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

LAST UPDATE: OCTOBER 2017

Part VI – Invasion of Privacy

Interception of Communications

189. (5) Notice of intention to produce evidence

189. (5) The contents of a private communication that is obtained from an interception of the private communication pursuant to any provision of, or pursuant to an authorization given under, this Part shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of the intention together with

> **(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting out full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and**
>
> **(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.**

189. (6) Privileged evidence

189. (6) Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

R.S. 1985, c. C-46, s. 189; 1993, c. 40, s. 10.

ANNOTATIONS

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[74] Documents prepared by the Crown, such as notices under ss. 189(5) and 540(8) of the *Criminal Code* that are served on the appellant, are communications with the accused initiated by the prosecution. Since those communications take place after an accused has exercised the right to a trial or preliminary inquiry in his or her own language, it seems to me to be logical and necessary that those communications (here the notices under ss. 189(5) and 541(8) of the *Criminal Code*) should either be bilingual or be prepared in the language of the accused to whom they are addressed.

[75] The Crown argued that there is no such obligation and cited case law that held that an accused was not entitled to receive a translation of the indictment when the indictment was not in the accused's language (*R. v. Simard* (1995), 27 O.R. (3d) 116 (C.A.)). To remedy that situation, an amendment to s. 530.01(1) of the *Criminal Code* was necessary. That amendment gave accused the right to require a translation of the indictment into their own language, but no right to receive a translation of other documents.

[76] In my view, those decisions are not relevant. The notices are not documents akin to an indictment. An indictment is prepared before the accused exercise their language rights under s. 530. The notices, on the other hand, are formal communications with the accused prepared by

the Crown after the accused exercise their rights and are directly connected with the trial or preliminary hearing that must be held in the language of the accused or be bilingual.

[77] Section 530.1(b) gives the accused the right to use either official language in written pleadings or other documents at the preliminary inquiry and trial. The Crown is not given the same right. This suggests that the written pleadings and other documents relating to the preliminary inquiry must be prepared by the Crown in the language of the accused to whom those documents are addressed.

[78] That interpretation is also consistent with the purpose of the notices: to give the accused "reasonable notice" of the Crown's intention to introduce certain communications or documents in evidence at the trial or preliminary hearing (see the text of ss. 189(5) and 540(8) of the *Criminal Code*). It seems reasonable to me to require that the notices be in the language of the accused. In Ontario, anglophone accused expect that the notices sent to them by the Crown will be in their language, English, and not French. Sending a notice in French to an anglophone accused would be unreasonable. A francophone accused is entitled to expect the same treatment.

[79] That means that in this case, sending the notices under ss. 189(5) and 540(8) in English only violated the appellant's language rights. In a bilingual trial or preliminary inquiry, those notices must either be bilingual or be written in French for accused who have exercised the right to a trial or preliminary inquiry in French, and written in English for accused who have chosen English. The violation in this case is particularly flagrant since sending the notices in English only does not comply with the policy on bilingual trials set out in the *Public Prosecution Service of Canada Deskbook*. In addition, one of the notices was addressed to only one person, the appellant, yet it was prepared in English only.

R. c. Ng, 1996 CarswellOnt 785, [1996] O.J. No. 666, 30 W.C.B. (2d) 144 (Ontario General Division) [hyperlink not available] [décision disponible en anglais seulement]

[4] At the preliminary hearing on May 1, 1995, Crown counsel filed 13 transcripts of intercepted communications together with an index. Those transcripts were English language translations of the original conversations in Cantonese. Those transcripts contained a statement respecting the time, place and date of the private communications and the parties thereto. I have ruled that the requirements of s.189(5)(b) have been met. I have also ruled that the delivery of the notice, copy tapes and computer discs to counsel for each accused was "reasonable notice given to the accused".

[…]

Is a "translation" of the original recording a "transcript"?

[25] The conflict of authorities is between those cases which hold that the definition of "transcript" in s.189(5)(a) is broad enough to include a translation from the language spoken and those cases which hold that a translation is not a "transcript" of the intercepted communication. This conflict emerges in those cases in which the recorded communication is in a language other than the language in which the trial is to be held.

[…]

[30] The possibility of a mistake or confusion or misinterpretation is even greater if the "transcript" delivered to the accused under s.189(5) is a translation into a language other than the language spoken in the communication. Not only is there a possibility, if not a likelihood, of inaccuracies but there is additional concern about the accuracy or reliability of the translation. The accused will be deprived of his right to prepare to meet effectively and completely the evidence of the recording when it is adduced at trial. As well, his right to mount a challenge to the translated version offered at trial will be severely compromised if he is not able before trial to compare the original recording

to the translated version which will be offered at trial. The conflict in the interpretation of s.189(5) was recognized by Watt J. in his book *Law of Electronics Surveillance in Canada* at p.241:

> Having due regard to the somewhat conflicting authorities upon this issue, it is submitted that the better practice to be followed in cases where the language of the conversation requires translation to become intelligible to the triers of fact is to serve upon the accused reasonable notice of the intention of the prosecution to introduce primary evidence in the form of a recording together with either a recording or transcription of the relevant conversation in the language spoken and the translation upon which it is proposed to place reliance in the proceedings. This form of notice would appear to fulfill the mandate of section 178.16(4)(a) and provide the accused with every opportunity to rebut the prosecutions case.

[31] Therefore, I do not agree that the purpose of s. 189(5) can be met by the delivery of a translation alone. While the *Official Languages Act* and s. 530 of the *Criminal Code* require that the proceedings at trial be recorded in one of the official languages and that all evidence given in another language be translated into the language of the trial, it does not mean that the translation can become a copy of the original private communication where the primary evidence to be adduced at trial is the original recording and not the translation of it.

