code* are not absolute.

Summary of the Facts: Before the Court of Appeal of Ontario, the co-accused, Mr. Sarrazin and Mr. Cetoute, who asked for a trial in English and Mr. Jean who asked for a trial in French under Sections 530 and 530.1 of the *Criminal Code*, disputed a decision of the trial judge to hold a bilingual trial.

In its analysis, the Court of appeal studied the issue of determining whether sections 530 and 530.1 of the *Criminal Code* allowed the trial judge to order a bilingual trial. The Court considered that given the well known principle of the holding of a joint trial for co-accused, the *Criminal Code*

Case Law Document on Bilingualism in the Judiciary

allowed the holding of a bilingual trial. The Court also specified that the right to have a trial in the official language of his choice is satisfied when the judge and the jury are bilingual.

For these reasons, the Court of Appeal unanimously concluded that the trial judge did not err in law in conducting a bilingual trial in the way that he did and dismissed the appeal.

Relevant Paragraphs:

Analysis

The language issue

[39] The issue arises here in the context of a joint trial in which the three accused are charged with engaging in a joint enterprise to murder the deceased. Thus, it must be considered in association with the well-established principle that those charged with carrying out a common enterprise or conspiracy should normally be tried together.

[43] I do not accept this argument. In my opinion, the *Code* permits a “bilingual trial”, if the circumstances warrant. Moreover, the right of an accused to be tried in the official language of his or her choice must be read together with the general principle favouring the joint trial of those charged with engaging in a common criminal enterprise. The trial judge properly exercised his discretion under s. 530(5) of the *Criminal Code* to order such a trial in the circumstances of this case. Everyone agrees that if such trial is permissible, the bilingual aspect of the trial was conducted in an impeccable fashion.

[44] Part XVII of the *Criminal Code* deals with the language rights of an accused. Sections 530 and 530.1 are of particular relevance to this appeal, and provide the statutory framework for the accused’s right to speak and to be understood at trial in his or her official language. They are considered to be examples of the principle of the advancement of the equality of status and use of the two official languages of Canada pursuant to s. 16(3) of the *Canadian Charter of Rights and Freedoms*.

[47] Accordingly, while the thrust of the provisions of s. 530 is to afford the accused the right to choose the official language spoken and understood by the judge or judge and jury by whom he or she will be tried, the effect of the combination of ss. 530 and 530.1 is to ensure that this right is complimented by a trial process that is institutionally bilingual.

[51] First, if the appellants are correct – that is, if the only difference between the three types of orders referred to above is the difference between a unilingual and a bilingual trier of fact and law, with the working language of the trial always remaining that of the accused’s choice – there is no need for the statute to provide for the alternative of a bilingual trier in order to preserve the linguistic rights of the accused. The linguistic rights of an accused to a trial in the official working language

Case Law Document on Bilingualism in the Judiciary

of his or her choice, before a judge or judge and jury who speak that official language, are equally preserved where the trial takes place before triers who are bilingual (and who, therefore, speak and understand that language of choice): *Beaulac*, para. 49. By definition, a trier who is bilingual fits the description of a trier “who speaks the official language of Canada that is the language of the accused” or in which the accused can best give testimony. There is therefore no need to provide specifically for a trial before a trier who speaks both official languages of Canada unless Parliament had something else in mind when it provided for the third type of order.

[52] Since sections 530 and 530.1 provide the statutory framework for the linguistic rights of an accused at trial, Parliament must have been directing its mind to something relating to the trial process. What it intended to provide for, in my opinion – where circumstances warrant – is a trial process where the judge or judge and jury are bilingual (s. 530) and in which the working language of the trial is both French and English, depending upon who is speaking (s. 530.1(a)-(e)), with interpretation and translation services available to be utilised where needed (s. 530.1(f)-(h)).

[54] These factors all buttress the view that Parliament intended to provide for more than simply bilingual triers with its addition of the phrase “if the circumstances warrant, [before a judge or judge and jury] who speak both official languages of Canada”. The something more Parliament intended to provide was the option of a bilingual trial, in the sense outlined above.

