IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC)

BETWEEN:

DUNCAN CROSS MacDONALD

Appellant
(Accused)

- and -

THE CITY OF MONTREAL

Respondent

- and -

THE ATTORNEY GENERAL OF CANADA

Intervenant

- and -

THE ATTORNEY GENERAL OF QUEBEC

Intervenant

- and -

THE SOCIÉTÉ FRANCO-MANITOBAINE

Intervenant

- and -

ALLIANCE QUEBEC, ALLIANCE FOR
LANGUAGE COMMUNITIES IN QUEBEC

Intervenant

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# FACTUM OF THE SOCIÉTÉ FRANCO-MANITOBAINE

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IN THE SUPREME COURT OF CANADA

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## PART I

## STATEMENT OF FACTS

1. Duncan Cross MacDonald is an English speaking resident of the Town of Roxboro, District of Montreal, Quebec.

2. On February 25, 1981, MacDonald was served with a summons commanding him to appear before the Municipal Court of Montreal to answer a charge of speeding contrary to Montreal by-law 1319, art. 41(a), as amended.
Case, p. 1.

3. The summons is printed in blank standard form in French only. The particulars are filled in manually in French only.
Case, p. 1-3.

4. MacDonald challenged the jurisdiction of the Court to proceed on the charge on the grounds that a unilingual French summons delivered to an English-speaking resident of Quebec is offensive to s. 133 of the Constitution Act, 1867.
Case, p. 10.

5. The jurisdictional challenge was unsuccessful before the Municipal Court; MacDonald was convicted on March 24, 1982. Appeals to the Superior Court (by trial de novo) and to the Court of Appeal failed. MacDonald appeals to this court, by leave, on a constitutional question stated by order of Mr. Justice Ritchie.

## PART II

## THE POINTS IN ISSUE AND THE INTERVENANT'S POSITION WITH RESPECT THERETO

The sole issue is stated in the Constitutional Question fixed by order of Mr. Justice Ritchie as follows:

> Does a summons which is printed and published in the French language only and commands an English speaking person to appear before the Courts of Quebec offend the provisions of s. 133 of the Constitution Act, 1867, resulting in a total absence of jurisdiction of the Court to proceed against him?

### Intervenant's Position

YES.

## PART III

## ARGUMENT

1. This appeal falls to be decided on the interpretation given to s. 133 of the Constitution Act, 1867, which, so far as material, provides:

> "and either of those Languages [English and French] may be used by any Person or in any Pleading or Process ... in or from all or any of the Courts of Quebec."

### Principles of Interpretation

2. Constitutional exposition differs significantly from statutory construction. As explained by this Court, "A Constitution['s] ... function is to provide ... for the unremitting protection of individual rights and liberties". This entails "a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects," and requires the Court "first ... to specify the purpose underlying [specific fundamental guarantees]".
   Hunter et al. v. Southam Inc., S.C.C. Sept. 17, 1984, p. 13, 15, 16.
   Reference re Minority Language Educational Rights, Ont. C.A., May, 1984, pp. 19, 51-2.

3. In Blaikie (No. 1), this court spotlighted the broad purposive approach as particularly relevant to interpreting language rights protected by s. 133. Section 133, the Court said, "ought to be considered broadly" (p. 1028); it should not be read "over-technical" (p. 1024) so as to "truncate" its requirements (p. 1027). "The proper approach to an entrenched provision [like s. 133] is to make it effective through the range of institutions [to which it applies]" (p. 1030).
   A.G. Quebec v. Blaikie, [1979] 2 S.C.R. 1016.

4. As an aid to a purposive analysis, the Court may consider the historical background giving rise to specific constitutional guarantees.
   Reference re the Senate, [1980] 1 S.C.R. 54, 30 N.R. 271, 282.

Historical analysis is relevant to determine the original content of the Constitution Act, 1867. From that original position the Court may expound the present meaning of the Constitution to conform to current conditions, having regard to the fact that the Constitution is a document "of evolving meaning, not limited to its original inspiration" (CIGOL); containing a principle "of growth and expansion" (Edwards); being "a resilient instrument capable of adaptation to changing circumstances" (AIB).

CIGOL v. Gov't. of Saskatchewan, [1978] 2 S.C.R. 545, 583.
Edwards v. A.G. Canada, [1930] A.C. 124, 136 (P.C.).
Reference re Anti Inflation Act, [1976] 2 S.C.R. 373, 412.