[32] When the intercepted communication is in the English language and the trial will be conducted in English, compliance with s. 189(5) is quite straight forward and will be met by delivery of the notice together with a copy of the tape or a written transcript in English. However, when the private communication intercepted is in another language and where the recording will be adduced in evidence, the delivery of a "transcript" will be satisfied by delivery of a copy of the audiotape or a written version in the language spoken. If the trial is held in English the original recording will be the primary evidence. A written translation will be provided to comply with the *Official Languages Act* and s. 530 of the *Code* and to enable the English speaking tribunal to understand the evidence. The translation will be part of the record just as the translation of the testimony of a witness is the official record. It is in this sense that the *Official Language Act* and s. 530 apply, not to the notice and disclosure required by s. 189(5).

SEE ALSO:

R. v. Tam, 2000 CanLII 5699 (ON CA)

R. v. Shayesteh, 1996 CanLII 882 (ON CA)

R. v. Tam, 1992 CanLII 3444 (QC CA) [judgment available in French only]

R. v. Trang, 2002 ABQB 990 (CanLII)

R. v. Biasi, 1981 CanLII 387 (BC SC)

R. v. Biasi, 1981 CanLII 375 (BC SC)

R. v. Rowbotham (No. 4), [1977] O.J. No. 1686 (Ontario Court of General Sessions of the Peace) [hyperlink not available]

R. v. Ouellet, [1976] B.C.J. No. 1303 (BC PC) [hyperlink not available]

R. v. Li (No. 1), [1976] B.C.J. No. 1227 (BC Co. Ct.) [hyperlink not available]

Part XVII – Language of Accused

530. (1) Language of accused

530. (1) On application by an accused whose language is one of the official languages of Canada, made not later than

(a) the time of the appearance of the accused at which his trial date is set, if

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or

(ii) the accused is to be tried on an indictment preferred under section 577,

(b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

(c) the time when the accused is ordered to stand trial, if the accused

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, 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.

530. (2) Idem

530. (2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

530. (3) Accused to be advised of right

530. (3) The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

530. (4) Remand

530. (4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be

tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

530. (5) Variation of order

530. (5) An order under this section that a trial be held in one of the official languages of Canada may, if the circumstances warrant, be varied by the court to require that it be held in both official languages of Canada, and vice versa.

530. (6) Circumstances warranting order directing trial in both official languages

530. (6) The facts that two or more accused who are to be tried together are each entitled to be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak one of the official languages of Canada and that those official languages are different may constitute circumstances that warrant that an order be granted directing that they be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

R.S., 1985, c. C-46, s. 530; R.S., 1985, c. 27 (1st Supp.), ss. 94, 203; 1999, c. 3, s. 34; 2008, c. 18, s. 18.

ANNOTATIONS – GENERAL

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

1. General Introduction and Procedural History

[7] This is the first time this Court has been called upon to interpret the language rights afforded by s. 530 of the *Criminal Code*, R.S.C., 1985, c. C-46. This case concerns the right to be heard by a judge or a judge and jury who speak the official language of Canada that is the language of the accused, or both official languages of Canada. The unique circumstances of the accused provide an opportunity to clarify the scope of the right in ss. 530(1) and 530(4) of the *Code* and to determine the proper scheme of the legislation in cases where a new trial is ordered. For the purposes of this introduction, I will only mention that s. 530(1) creates an absolute right, while s. 530(4) subjects that right to the discretion of the trial judge.

[…]

[23] When s. 530 was promulgated in British Columbia, on January 1, 1990, the scope of the language rights of the accused was not meant to be determined restrictively. The amendments were remedial (see *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12), and meant to form part of the unfinished edifice of fundamental language rights (*House of Commons Debates*, vol. XIV, 2nd sess., 33rd Parl., July 7, 1988, at p. 17220). There was nothing new in this regard. In the House of Commons, the Minister of Justice had clearly articulated the purpose of the original language of the provisions when he introduced amendments to the *Criminal Code* on May 2, 1978, to add Part XIV.1 (*An Act to amend the Criminal Code*, S.C. 1977-78, c. 36, s. 1). He said:

> It seems to me that all persons living in a country which recognizes two official languages must have the right to use and be understood in either of those languages when on trial before courts of criminal jurisdiction. I repeat that a trial before a judge or jury who understand the accused's language should be a fundamental right and not a privilege. The right to be heard in a criminal proceeding by a judge or a judge and jury who speak the accused's own official language, even if it is the minority official language in a given province, surely is a right that is a bare minimum in terms of serving the interests of both justice and Canadian unity. It is essentially a question of fairness that is involved. [Emphasis added.]
>
> (*House of Commons Debates*, vol. V, 3rd sess., 30th Parl., at p. 5087.)

[…]

[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.

[…]

[53] Section 530 is not concerned with assuring a fairer trial or a more reliable verdict. In my view, there is an analogy to be made in this case with *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, where the Court refused to apply the s. 686 proviso to a violation of s. 14 of the *Charter*. Lamer C.J. said, at p. 1008:

> Section 686(1)(b)(iii) is designed to avoid the necessity of setting aside a conviction for minor or "harmless" errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred. Section 686(1)(b)(iv), a relatively new provision of the *Code* introduced in 1985, is also designed to permit a court to dismiss an appeal from a conviction, but in cases of procedural irregularity where the Crown can show that the accused suffered no prejudice.

At p. 1009, he continues:

> While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Therefore, I find as a matter of law that a violation of s. 14 of the Charter precludes application of both s. 686(1)(b)(iii) and s. 686(1)(b)(iv) of the *Code*.