[69] I am satisfied on the basis of the foregoing, therefore, that the combined effect of ss. 530 and 530.1 of the *Criminal Code* is to permit the ordering of a bilingual trial in the sense that I have used that term in these reasons, as the statute says, “if the circumstances warrant.” Where different accused, who are alleged to have participated in a common enterprise or conspiracy seek to be tried in different official languages of choice, severance is not mandatory. It is for the trial judge, in the exercise of his or her discretion, to decide whether and when the circumstances warrant severance and an individual trial. As Doherty J.A. noted in *R. v. Suzack and Pennett*, *supra* at 485 – albeit in a somewhat different context – “[a]n accused’s right to a fair trial does not . . . entitle that accused to exactly the same trial when tried jointly as the accused would have had had he been tried alone”.

R v. Potvin, [2004] ONCA 285

Summary of the Law: When an order for a trial in the official language chosen by the accused has been given under Section 530 of the *Criminal Code*, the trial must be conducted in this language.

Summary of the Facts: Before the Court of Appeal of Ontario, Mr. Potvin disputed his conviction at the end of a trial held in French under Section 530 of the *Criminal Code* on the grounds that the trial judge communicated in English on several occasions without translation.

In its analysis, the Court of Appeal refused to consider the omission of the accused to object to the use of French at any moment as consent to the holding of a bilingual trial. The Court specified that when an order for a trial in the official language chosen by the accused has been given under Section 530 of the *Criminal Code*, the trial must be held in this language without the need to continually object. Therefore, the Court held that the trial judge was required to ensure that the trial be

Case Law Document on Bilingualism in the Judiciary

conducted in French.

For these reasons, the Court of Appeal concluded that the language rights of the accused provided at Section 530 had been violated. Therefore, the Court unanimously allowed the appeal, set aside the conviction and ordered the holding of a new trial.

Relevant Paragraphs:

The right to a trial in the official language of the accused

[5] Section 530 of the *Criminal Code* allows any accused, whose language is one of the official languages of Canada, to be tried by a court, which in the present matter is comprised of judge and jury, "who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada".

The language spoken at trial

[24] In my view, the arguments of the respondent with respect to the alleged consent of the appellant are ill founded. In his factum, the respondent makes no reference to what occurred during the days when pretrial motions were heard, such as I have described earlier. Where the first five days of trial are considered within the context of the trial as a whole, it is unreasonable to conclude that the appellant, by failing to object, had changed his mind and waived his right to a French trial. Nor can it be concluded that he consented to a bilingual or English trial. Any such conclusion would appear all the more unreasonable in view of the fact that the appellant speaks very little English.

[25] It is important to note that an accused is fully entitled to rely upon one of the two official languages as his own, even where he is capable of speaking the other official language; see *R. v. Beaulac* at paras. 45-47. I note in this regard Mr. Potvin's very limited command of the English language, not as a ground for his right to a French trial, but simply to underline the fact that, within the context of this matter, it is not reasonable to suppose that the appellant would have desired anything other than a French trial.

[26] I conclude without hesitation that the appellant never agreed to a bilingual trial. Due to the difficulties which the appellant and defence counsel encountered during the pretrial phase, it is not surprising that defence counsel did not raise further objections at the commencement of trial, in the presence of the jury, when the judge ordered that translation should be carried out simultaneously. In any event, once an order is made that a trial shall proceed solely in the official language of the accused, the trial should comply with the terms of the order, without the accused or his counsel being repeatedly forced to raise the issue. It is the judge's responsibility to ensure that the trial proceeds in the French language.

[29] The Quebec Court of Appeal upheld the constitutionality of s. 530.1(e). The Court of Appeal ruled that any attempt by a judge to prohibit Crown counsel from speaking the official language of his choice would be an infringement of s. 133. However, pursuant to the *Criminal Code*,

the Attorney General has the duty to ensure that Crown counsel assigned to the case must not only be capable of speaking the language of the accused, but also be prepared to do so throughout the trial. The Court of Appeal added [p. 174]:

[TRANSLATION]

If it happens that during the course of the trial this Crown counsel feels unable to do justice to his mandate in a language other than his own and manifests the intention to speak French or English as s. 133 permits him to do, the judge of course could not force him to speak the official language which is not his own. In such a case, the judge should adjourn the trial to permit the Attorney General to find a replacement ready to continue the case in the language of the accused. If that proves impossible within a reasonable delay, the judge presiding over a jury trial may have to declare a mistrial.