Purpose of s.133

5. It is submitted that the purpose of s. 133 is to facilitate participation of English and French minorities in their own languages in certain governmental institutions, including the Courts. The Fathers of Confederation intended that s. 133 would "perpetuate both languages" in Quebec (Bertrand v. Dussault). The means chosen was to place both languages on a plane of "equality" in designated institutions, including the Courts (Jones v. A.G.N.B.).

Bertrand v. Dussault, Co. Ct. St. Boniface, Jan. 30, 1909. Cited approvingly by Deschênes, C.J. in Blaikie v. A.G. Quebec (1978), 85 D.L.R. (3d) 252, 279, in reasons specifically adopted by this Court "on matters of detail and of history": [1979] 2 S.C.R. 1016, 1027.
Jones v. A.G.N.B., [1975] 2 S.C.R. 182, 195.

6. It is submitted that courts sitting under s. 133 should give the strictest scrutiny to laws and administrative practices which place undue burdens on the minority language in protected institutions, or which fail to implement in a large and liberal spirit the state's affirmative duties to publish bilingual laws and to promote bilingualism in the legislature and courts.

Historical Background: Municipal Traffic Violations

7. Pre-confederation law applicable to Lower Canada required a summons such as that issued to appellant to be in the language of the defendant, if English or French. Appellant is charged with breach of a municipal by-law regulating vehicle speed. The pre-confederation precursor of this provision stems from the Municipalities and Roads Act C.L.S.C. 1861, c. 24, s. 27(14), which provides:

> "Every local council may make by-laws to prevent parties from driving or riding faster than an ordinary trot, in the streets or public places comprised within a radius of one mile from the principal church in the local municipality..."

Persons charged with breach of municipal by-law would be summoned by "special notice" to appear before the Circuit Court. Special notices are defined at s. 5 (19) of the Municipalities and Roads Act as follows:

> "a notice given or to be given to any member or officer of any municipal council, or to any other person under this or any Act relating to municipal purposes, or in pursuance of any by-law passed by any such council for the purpose of informing him of any appointment or of any other fact, or of requiring him personally to attend, or be present at any particular place, or for any other object."

A summons to Municipal Court, such as that issued to appellant, is clearly a notice given to a person in pursuance of a by-law requiring him personally to attend at any particular place, and thus a "special notice" within the meaning of the applicable pre-confederation definition.

> Sheppard, The Law of Languages in Canada (1971), p. 238 ("Traffic tickets and summons qualify as 'special notices' which are served on the recipient...").

On the eve of Confederation, pursuant to s. 7(2) of the Municipalities and Roads Act, persons required to give a special notice "shall cause it to be drawn up in the language of the person to whom it is addressed, if such language be the English or the French," and to "serve it on the person to whom it is addressed..."

8. The requirement for service of special notices in the language of the person to whom it is addressed was immediately carried forward into Quebec law by the first Quebec Municipal Code which superceded the Municipalities and Roads Act in 1871

> Code Municipal de la Province de Québec, S.Q. 1871, c. 8, secs. 132-3.

9. In the Confederation Debates in the Province of Canada, then Attorney General John A. MacDonald explained art. 46 of the Quebec Resolutions, the precursor of s. 133, as follows:

> "... the rights of the French-Canadian members as to the status of their language in the Federal legislature shall be precisely the same as they now are in the present legislature of Canada in every possible respect ... The status of the French language, as regards the procedure ln Parliament, the printing of measures, and everything of that kind should be precisely the same..."
>
> Parliamentary Debates on Confederation of the British North American Provinces, 3d sess., Provincial Parliament of Canada, Quebec, 1865 (repr. King's Printer, 1951), p. 944.

10. It is submitted that s. 133 preserves at least the status quo ante with respect to language rights, and thus preserves the right of the anglophone minority in Quebec to be served in the English language with summonses commanding appearance before Municipal Court for breach of municipal traffic by-laws.

Historical Background: Summonses in Criminal Cases

11. The conclusion in paragraph 10 may be rationalized with the general position of pre-confederation law respecting the issuance of writs of summons in criminal proceedings. By the longstanding law and practice of the Province of Canada, summonses initiating Lower Canadian criminal proceedings had to be in English. Documents initiating civil proceedings could be in either English or French, with the exception of the periods 1777-1801, when initiating civil writs had to be in the language of the defendant, and 1843-1846 when they had to be in both languages.