[54] Given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, as described here, and the objective of s. 686, I believe that the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity. Accordingly, s. 686(1)(*b*) has no application in this case and a new trial must be ordered. Clearly, there must be an effective remedy available for breach of s. 530 rights. The application of the s. 686 *proviso* would make it illusory.

[55] Since the language in which the new trial is to be held is the very object of this appeal and the appellant has affirmed his request for a trial to be held before a judge or judge and jury who speak both official languages of Canada, I would hold that the appellant's application be granted.

6. Summary

[56] Courts must give effect to s. 530 of the *Code* in light of its remedial character, its substantive nature and its object, which is foremost to assist members of the two official language communities to enjoy equal access to specific services, in specific courts, in their own language. Absent evidence that the accused does not speak the language chosen, an accused is free to make his or her choice of the official language spoken by the judge or judge and jury by whom he or she will be tried, providing his or her application is timely. The exercise of discretion by the judge under s. 530(4) of the *Code* is based on the additional difficulties caused by an untimely application and the reasons for the delay. Administrative inconvenience is not a relevant factor, nor is the language proficiency of the accused in the official language not chosen by him or her; fairness of the trial is not a language rights issue. Any denial of the s. 530(4) right is exceptional and must be justified; the burden of this demonstration is on the Crown. In the case of a new trial, there is an even stronger presumption in favour of the accused because of the similarity between that situation and the one contemplated in s. 530(1).

Bessette v. British Columbia (Attorney General), 2017 BCCA 264 (CanLII)

STATUTORY FRAMEWORK

[9] The foundation of Mr. Bessette's application is his assertion that he has a right to have his trial in French by reason of the combined operation of s. 133 of the *Offence Act*, R.S.B.C. 1996, c. 338, and s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46. […]

[10] The *Offence Act* governs prosecutions under provincial statutes such as the *Motor Vehicle Act*. The predecessor to s. 133 of the *Offence Act* was first passed in 1955 as part of *An Act respecting Summary Proceedings (Summary Convictions Act, 1955)*, S.B.C. 1955, c. 71, s. 102, a section substantially similar to the current s. 133. It read as follows:

> Where, in any proceeding, matter, or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the *Criminal Code* relating to offences punishable upon summary conviction shall apply, *mutatis mutandis*, as if the provisions thereof were enacted in and formed part of this Act.

[11] Section 530 of the *Criminal Code* (then s. 462.1) became law on June 30, 1978. It was declared in force in British Columbia on January 1, 1990.

[12] It is common ground that prior to January 1, 1990, pursuant to an *Imperial statute of 1731* (4 Geo. II, c. 26) [*1731 Act*] all legal proceedings in British Columbia had to be in English. The *1731 Act* was received into British Columbia law and is in force pursuant to the requirements of s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 (CanLII) [Conseil scolaire]. In *Conseil scolaire*, the Supreme Court of Canada confirmed that the *1731 Act* continues to apply and that civil proceedings in British Columbia must be conducted in English.

[13] The parties also agree that since s. 530 was declared in force in British Columbia on January 1, 1990, a francophone accused charged with a *Criminal Code* offence is entitled to be tried in French. The point in contention is whether a party tried for a provincial offence can require a trial to take place in French.

[14] Mr. Bessette submits that s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code* and his trial must be in French. The Attorney General does not agree. He maintains that Mr. Bessette does not have the right to a trial in French because the charge concerns a provincial offence, not a *Criminal Code* or other federal offence where different rules apply. He submits that provincial offences are to be tried in English, pursuant to the provisions of the *1731 Act.*

[…]

DISCUSSION

[29] Mr. Bessette submits that Blok J. erred in failing to recognize that the decision denying Mr. Bessette a trial in French was jurisdictional in nature. He submits that Judge Gulbransen exceeded his jurisdiction in refusing to order that Mr. Bessette receive a trial in French. Assuming without deciding that the decision was jurisdictional in nature, this does not necessarily lead to the conclusion that Justice Blok erred in refusing prerogative relief. The adequate alternative remedy principle applies even in cases involving jurisdictional error: *Harelkin* at 586; *Matsqui* at para. 33.

[30] Alternatively, Mr. Bessette submits in this case there are special circumstances that warrant this Court's immediate intervention. He draws an analogy to cases where the Court has intervened in the course of a Provincial Court trial to protect solicitor-client or informant privilege. He submits an appeal cannot effectively remedy the violation of his right to have a trial in French. I do not accept the analogy. In cases concerning privilege there is no remedy. The harm caused by disclosure cannot be undone. If Mr. Bessette is tried in English and convicted and it turns out that he was entitled to a trial in French, he will be entitled to a new trial: *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768.

[31] In this case, Mr. Justice Blok concluded that judicial economy strongly favoured adjudicating the language issue in an ordinary appeal. He found that Mr. Bessette failed to establish that the circumstances of this case were such that the interests of justice required immediately granting the prerogative remedy sought. Such a decision was open to him. His decision is entitled to deference. Mr. Bessette has not shown any error in principle or other reason why this Court should intervene.

[32] In the result therefore I would dismiss the appeal.

N.B. – The appellant brought an application for leave to appeal before the Supreme Court of Canada. An application for a stay of the trial proceedings pending the determination of leave to appeal application with the Supreme Court of Canada was granted in Bessette v. British Columbia (Attorney General), 2018 BCCA 59 (CanLII).