[30] I agree with this interpretation of s. 530.1(e). Furthermore, I am of the view that the same conclusion applies with respect to the right of the accused to a trial before "a judge and jury who *speak*" his official language. In my view, this is the sole interpretation which corresponds to the purpose and intent of the legislation, as laid down by the Supreme Court of Canada in *Beaulac*.

[31] In *Beaulac*, at para. 25, the Supreme Court stated that "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" [emphasis in original]. At para. 34, the Court defined the objective of s. 530 as being "to provide *equal* access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity" (my italics).

[32] If it were simply required that the judge and prosecutor *understand* French without any corresponding duty to speak French throughout the trial, there would be little distinction between the right to a unilingual trial in the official language of his choice on the one hand, and, on the other hand, the right to the assistance of an interpreter already provided for at s. 14 of the *Canadian Charter of Rights and Freedoms*. The right to assistance by an interpreter allows the accused both to follow proceedings and to make himself understood, thereby ensuring that his trial is fair; see *R. v. Beaulac* at para. 41. But, as noted by the Supreme Court of Canada in *Beaulac* at paras. 25 and 41, "language rights are a particular kind of right, distinct from the principles of fundamental justice ... Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English."

[33] The narrower reading proposed by the respondent would perhaps ensure that the accused is understood by the prosecutor, judge and jury in his original language, without requiring any translation. But, for purposes of linguistic equality, in my view it is just as important to ensure that the *accused* can understand the remarks of the judge and the prosecutor in the original language spoken by them at trial. Undoubtedly, the requirement that both judge and Crown prosecutor not only understand French, but that they also speak it, may cause some inconvenience in certain circles, but this fact is not relevant. Bastarache J. in *Beaulac* stated this clearly at para. 39:

Case Law Document on Bilingualism in the Judiciary

I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages.

***R v. Mackenzie*, [2004] NSCA 10**

- **The authorization for appeal before the Supreme Court has been dismissed**

Summary of the Law: The breach of Subsection 530(3) of the *Criminal Code* requires the holding of a new trial.

Summary of the Facts: Before the Court of Appeal of Nova Scotia, the Crown appealed from a decision of the Supreme Court of Nova Scotia ordering a stay on the grounds that the trial judge forgot to inform the defendant of his right to a trial in French under Subsection 530(3) of the *Criminal Code*.

In its analysis, the Court of Appeal also concluded that there had been a breach of Subsection 530(3) of the *Criminal Code*. The Court rather determined that the issue was whether the remedy should be a stay or a new trial. First, the Court held that Subsection 24(1) did not apply in the circumstances because there had been no violation of the provisions of the *Charter*. Then, based on the relevant case law, the Court concluded that a stay could not be ordered in a discretionary manner if there was no abuse. Therefore, the Court determined that the violation of Subsection 530(3) alone did not constitute an abuse and a stay was not the appropriate remedy.

For these reasons, the Court of Appeal unanimously allowed the appeal and ordered the holding of a new trial.

Relevant Paragraphs:

[10] Breach of s. 530(3): If the accused is unrepresented by counsel at her first appearance, then as stated by Justice Edwards, s. 530(3) is mandatory. The Provincial Court judge “shall” advise the accused of his right to apply for an order that the trial be in either official language.

[11] Ms. MacKenzie appeared unrepresented for her arraignment. The Provincial Court judge was required to notify Ms. MacKenzie of her right to apply for an order under subsections (1) or (2)

Case Law Document on Bilingualism in the Judiciary

of s. 530 and the time before which such an application must be made. He did not do so. This violated s. 530(3). The only issue is the remedy.