12. Civil proceedings. Civil proceedings took place before the Circuit Court or Superior Court at first instance, and before the Court of Queen's Bench (Appeal Side) on review. The establishment, composition and jurisdiction of these courts were governed by An Act respecting the ordinary procedure in the Superior and Circuit Courts, C.S.L.C. 1861, c. 83 and An Act respecting the Court of Queen's Bench, C.S.L.C. 1861, c. 77. Section 2 of the Superior and Circuit Courts Act provided that writs issuing out of the Superior Court "may be either in the English or in the French language"; s. 169 provided an identical rule for the Circuit Court; and s. 28 of the Queen's Bench Act stipulated the same for appellate functions of the Queen's Bench.

13. Criminal Proceedings. No provision is made in these, or in any other statutes of the United Province of Canada (1840-1867) or the Province of Lower Canada (1791-1840) governing the language of writs initiating criminal proceedings.

Pre-confederation criminal jurisdiction was exercised by the Court of Queen's Bench (Crown Side) and by the Sessions Court established under C.S.L.C. 1861, c. 97. Sections 67 ff. of C.S.L.C. 1861, c. 77 provide for the original criminal jurisdiction of Queen's Bench. Section 73 provides for the issuance of writs, but is silent on language requirements. C.S.L.C. 1861, c.97 establishes Courts of General and Quarter Sessions, and invests them with criminal jurisdiction "cognizable according to the laws of England then in force in Lower Canada". No provision is made for the language of writs initiating proceedings in these courts.

14. At law, thus, criminal proceedings were governed by art. 11 of The Quebec Act (1774), 14 Geo. 3, c. 83 (U.K.) which provided that "The criminal law of England ... shall be observed as law in the Province of Quebec ... in the Description and Quality of the Offence as in the method of Prosecution and Trial ...to the exclusion of every other Rule of Criminal law or mode of proceedings thereon". This section incorporated into the law of Quebec the Statute 4 Geo. II, c. 26 (1733) which prescribed that from March 25, 1733, "all proceedings whatsoever in any courts of Justice ... shall be in the English Tongue and Language only, and not in Latin or French". These provisions were carried forward by art. 33 of The Constitutional Act of 1791, 31 Geo III, c. 31 and by arts. 46-7 of The Union Act, 1840, 3 & 4 Vict, c. 35 (U.K.), and remained in force on the eve of Confederation.

R. v. Watts, Ex.p. Poulin (1968), 69 D.L.R. (2d) 526, 528-9 (B.C.S.C.).
Morel, La Réception du droit Criminel Anglais au Québec (1760-1892), (1978), 13 R.J.T. 449, 534 ff.

15. By the law described in para. 14, criminal indictments in the pre-confederation period had to be in English. The position in law was universally followed in practice until the eve of Confederation.

Cavendish, Debates of the House of Commons in the year 1774 on the Bill for Making More Effectual Provision for the Government of the Province of Quebec (London, 1839; repr. 1966), p. 139-140 (Cavendish reproduces the testimony of Attorney General Francis Maseres before the committee of the House studying The Quebec Act, 1774.
"In what language do you conceive, by the present bill, the [civil] pleadings will be? - I suppose in either; ...
Suppose one party says, I choose to have it in English, and another says, I choose to have it in French; who is to determine? - Hitherto, it has been the custom, I believe, that to the English declaration a French plea may be made.
How do you think, under the bill, the criminal proceedings would be carried on, in English or in French? - I presume in the English language".
[Maseres has been described as the most

"distinguished mind ever sent to share in the Canadian administration"; "tremendously able"; having made an "important and exhaustive contribution" as the Crown's Chief law officer: Edwards, The Advent of English (Not French) Criminal Law and Procedure into Canada - A Close Call in 1774 (1984), 26 Crim. L.Q. 464, 468])

Perrault, Questions et réponses sur le droit criminel du Bas-Canada, p. 210.

Cremazie, Les lois Criminelles Anglaises. Traduites et compilées de Blackstone, Chitty, Russell et autres criminalistes anglais, et telles que suivies en Canada (Quebec, 1842), p. 162 ("Nous devons remarquer en terminant, qu'autrefois, les indictments ... maintenant, d'après les statuts 4 Geo. II, c. 26 et 6 Geo. II, c. 6, ils doivent être redigés dans la langue anglais ...").

Morel, La Reception du droit criminel au Quebec (1978), 13 R.J.T. 449, 536 (L'habitude de rediger les actes d'accusation en anglais même lorsque l'accuse était de langue française, n'en persista pas moins pendant quelques années encore, après 1867).