Yamba v. Canada (Minister of Justice), 2016 BCCA 219 (CanLII)

Mr. Yamba's Linguistic Abilities

[17] Mr. Yamba submits that the Minister failed to properly consider his language rights and abilities. In light of his speech impediment and the fact that English is his third language, Mr. Yamba says he will not have a fair trial in the United States as he will not have access to a trial conducted in French. As the right to a fair trial is a principle of fundamental justice, Mr. Yamba says his surrender would violate that principle.

[18] Mr. Yamba takes the position that the right to a French trial provided for in s. 530 of the *Criminal Code*, combined with the official language rights in s. 16 of the *Charter*, elevates the right to a French trial in Canada to the equivalent of a constitutional right. Mr. Yamba argues that the Minister's conclusion that access to a certified translator will address concerns regarding trial fairness in the United States does not give "due consideration" to the language rights Mr. Yamba has in Canada.

[19] The Minister submits that the information he received from the United States Department of Justice with respect to the availability of a certified translator and a public defender addresses Mr. Yamba's concerns regarding trial fairness. The Minister says Mr. Yamba's argument that his trial will be unfair because he does not have a right to a French trial in the United States cannot succeed as extradition respects differences—even substantial differences—in other jurisdictions' criminal justice systems. In *Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500 at 522-523, the Court held that it is not always unjust to surrender a person to stand trial in accordance with the criminal procedures of another country, even though those procedures may not meet specific constitutional requirements—such as a presumption of innocence—for trial in Canada. The *Charter* cannot be given extraterritorial effect to govern the conduct of criminal proceedings in a foreign state (*Schmidt* at 518). Also, there is an assumption that an accused will receive a fair trial in a foreign state (*Argentina v. Mellino*, 1987 CanLII 49 (SCC), [1987] 1 S.C.R. 536 at 558). Mr. Yamba's assertion that his trial will be unfair in the United States simply because it will not be conducted in French does not displace this assumption.

[20] In my view, the Minister's conclusion that Mr. Yamba's language abilities and personal circumstances do not render Mr. Yamba's surrender unjust or oppressive or contrary to the principles of fundamental justice is a reasonable one.

[21] To begin, it is not at all clear that the right to a trial in one of our two official languages, provided for in s. 530 of the *Criminal Code*, is the equivalent of a constitutional right. Although, by virtue of s. 16(1) of the Charter, English and French are the "official languages of Canada", the *Charter* right to use either language in court proceedings extends only to the courts of New Brunswick and those established by Parliament (Charter, s. 19). In *R. v. MacKenzie*, 2004 NSCA 10 (CanLII), 181 C.C.C. (3d) 485, leave to appeal ref'd [2005] 1 S.C.R. xii, the court held that a breach of the rights established under s. 530 did not give rise to a constitutional remedy. Mr. Justice Fichaud said:

> [60] The quasi-constitutional status of s. 530 invokes a broad and purposive interpretation of the statutory language. But s. 530 is not entrenched as a provision of the Charter. Its breach does not invoke s. 24(1) of the *Charter*.

See also: *R. v. Schneider*, 2004 NSCA 151 (CanLII) at para. 19, 192 C.C.C. (3d) 1, leave to appeal ref'd [2005] 2 S.C.R. xi.

[…]

[43] The Minister's reasons evince that he conducted a proper *Cotroni* analysis. There was no need for him to consider Mr. Yamba's linguistic abilities again in the context of that analysis. Section 530 of the *Criminal Code* affords every accused with sufficient knowledge of an official language to instruct counsel the right to a trial in that language (*R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 S.C.R. 768 at paras. 28, 34). That right is not dependent on the accused being a Canadian citizen or resident of Canada.

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[98] At the preliminary inquiry, the appellant asked that the unilingual court reporter be replaced by a bilingual court reporter. The judge simply refused to accede to the request. He replied as follows:

> [TRANSLATION] So in the circumstances I am taking no action in this respect because I am not in charge of administration, I have enough problems to solve without solving everybody's. So – I understand that it would be preferable for our reporters to be bilingual, it is not – I am not going to make orders to get one. So we are going to proceed with the resources available to us this morning.

[99] The appellant renewed his request a few days later. The judge noted his request, but did nothing to address it.

[100] In the appellant's submission, the judge's failure to act is a violation of his rights under ss. 530 and 530.1. The certiorari judge agreed. In addition, the appellant argued that the absence of a bilingual court reporter contributed to the delay in the preparation of the transcripts that were needed in order to bring his application for certiorari.

[101] The Crown contended that there had been no violation. It argued that ss. 530 and 530.1 impose no express obligations concerning the presence of a bilingual court reporter. In addition, given technological advances, the preliminary inquiry is tape recorded, and it is not necessary for there to be a court reporter present. Accordingly, the fact that a bilingual court reporter was not present does not constitute a violation of the appellant's linguistic rights.

[102] There has been no decision dealing specifically with the right to a bilingual court reporter during a bilingual trial or preliminary inquiry. In *Beaulac*, however, the Supreme Court of Canada seems to have assumed that a bilingual court reporter would be present in a bilingual trial. At para. 39, the Court explained:

> 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. [Emphasis added.]

[103] In my opinion, the judge's inaction in the circumstances constitutes a violation of the appellant's language rights. The effect of an order for a bilingual trial or preliminary inquiry under s. 530 is that all court personnel whose presence is necessary to the proper conduct of the proceeding must be bilingual. To the extent that the presence of the court reporter is necessary for the proper conduct of the inquiry or the trial, then the judge must ensure that the reporter is bilingual.

[104] It is impossible for us, on appeal, to conclude that in this case the court reporter played no role during the preliminary inquiry. It is quite probable that the court reporter was available, for example, to replay or read back extracts of witness' testimony, in the event that the judge or the parties so requested.