[12] The only condition which triggers the requirement for a notice is that the accused appear unrepresented. The accused is not required to present herself as French-speaking. She need not take the initiative before the notice. The reason for the notice under s. 530(3) is that the unrepresented person likely is unaware of her right to a trial in either language. Once the sole condition - unrepresented appearance - exists, the onus of initiative is with the judge.

[21] The ultimate question is whether there should be a stay or a new trial. To answer this, a threshold issue is whether there is a breach of the *Charter*. If so, there is access to the remedial power under s. 24(1). If not, it is necessary to consider the general power of a criminal court to grant a stay.

[22] The SCAC stated [in *R v. Deveaux*, similar situation] :

In summary, this is a serious *Charter* breach involving the Appellant's equality of access to the criminal justice system. To order a new trial in this situation would compound the consequences of the *Charter* breach for this particular Appellant. Moreover, a new trial would not sufficiently deter future breaches involving other members of the linguistic minority. The seriousness of this breach and the potential for future breaches trumps the public interest in having this charge decided on its merits. A stay of proceedings is the most appropriate remedy.

The decision does not refer to s. 24(1) of the *Charter*. But the SCAC's conclusion that there was a "serious *Charter* breach" obviously affected the choice of a stay over a new trial.

[26] In my view there is no breach of the *Charter* and the remedial power of s. 24(1) was unavailable.

[49] In my view, the language guarantees of s. 16(1) did not apply to the Provincial Court's arraignment and trial of Ms. MacKenzie. There was no breach of s. 16(1).

[69] **Was the stay an option?** Had there been a breach of the *Charter*, the analysis would begin with s. 24(1). As there is no *Charter* breach, the starting point is s. 686 of the *Criminal Code* incorporated for the SCAC by s. 822(1) of the *Criminal Code* and s. 7(1) of the *Summary Proceedings Act*.

There is no express reference to a stay.

[72] In *R. v. Power*, 1994 CanLII 126 (SCC), [1994] 1 S.C.R. 601 the court considered whether s. 686(4) of the *Criminal Code* empowered an appeal court with discretion to stay proceedings. Justice L'Heureux-Dubé for the majority(p. 612) stated that it is "undisputed that courts have an inherent and residual discretion to prevent an abuse of the court's process." Justice L'Heureux-Dubé

Case Law Document on Bilingualism in the Judiciary

(pp. 613, 615) reaffirmed the principles from *Jewitt* and *Conway* and stated (pp. 615-16):

I, therefore, conclude that, in criminal cases, courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.

To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice. ... Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

Justice L'Heureux-Dubé ruled that absent such an abuse, there was no power to order a stay (p. 620):

For these reasons, I am of the view that s. 686(4) of the *Criminal Code* does not confer a court of appeal any discretion, however limited, beyond the general power to control its process in case of abuse.

[73] Deference to prosecutorial discretion is the reason that the court has limited discretion to stay. In *Power* Justice L'Heureux-Dubé stated (pp. 624-5):

It is important to understand the rationale for this judicial deference to the prosecutor's discretion. In this regard, the reasons of Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*, [1976] 2 All E.R. 497 (H.L.), at p. 511, are instructive:

A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval. [Supreme Court's emphasis]

Justice L'Heureux-Dubé concluded (p. 629):

My colleague's invitation to the court of appeal to interfere with prosecutorial discretion, absent abuse of process, goes against the grain of doctrine and

Case Law Document on Bilingualism in the Judiciary

jurisprudence. It also carries with it the dangers that have been outlined above. In my view, there is neither a need nor a justification for an interpretation of s. 686(4) of the *Criminal Code* which extends the discretion of the courts in this manner.

[78] As discussed above, there was no breach of ss. 15, 16 and 19 of the *Charter*. Given this, before the SCAC could consider a stay, it was necessary to conclude that the court's process had been abused as defined above, in a manner which would constitute abuse of process at common law (*Power*), violate principles of fundamental justice under s. 7 or deny Ms. MacKenzie's right to a fair trial under s. 11 (d). The SCAC did not consider these issues before ordering the stay. This was a misdirection and an error of law.