Hey, The Meaning of the Criminal Law in Quebec, 1764-1774, in "Crime and Criminal Justice in Europe and Canada" (Wilfred Laurier University Press, 1981), p. 77, 85-6 ("Preservation of the exact forms of indictment meant the use of English: the formal charge ... was always written in the language of the conqueror...")

16. In R. v. Pitre Chouinard (1874), 4 Q.L.R. 220, a French accused objected to an indictment issued in French only, on the grounds that "the French language [was] prohibited from being used in indictments in the courts of this country by the laws in force therein." The Court ruled that s. 133 of The Constitution Act, 1867 made French a permissive language, thus changing the prohibition on French before 1867, but did not consider in its brief reasons, whether English remained a mandatory language for English accused.

17. On the eve of Confederation, thus, the long standing law and practice of Lower Canada required that English be used to summon anglophones before the criminal courts of Quebec. If it were intended to change the long standing rights of Quebec's anglophones by s. 133, one would expect to find discussion - and protest - in the Confederation debates. None appears. On the contrary, one finds assurances from Attorney General MacDonald that s. 133 preserves the status quo ante with respect to language rights. It is submitted that s. 133 preserves the language rights of Quebec's anglophone minority existing in 1867, and thus preserves their right to be summoned before Quebec's criminal courts in English.

English or French at Whose Option

18. Section 133 creates an option to choose English or French as the language of pleading ["either of the languages may be used"]. That is not the end of the matter. There is a further question: who enjoys the option to choose?

In civil proceedings, prior to Confederation, the option to choose the language of the initiating writ lay with the plaintiff. The language of s. 133, and the assurances given in the Confederation Debates, appear to preserve the plaintiff's option.

In criminal proceedings, pre-confederation law knew no option to choose the language of indictment. English was mandatory. Section 133 is easily read as giving an option to the accused.

It is more difficult to read s. 133 as reserving an option to choose the language of the indictment to the state. The purpose underlying s. 133 is to protect minority language use against invasion by the majority. It would defeat this purpose to read s. 133 as reserving power to the majority, acting through the Attorney General's Department, to eradicate the use of English in all printed forms.

19. Laws are made for the benefit of the subject, not the Crown, unless there is express indication in the text to the contrary.

> Willion v. Berkley (1562), 75 E.R. 339, 365-6.
> A.G. v. Donaldson (1842), 11 L.J. Ex. 338, 340. ("It is a well established rule, generally speaking, in the construction of acts of parliament, that the King is not included, unless there be words to that effect; for it is to be inferred prima facie, that the law which is made by the Crown with the assent of Lords and Commons, is made for subjects and not for the Crown").
> Craies on Statute Law (7th, 1971), p. 423.

20. The Crown is not included in general statutory phrases such as "Person", and thus acquires no option to choose language as a 'person' under s. 133.

> The Queen in right of Alberta v. C.T.C., [1978] 1 S.C.R. 61, 69. ("Prima facie, the Crown, whether in right of Canada or in right of a Province, is not a 'person' under the Aeronautics Act or under the Air Carrier Regulations ... The Crown can be a 'person' for the purposes of the Act and Regulation only if it can be found that it is included in the regulatory scheme by necessary implication").
>
> Hogg, Liability of the Crown (1971), p. 166. ("The Crown is not bound by statute except by express words or necessary implication. What this means is that general words in a statute, such as 'person' or 'owner' or 'landlord' are presumed to exclude the Crown unless the context provides compelling indications that the Crown was intended to be included ... it is a rule of construction, a presumption, designed to ascertain whether or not the statute does apply to the Crown").
>
> U.S. v. United Mine Workers, 330 U.S. 358, 67 S. Ct. 677, 687 (1947). ("The act does not define 'persons'. In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so".
>
> U.S. v. Cooper Corp., 312 U.S. 600, 605 (1941).

21. Quebec's interest in unilingual forms is administrative convenience. The interest of the anglophone minority is to perpetuate the use of English in protected institutions. Administrative convenience is far less important than keeping the English language alive in the Courts when the overriding purpose of s. 133 is to "perpetuate both languages" (supra., para. 5).

It is submitted that the option to use English or French as the language of criminal pleadings is the option of the accused. Section 133 was enacted for the benefit of the minority language; it creates no language rights for the state. Quebec is not a 'person' within the meaning of s. 133 and thus can claim no special constitutional right to use its administrative power to eliminate English in standard form pleadings. Section 133 imposes only obligations on Quebec - obligations to facilitate in a large and liberal spirit the citizen's right to choose.