[105] With respect to the Crown's argument that there can have been no violation since there was no express obligation to have a court reporter present, no evidence was presented to us to establish the rules and practices of the court governing whether a court reporter is to be present. The fact remains that the court thought it appropriate to have a court reporter present during this preliminary inquiry. When the appellant objected, the judge did not simply say that the court reporter had no role to play. The judge seemed to be of the opinion that a court reporter should be present. It is therefore reasonable to conclude that in this case, the court reporter was an integral part of the preliminary inquiry and of the proper conduct of that proceeding, and had to be able to work in both languages.

[106] In response to the appellant's complaint, the judge should have determined whether the court reporter might be required to play a role in the proper conduct of the inquiry and, if so, ensured that a bilingual court reporter was present. He should not simply have washed his hands of the problem. If the presiding judge refuses to be responsible for ensuring respect of the accused's language rights in the courtroom, the accused is left with no option for remedying the problem.

[107] I therefore conclude, as did the certiorari judge, that the absence of a bilingual court reporter was a violation of ss. 530 and 530.1. The violation was particularly serious in that the judge refused to act despite the appellant's request.

[108] With respect to the appellant's argument that the absence of a bilingual court reporter caused a delay in the preparation of the transcripts needed for the application for review, the appeal record is not clear or complete on that point. In the absence of a sufficient factual record, in this case, it cannot be concluded that the appellant's language rights were violated on this ground.

W.F. v. CAS, 2015 ONSC 6751 (CanLII)

[19] It appears to me based on the quoted passages of the transcript that the Appellant speaks and understands French fluently. In my view the motions judge erred in fact in concluding otherwise. The Appellant's counsel (who was not the counsel who acted for the Appellant before the motion judge) confirms that the Appellant communicates with him in French. Counsel for the Appellant does not request a remedy in respect of the motions judge's rulings and comments as to her request for a bilingual proceeding, but does request that this court enunciate that an error has been made in the court below in challenging the Appellant's request for a bilingual proceeding. A bilingual proceeding did take place at the request of the Appellant when she requested it. The motion judge correctly referred to the test relevant to a proceeding where a party requests that the proceeding take place as a bilingual proceeding. At page 6 of his reasons the motion judge stated,

> According to the Supreme Court of Canada, language rights should be interpreted purposively and remedially: *Reference Re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 SCR 212; *Reference re Public Schools Act (Manitoba)*, 1993 CanLII 119 (SCC), [1993] 1 SCR 839. The right to require a bilingual proceeding is set out in s.126(1) of the *Courts of Justice Act*, which states, *A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding.* (emphasis mine)
>
> Provisions such as this have been accorded quasi-constitutional status: *R. v. McKenzie*, 2004 NSCA 10 (CanLII). It is settled law that the right of a party who speaks French to require that a proceeding be bilingual is a substantive and not merely procedural right. It is an absolute right: *Ndem v. Patel*, 2008 ONCA 148 (CanLII), [2008] OJ 748. Such a party need not prove that he or she cannot also communicate in English: *Tremblay v. Picquet*, [2010] O.J. 1216 (Ont.S.C.). However, when such a request is made, it is incumbent upon the court to satisfy itself that the requesting party does in fact "speak French". It is clear that the requesting party's ability to "speak French" is a condition precedent to the right to a bilingual proceeding: *Mimico Co-operative Homes Inc. v. Ward*, [1997] OJ 519, 97 OAC 309; *A.J.W. v. B.W.*, 2014 ONSC 2745 (CanLII), [2014 OJ 2209. In applying the appropriate interpretation of the term "speaks French", I am guided by the Supreme Court of Canada's decision in *R. v. Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768, [1999] SCJ 25, where an accused was denied a bilingual trial after making an application under s.530 of the *Criminal Code*, which provides:
>
> > […]
>
> Although Bastarache J. sets out a relatively relaxed test for identifying the "language of the accused", he makes it clear that not everyone can simply assert a right to a bilingual

proceeding. Without a subjective connection to the official language, language rights are not triggered because there is no threat to the subjectively-felt cultural identity that these rights are intended to protect.

In my view, the words "speaks French" in the context of s.126 of the *Courts of Justice Act*, should be interpreted having regard to the intent and spirit of the provision: to permit francophone litigants, or litigants who are more comfortable communicating in French than in English, to participate in court proceedings in French. The words "speaks French" in this important legislative provision should connote something more than being able to order crème brulée in a restaurant. The party requesting a bilingual proceeding should be able to demonstrate that he/she has a working fluency in the French language sufficient to instruct counsel and follow the proceedings in French. In my view, anything less than this makes a mockery of s.126 and permits the invoking of this provision by obstructionist litigants and their counsel as a delay tactic or as a way of avoiding a particular judge. This strikes at the very heart of the integrity of the single-judge case management system, which is a hallmark of family court in this province. Unfortunately, this is a very real concern, given my 19 years' experience on the Bench. Sadly, the circumstances of this case are by no means unusual or infrequent.