[82] There is failure to comply with s. 530(3). There is no abuse of process or denial of Ms. MacKenzie's rights to fundamental justice and a fair trial under ss. 7 and 11(d) of the *Charter*.

[83] Accordingly, the stay was not an option for the SCAC. The SCAC should have ordered a new trial under ss. 686(2)(b) and 822(1) of the *Criminal Code*.

[92] In the present case, notwithstanding the argument advanced by the respondent, there is nothing to show continuing violation of s. 530(3). If, as submitted in the respondent's factum, "it is an intentional breach done systemically by judges across the province", this must be established by evidence on the record. There was no such evidence here. The transcript of the arraignment is quoted above. Applying the test in *O'Connor*:

(a) There was no prejudice to Ms. MacKenzie which would be manifest, perpetuated, or aggravated in the future by the conduct or outcome of a new trial.

(b) There was no evidence of systemic discrimination and therefore no basis to say that the failure to comply with s. 530(3) impugned the integrity of the judicial system or would continue to do so in the future if there was a new trial.

[93] In *Regan* the trial judge granted the stay which was overturned by the Nova Scotia Court of Appeal. The majority of the Supreme Court of Canada (paras 105-8, 121-3) ruled that by failing to apply the *O'Connor* test, the trial judge committed reviewable error for which the Court of Appeal was entitled to overturn the stay.

[94] The SCAC's failure to consider the *O'Connor* test was an error of law and a misdirection. Had the test been applied, the result would have been an order for a new trial instead of a stay.

R. v. Schneider, [2004] NSCA 151

Summary of the Law: Section 530 of the *Criminal Code* alone does not confer the right to communicate in the official language of his choice in the context of preliminary motions, but the use of another official language may cause such a serious harm that it would be appropriate to order a

new trial.

Summary of the Facts: Before the Court of Appeal of Nova Scotia, the Crown appealed from a decision of the Supreme Court of Nova Scotia holding that the defendant, who chose to have her trial in French, had also the right to communicate in French to the Court for preliminary motions (i.e. an adjournment).

In its analysis, the Court of Appeal relied on the *Mackenzie* case and the principles of interpretation enumerated in *Beaulac* to dismiss the arguments of the Crown in respect to the fact that Ms. Schneider could have easily communicated in English with the Motions Judge. Moreover, instead of determining if the motion for adjournment was part of the trial under Section 530 of the *Criminal Code*, the Court rather held that this motion did not have to be heard by the trial judge. Thus, since any Motions Judge could have heard the motion, the Court concluded that the rights of the accused provided at Section 530 had not been violated. However, the Court relied on the principles established in *Beaulac* to conclude that the omission to give the motion to a judge speaking the same language as the accused had caused a serious harm to the trial.

For these reasons, the Court of Appeal allowed the appeal, set aside the conviction and ordered a new trial.

Relevant Paragraphs:

[18] In paragraph 34 of the decision under appeal, quoted above, the summary conviction appeal court judge found that Ms. Schneider's constitutional language rights were violated. With respect, in my opinion he erred in coming to that conclusion. This issue was clearly determined by this Court in a decision released a few months after the date of the decision under appeal. In *R v. MacKenzie*, 2004 NSCA 10 (CanLII), 2004 NSCA 10; [2004] N.S.J. No. 23 (Q.L.), Justice Fichaud for the Court thoroughly analyzed s. 530 of the Code and s.16 of the Charter and their implications in the context of summary conviction matters in the Provincial Court.

[19] The conclusion reached in *MacKenzie* was that a breach of s. 530 of the Code did not violate either s. 15 or s. 16 of the Charter. Language is neither a listed category nor an analogous ground of discrimination in Section 15. Section 16 only applies to "institutions of the Parliament and government of Canada" which does not include the Provincial Court of Nova Scotia. The language guarantees of s. 16(1) of the Charter do not apply to proceedings in the Provincial Court and s. 16(3) has not constitutionalized s. 530 of the Code. It is not necessary to repeat the analysis here. For the reasons given in *MacKenzie*, this ground of the Crown's appeal is allowed. There was no breach of Ms. Schneider's constitutional rights.