Constitutional Policy

22. The purpose of s. 133 is to equalize the status of official language minorities in designated institutions. To interpret s. 133 as guaranteeing language rights to the state is inconsistent with this purpose. It would perpetuate the unequal position of the minority, rather than entrench its equality.

The rule that the initiator of the process retains the option to choose the language of the writ in civil proceedings is a necessary compromise. Both plaintiff and defendant have language rights. The rights of one are thus coloured by the rights of the other. Long standing practice in Quebec resolved this potential conflict of rights by allowing a French defense to be made to an English declaration, and vice versa. It is sound constitutional policy to read s. 133 as entrenching this compromise, which practice has proven workable.

No such compromise is necessary or desirable in criminal cases to which the state is a party. There are no competing rights in the state. It would be unsound constitutional policy to read s. 133 as allowing the Government to use its power to create obstacles to use of the minority language by instituting the process in one language only.

Jurisprudence

23. In Blaikie no. 1, this Court held section 12 of the Charter of the French Language [Bill 101] offensive to s. 133. Section 12 provides:

> "12. Procedural documents issued by bodies discharging judicial or quasi-judicial functions or drawn up and sent by the advocates practicing before them shall be drawn up in the official language ..."

In the Superior Court Chief Justice Deschênes held s. 12 constitutionally infirm because:

> "art. 12 reduces to nothing the right provided by the Constitution to the exclusive use of one or the other language, at the choice of the citizen" (emphasis added).
>
> Blaikie v. A.G. Quebec (1978), 85 D.L.R. 3d 252, 268 (C.S.)

Chief Justice Deschênes thus ruled that the option provided by s. 133 is the choice of the citizen, not that of the state. This Court adopted the ruling of Chief Justice Deschênes: [1979] 2 S.C.R. 1016, 1027.

This Court further ruled that s. 12 was incompatible with s. 133 for the additional reason that "S. 12 would ... make [French] the only official language of procedural documents" (p. 1022). If it is offensive to s. 133 for the legislative arm of the government to require that procedural documents be in one language only, it cannot be that that requirement would comport with s. 133 if, as here, it emanates from the administrative arm. The practical effect is the same.

24. It is in this context that this Court said the following in Blaikie (no. 1), supra., p. 1030:

> "Hence, not only is the option to use either language given to any person involved in proceedings before the Courts of Quebec ... but documents emanating from such bodies or issued in

> their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders."

The Court was addressing itself to the invalidity of s. 12 of Bill 101, which required procedural documents to be in French only. Nothing in this passage considered whether the option to choose the language of initiating documents lay with the state or with the citizen, or whether s. 133 reserves language rights to the state.

The Court did conclude that judges have the right to issue and publish judgments in either language. This holding underlines that "Judges who preside over Courts in Quebec are persons in the sense of s. 133" (per Deschênes, C.J. 85 D.L.R. (3d) 252, 268). The reasoned process of expounding the law and writing opinions is individual, and highly particular to the person. It is wholly different than the automatic administrative machine by which the state makes available compulsory forms for writs of summons. Nothing in the Court's remarks suggests that the State has the option to order that compulsory forms be in one language only.

25. It is submitted that anglophones in Quebec have the right to be summoned before the criminal courts of Quebec in English, or in English and French, for the following reasons:
    (a) Anglophones had this right prior to Confederation;
    (b) The Confederation Debates offer assurances to official language minorities that their rights will be maintained;
    (c) Section 133 must be given a purposive interpretation;
    (d) In accordance with its purpose, Section 133 is easily read as according a criminal accused the option to choose the language of summons;
    (e) To read s. 133 as according an option to choose the language of summons to the state conflicts with its purpose;
    (f) Laws are made for the benefit of the Subject, not the Crown;
    (g) The Crown is not a person within the meaning of s. 133;
    (h) Sound constitutional policy requires s. 133 to be read as removing obstacles to minority language use, not as creating a power to eliminate the minority language.

## PART IV

## ORDER SOUGHT

Intervenant respectfully asks that this Honourable Court:

1. Answer the constitutional question posed "Yes";
2. Allow the appeal;
3. The whole without costs for or against Intervenant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at OTTAWA, Ontario
this 30th day of November,
1984.

_____
Joseph Eliot Magnet
Counsel for the Société Franco-Manitobaine

## LIST OF AUTHORITIES

### Books and Articles

Legislation



Jurisprudence