I am not suggesting that a voir dire must be held each time a request for a bilingual proceeding is made, to determine whether the requesting party speaks French. For example, in cases where court documents have been prepared in French, or where the request for a bilingual proceeding is made promptly at the beginning of the case, or where a party's fluency in French is self-evident, the court need not make any inquiries and the request for a bilingual proceeding should be immediately granted. However, in circumstances giving rise to a suspicion that the request may not be a bona fide one – especially where the request is not made in a timely fashion, the court materials are in English and the requesting party's lawyer does not speak French – then the court should conduct a voir dire to satisfy itself that the requesting party does in fact "speak French" as contemplated by s.126. I appreciate that it can be difficult and awkward to assess someone's facility in a language that the assessor does not speak, but judges are routinely required to engage in similar inquiries when assessing the validity of a party's request for an interpreter (see for example *R. v. Wangchuk*, 2012 ONCJ 338 (CanLII)) or the competence of unaccredited interpreters, and so what is being suggested here is not foreign to judges. The presence of a French interpreter, who can be asked to converse with the requesting party, would generally be sufficient to assist the court in making a determination that the party "speaks French" with sufficient fluency to make the request for a bilingual hearing a bona fide one. Had such a voir dire been conducted in this case, it would have been abundantly clear to the case management judge that the mother's French language skills did not rise to the minimum level necessary to allow her to invoke s.126 of the Courts of Justice Act. Her request for a bilingual hearing was motivated by a desire to frustrate, obstruct and delay the inevitable disposition being ordered today. This was not fair to her children, whose permanency planning was significantly delayed by the transfer of this case to a bilingual judge. 2014 ONCJ 480 (CanLII)

[20] I do not have a ready solution for the problem that the motion judge stated gave rise to his concern with respect to the possibility of obstructionist litigants and their counsel invoking linguistic rights as a delay tactic, other than to note that it should be sufficient to advise all litigants of the right to a bilingual proceeding at the outset in order to ensure that they are aware of that right. It is my understanding that the bar is under an obligation to advise clients of the right to have a bilingual proceeding. This may not be sufficient to address what the motion judge states is a concern in his jurisdiction. In my experience in this jurisdiction there is not and never has been any such problem. […]

[21] It is clear, as expressed by the decisions of the Supreme Court of Canada and the Court of Appeal quoted *supra*, that language rights cannot be infringed upon, and that a judge who

attempts to weigh and evaluate the ability of a person to speak French in the matter which was attempted in this case invites an appeal, long delay, and potential prejudice to the children involved.

HMTQ v. Pelletier, 2002 BCSC 561 (CanLII)

[34] Can s. 530 be read as encompassing parole eligibility hearings under ss. 745.6 to 745.63? After a careful consideration of those provisions, I conclude that parole eligibility hearings do not fall within s. 530 and that Mr. Pelletier is not an "accused" within s. 530. It is clear from a full reading of s. 530 that this provision is specifically aimed at trials of accused persons. It is equally clear that ss. 745.6 to 745.63 do not deal with trials of accused persons. They deal with hearings accorded to prisoners who are convicted and sentenced offenders. The differences are too marked to be cured by liberal interpretation. In my opinion, the court would be legislating in the guise of interpretation if it were to hold that Mr. Pelletier and his parole eligibility hearing come within the scope of s. 530. In my view, if this court were to do that, it would be interfering with the functions of Parliament or the Legislature to achieve an end that should only be accomplished by appropriate legislation.

Amyot v. Autorité des marchés financiers (AMF), 2016 QCCQ 12492 (CanLII)

[2] Four statements of offence were issued involving over twenty defendants. Some defendant's mother tongue is English as for others is French.

[…]

[7] May the petitioners claim for the trial to be held in English only?

[…]

[9] These criminal cases deal with the interpretation of section 530 and/or 530.1 of the *Criminal code* but the present charges are brought under the *Securities Act*, a provincial statute.

[10] Even if the petitioner Amyott (the only one risking an imprisonment) uses the expression "quasy-criminal nature", it is not relevant.

[11] In *Beaulac*, it is said: "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. This is a substantive right and not a procedural one that can be interfered with. " (Underlined by the Court)

[12] The *Code of Penal Procedure* doesn't incorporate section 530 of the *Criminal code*.

[13] Also, even when section 530 of the *Criminal code* applies, a bilingual trial may be authorized.

[14] Under the *Charter of the French language*, French is the Quebec's language justice. However, although according to paragraph 7, everybody may use French or English in all cases before the Quebec' courts.

[15] Section 14 of the *Canadian Charter of Rights and Freedoms* guarantees the right of having an interpreter. However, the right to an interpreter is independent of the right to a full defence.

[16] As stated by the Supreme Court of Canada in *R. v. Beaulac*, language rights and trial fairness are distinct. 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 own trial.

[17] The right to a fair trial is universal and can't be greater for members of official language communities than for people 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.

[18] Section 133 of the *Constitution Act of 1867* (LC 1867) specifies the judicial proceedings' language before the Courts: "Either the English or the French (…) 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." (Underlined by the Court)

[19] Pursuant to section 36 of the *Charter of Human Rights and Freedoms*, the provincial *Charter*, "every accused person has a right to be assisted free of charge by an interpreter if he does not understand the language used at the hearing (…)".

[20] The section 204 of the *Code of penal procedure* provides the use of an interpreter.

[21] Than, the petitioners have the right to express themselves in the official language of their choice but they can't obligate that the trial be held in English only.

R. v. Bauer, 2005 ONCJ 337 [hyperlink not available]

[22] What is the intent of *Part XVII - Language of the Accused*? Does it allow language rights to an accused in circumstances where the range of incarceration is less and the standard of proof is more onerous - beyond a reasonable doubt rather than on the balance of probabilities - but prevent a person who is nominally called a defendant from accessing those rights?

[23] We must look to the case law for a possible answer. [...]

[…]

[28] The Supreme Court of Canada, in *R. v. Beaulac*, has indicated strong support for the right of a bilingual person to a hearing in the official language of her choice but it does not directly address the question of whether a defendant in an 810 hearing has the same rights as an accused under Section 530.