[23] As noted by Justice Fichaud in *MacKenzie*, at 15, these sections provide that everyone has the right to a trial in either English or French, or if the circumstances warrant, a bilingual trial.

(The parts of the sections dealing with accused who speak neither official language are not relevant here.) An accused has the right to decide which of the two official languages is her own language for trial. The only linguistic prerequisite is that she is able to instruct counsel in the chosen language. An unrepresented accused must be notified of her right to be tried in either French or English.

[24] As observed by Justice LeBlanc, the Supreme Court of Canada provided interpretative guidance of these sections in *Beaulac*. With respect to the Crown's assertion here that Ms. Schneider could have spoken English to Judge Beach, Justice Bastarache's statement at 45 would seem to refute that notion as being relevant to the issue:

45 In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist.

[25] Although the summary conviction appeal court judge and the Crown address the issue in terms of when the trial started, and whether s. 530 applies to pretrial motions, it is more constructive to determine whether a motion for adjournment should be heard by the trial judge. Section 530 does not indicate that once a language preference is stated, all future appearances for whatever reason must be conducted in that language. The section grants the accused a right to a trial judge who understands the official language of her choice. The right granted is the right "to be tried before" a judge who speaks the specified language. So the question here becomes, is a request for an adjournment a matter which must be heard by the trial judge?

[26] The answer, found in sections 803(1) and 669.1(1) and (2) of the Criminal Code, is no. Those sections state:

803. (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.

669.1 (1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication.

(2) Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings.

[27] The effect of these sections is that, any judge of the Provincial Court has jurisdiction to try a matter and any judge, clerk or proper officer of the court is able to adjourn the proceedings. The application for an adjournment does not have to be heard by the judge who will hear or has commenced to hear the evidence.

[28] In my view, since the application for an adjournment can be heard by any judge, or even the clerk of the court, it was not a breach of Ms. Schneider's rights granted by s. 530 that the person who heard the applications could not communicate with her in her language of choice. Her right "to be tried before" a judge who understands French was not infringed. With respect, the summary conviction appeal court judge erred in finding that there was a breach of Ms. Schneider's s. 530 rights and the Crown's second ground of appeal should be allowed.

[29] However, a purposive interpretation of s. 530, as compelled by *Beaulac*, would require that an accused not be prejudiced as a result of administrative failure to assign the trial judge, or another judge who speaks the language of the accused, to hear pre-trial motions. This will be addressed further in 36 herein.

Did the trial judge properly exercise his discretion?

[36] With respect, the denial of the request was, in my opinion, not exercised judicially. It was not based on reasons well founded in law (*Barrette*) or rules of reason and justice (*Sharp v. Wakefield*). The decision was not responsive to the grounds for the request. Although the main concern seemed to be the cost and inconvenience of the attendance of the Calgary witness, there was no acknowledgment of the fact that had Ms. Schneider's earlier attempts to address the adjournment been dealt with on the merits, those expenses might have been avoided. As mentioned in ¶ 29 above, the inability to address the court in one's language of choice on a pre-trial motion should not prejudice the accused. Had she been able to address the trial judge in French on the May 14 adjournment application, the adjournment would have been considered before the Crown's witness traveled from Calgary. In the overall circumstances of this case, given the difficulties presented to the accused by not being able to be heard in her language of choice on her earlier requests for adjournment, the request to the trial judge should have been considered in light of her language rights as characterized in *Beaulac*:

20 ... Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. ...

22. ... Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. ...

25 Language rights must in all cases be interpreted purposively, in a manner

Case Law Document on Bilingualism in the Judiciary

consistent with the preservation and development of official language communities in Canada; ... The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin.

[37] In conclusion on this issue, although I disagree with the summary conviction appeal court judge's reasons for allowing Ms. Schneider's appeal and ordering a new trial, I would agree that her appeal from conviction should be allowed because the trial judge erred by not judicially considering her request for an adjournment.