[29] *The Dictionary of Canadian Law*, Third Edition, 2004, Thomson Carswell: The Criminal Code does not provide a definition for accused but at page 14 in the *Dictionary of Canadian Law*, Third Edition, 2004, accused is defined as:

1. One charged with a crime;

2. Includes (a) a person to whom a peace officer has issued an appearance notice under s. 496, and (b) a person arrested for a criminal offence;

3. Includes a defendant in summary conviction proceedings and an accused in respect of whom a verdict of not criminally responsible on account of mental disorder has been rendered - Section 672.1.

[30] Section 810 is in Part XXVII of the *Criminal Code*, deals with summary conviction proceedings. The *Dictionary of Canadian Law* defines accused as including a defendant in summary conviction proceedings. A trial by definition includes a hearing. A defendant in a Section 810 hearing is not an accused but is subject to prison for a term not exceeding 12 months if he or she fails or refuses to enter into a recognizance 810(3)(b) - ordered pursuant to Section 810(3)(a). The penalty for failing or refusing to comply with a Section 810 order is greater than the general provision for punishment of a summary conviction offence provided by Section 787(1).

[31] Further, a breach of recognizance, ordered under Section 810, is a *Criminal Code* offence pursuant to Section 811, is listed under Section 553 as being under the absolute jurisdiction of a provincial court judge, and is entitled to the language rights under Section 530.

[32] There are no cases submitted, nor have I been able to find decisions precisely on the points raised in this motion. However, considering the rules of statutory construction, and the decision of *R. v. Beaulac* regarding Section 530, and the importance of an individual having access to a trial/hearing in the official language of his or her choice, notwithstanding administrative inconvenience, the risk of imprisonment up to 12 months and the criminal nature of any breach of an order made under Section 810, it is my view that a defendant under Section 810 is entitled to the same language rights as provided an accused under Section 530.

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

[164] On the question of the judicial processing of prosecutions for federal contraventions, the Court was presented with, and even participated in, a virtually microscopic examination both of the provisions of sections 530 and 530.1 of the *Criminal Code* and of sections 125 and 126 of the *Ontario Courts of Justice Act*.

[165] Certainly, at first glance, the provisions of section 126 of the *Ontario Courts of Justice Act* seem to be comparable to section 530.1 of the *Criminal Code*, the effects of which have been suspended by the implementation of the *CA* [*Contraventions Act*] and the regulations thereunder.

[166] However, it must not be forgotten that, as was pointed out in *R. v. Beaulac*, *supra*, that in Canadian law, substantive equality is the applicable norm. [...]

[167] Section 125(2) of the *Ontario Courts of Justice Act* clearly establishes the context, which is that English is the language of the administration of justice in Ontario unless otherwise provided and that those exceptions are delineated in detail by the provisions of the next section, section 126.

[168] It is clear that the *Courts of Justice Act* does not adopt the principle of the substantive equality of the two official languages that is recognized by the *Charter* and the *OLA*, and that in fact the principle that governs the *Courts of Justice Act* is that there is one principal language in the administration of the courts in Ontario, English, and that the place assigned to French is that of a secondary language that it is agreed will be accommodated. This is particularly clear when we consider the subsequent provisions of the *Courts of Justice Act*.

[169] The principle that underlies the *Ontario Courts of Justice Act* is precisely the principle that Mr. Justice Bastarache rejected in *R. v. Beaulac*, *supra*, when he interpreted the language rights guaranteed by the *OLA* and the *Charter*. He wrote:

> 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.

[170] It must be recalled that the *Criminal Code* establishes that the language of the accused is the rule, and this is not stated formally in the provisions of the *Ontario Courts of Justice Act*.

[171] It is clear that section 530(3) provides for an active offer of services in French, and that the judge must make the necessary arrangements so that the offer is made for an accused to be tried in French. No equivalent provision is made in the Ontario Act.

[172] Moreover, given the fact that sections 530 and 530.1 of the *Criminal Code* are no longer applied in respect of the processing of contraventions under the new scheme, accused individuals will no longer be able to file a complaint with the Commissioner of Official Languages, and this is no small matter.

[173] The Court also noted that only the summary convictions part of the *Criminal Code* has been imported in applying the *CA* in Ontario, under section 5 of the Act. The result of this is that an accused person has no remedy in respect of the rights set out in sections 530 and 530.1 of the *Criminal Code*. Those sections might have been used to protect an accused's rights if it were established in a provincial court that the rights provided by the Ontario *Courts of Justice Act* did not fully protect the rights provided in sections 530 and 530.1 of the *Criminal Code*.

[...]

[181] Counsel also pointed out that the provisions of section 530.1(f) of the *Criminal Code* grant an unconditional right to an interpreter to assist the accused, his or her counsel or a witness during the preliminary inquiry or at trial. Section 530.1(g) sets out the right to a transcript of everything that was said during the proceedings in the official language in which it was said, and to a transcript in the other official language of everything that was said. Item 9 of subsection 126(2) of the *Court of Justice Act* provides that the court shall provide interpretation of anything given orally in the other language and at examinations out of court, but not a transcript of the interpretation, as is provided in the *Criminal Code*; what is even more disquieting is that this service is provided only in the case of a party or a lawyer who speaks French but not English, which makes it virtually impossible, properly speaking, to use that provision, since it could apply only in the case of accused persons or counsel who speak only French and do not speak English. This is a significant erosion of rights in comparison to the rights guaranteed by sections 530 and 530.1 of the *Criminal Code*, not to mention that it must be rare for a lawyer practising in Ontario to speak only French and not English.