***R v. Deveaux*, [1999] NSSC 477**

Summary of the Law: Subsection 530(3) of the *Criminal Code* confers a positive obligation upon the State to inform the accused of his right to a trial in the official language of his choice.

Summary of the Facts: Before the Supreme Court of Nova Scotia, Mr. Deveaux, whose mother tongue is French and was self represented, disputed the omission of the trial judge to inform him of his language rights under Subsection 530(3) of the *Criminal Code*, which resulted in a trial and a denunciation in English.

In its analysis, the Court relied on the principles established in *Beaulac* to rule that Subsection 530(3) was mandatory and conferred a positive obligation upon the trial judge to inform the accused of his right to a trial in the official language of his choice.

For these reasons, the trial judge allowed the appeal and ordered the holding of a new trial. .

Relevant Paragraphs:

6 Subsection 530(3) of the Criminal Code is mandatory. The word “shall” imposes a statutory obligation on the trial judge or justice of the peace before whom an unrepresented accused first appears to advise him of his rights under Subsections 530(1) and (2) of the Code as the case may be.

7 In *R. v. Beaulac* [1999] C.C.J. No. 25, File No. 26416, rendered May 20, 1999, Justice Bastarache of the Supreme Court of Canada states that language rights are not passive rights and these can only be “enjoyed” by the linguistic minority if the state takes positive steps to ensure that these rights are provided:

10 *Beaulac*, supra, thus makes it clear that the Court must advise an unrepresented accused of his or her right to a trial in either official language or, for that matter, to a bilingual trial.

11 The ability of an accused to speak or understand English is of no importance because a violation of Section 530 is not a procedural error.

Jury Act

Quebec

*Jurors Act*⁵⁰

Subsection 4(i) of the *Act* provides that persons who do not speak French or English fluently are disqualified from serving as jurors.

Alberta

Jury Act

According to Subsection 5(1)*f*) of the *Jury Act*,⁵¹ a person who is unable to understand, speak or read the language in which the trial is to be conducted may be exempted from serving as a juror.

Saskatchewan

Jury Act, 1998

Subsection 6*j*) of the *Jury Act, 1998*⁵² provides that persons who are unable to understand the language in which the trial is to be conducted are excluded from service as jurors.

⁵⁰ *Jurors Act*, SRQ 2002, c J-2

⁵¹ *Jury Act*, RSA 2000, c J-3

⁵² *The Jury Act*, SS 1998, c J-4.2

Case Law Document on Bilingualism in the Judiciary

Manitoba

Jury Act

According to Section 4 of the *Jury Act*,⁵³ a person is disqualified from serving as a juror in a trial where the language in which it is primarily to be conducted is one that this person is unable to understand, speak or read.

New Brunswick

Jury Act

According to Subsection 5c) of the *Jury Act*,⁵⁴ a person who is unable to understand, speak or read the official language in which the trial is to be conducted may be exempted from serving as juror.

Prince Edward Island

Jury Act

The *Jury Act*⁵⁵ provides that jurors must be able to speak and understand the language in which the trial is primarily to be conducted.

Newfoundland and Labrador

Jury Act

According to the *Jury Act*,⁵⁶ a person who does not speak or understand the official language used in the trial is unable to serve as a juror.

⁵³ *Jury Act*, CCSM 2010, c J30

⁵⁴ *Jury Act*, SNB 1980, c J-3.1

⁵⁵ *Jury Act*, RSPEI 1988, c J-5.1

⁵⁶ *Jury Act*, SNL 1991, c16

Case Law Document on Bilingualism in the Judiciary

Northwest Territories

Jury Act

The *Jury Act*⁵⁷ provides that any person able to speak and understand one of the official languages of the Northwest Territories, that is English, French or one of the Aboriginal languages, is able to serve as a juror.

Yukon

Jury Act

According to Subsection 4c) of the *Jury Act*,⁵⁸ every person who is able to speak and understand the official language in which the trial is being conducted is qualified to serve as juror.

⁵⁷ *Jury Act*, RSNWT 1988, c J-2

⁵⁸ *Jury Act*, RSY 2002, c 129