[182] I therefore have no hesitation in concluding that the measures taken by the respondents regarding the application of the *CA* and the agreements entered into by the respondents and the Government of Ontario and the subsequent municipal agreements do not adequately and completely protect the quasi-constitutional language rights provided by sections 530 and 530.1 of the *Criminal Code* and by Part IV of the *OLA*.

[183] The violation of the language rights provided in sections 530 and 530.1 of the Criminal Code and Part IV of the *OLA* also constitutes a violation of the rights provided in sections 16 to 20 of the *Charter*.

SEE ALSO:

R. v. Schneider, 2004 NSCA 151 (CanLII)

R. v. Car-Fre Transport Ltd., [2015] ABPC 280 (CanLII) [judgment available in French only]

Lavigne v. Quebec (Attorney General), 2000 CanLII 30033 (QC SC)

Edwards v. Lagacé, ès qualités Juge, 1998 CanLII 11790 (QC SC) [judgment available in French only]

ANNOTATIONS – SUBSECTION 530(1)

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

1. General Introduction and Procedural History

[7] This is the first time this Court has been called upon to interpret the language rights afforded by s. 530 of the *Criminal Code*, R.S.C., 1985, c. C-46. This case concerns the right to be heard by a judge or a judge and jury who speak the official language of Canada that is the language of the accused, or both official languages of Canada. The unique circumstances of the accused provide an opportunity to clarify the scope of the right in ss. 530(1) and 530(4) of the *Code* and to determine the proper scheme of the legislation in cases where a new trial is ordered. For the purposes of this introduction, I will only mention that s. 530(1) creates an absolute right, while s. 530(4) subjects that right to the discretion of the trial judge.

[8] The appellant, Jean Victor Beaulac, was charged in 1988 with first degree murder for an offence that occurred in 1981 and went unsolved for many years. He was subsequently tried three times in the Supreme Court of British Columbia for this same murder. His first trial ended in a mistrial because of a conversation between a juror and his wife who had overheard prejudicial information. The second trial resulted in the conviction of the appellant, but this conviction was overturned by the Court of Appeal on the basis of errors in the jury charge concerning the issue of self-induced intoxication. The third trial also ended in a conviction. The current appeal deals solely with the question of the violation of the accused's language rights.

[9] Section 530 was declared in force in British Columbia on January 1, 1990. Thus, it was not in force until after the January 1989 preliminary hearing at which this accused was ordered to stand trial for the first time. In fact, the first application for a trial before a judge and jury who speak both official languages of Canada was made by the appellant on October 30, 1990 during a voir dire, five days into the first trial, but was denied by Skipp J. After the mistrial ruling, the appellant applied for a retrial before a court composed of a judge and jury who spoke both official languages of Canada. Macdonell J. dismissed the application with written reasons on February 11, 1991: [1991] B.C.J. No. 277 (QL). An application for leave to appeal to the Supreme Court *per saltum* was dismissed without reasons. Although Macdonell J.'s reasons are not directly on appeal, they were relied upon in the subsequent rulings and are therefore highly relevant. Macdonell J. considered what was in the best interests of justice. As discussed later in these reasons, this is the criterion governing the exercise of the judge's discretion under s. 530(4) of the Code. Macdonell J. assessed the appellant's fluency in English based on the transcripts of his evidence at the first trial, which was held in English. He found that his English was not the most refined, but that his message gets across clearly and forcefully. He concluded that no injustice would result from a new trial in English. He also commented on the logistical difficulties connected with mounting a complete trial in French in British Columbia. He finally mentioned that the appellant was in custody and that it was the general policy to proceed with trials of people in custody as quickly as possible. In all of the circumstances, Macdonell J. found that it was not in the best interests of justice that the appellant be tried before a judge and jury who speak both English and French.

[10] The application for a trial before a judge and jury who speak both official languages of Canada was renewed, but dismissed by Rowles J. on June 18, 1991. I note here that she was not the "judge before whom the accused is to be tried", as prescribed by s. 530(4). She decided that s. 530(1) does not apply to a retrial before dealing with the application of s. 530(4). The second trial was heard by Murray J. who dismissed yet another application on October 7, 1991. The conviction of the accused was overturned by the Court of Appeal, which declined to rule on the language of proceedings in its decision of January 21, 1994: (1994), 1994 CanLII 1983 (BC CA), 40 B.C.A.C. 236.

[11] During the pre-trial hearing of July 4, 1994, the accused applied again for a trial before a judge and jury who speak both official languages of Canada. Owen-Flood J., who, like Rowles J., was not the judge before whom the accused would be tried, dismissed the application. The trial proceeded in English and the appellant was convicted. The Court of Appeal assumed that the order made pursuant to s. 530(4) was an order pertaining to the judicial process and that it could therefore be attacked collaterally under the principles articulated in *R. v. Litchfield*, 1993

CanLII 44 (SCC), [1993] 4 S.C.R. 333. It dismissed the appeal from conviction on October 29, 1997, upholding the decision of Owen‑Flood J. on the language issue: (1997), 1997 CanLII 3579 (BC CA), 120 C.C.C. (3d) 16. It is this decision that is currently under appeal. The respondent did not argue against the appellant's appeal on the basis of the rule against collateral attack. Although it is not technically necessary to deal with this latter issue, I would lift the uncertainty of the Court of Appeal's decision by saying that the order under s. 530(4) governs the judicial process itself, rather than the conduct of the parties, such that traditional concerns as to certainty and the need for the orderly administration of justice are not brought into play. The order would have been subject to review if it had been made by the trial judge, and the appellant should not be penalized for having brought the application in a timely manner prior to the trial rather than at the trial proper. I would therefore conclude that the rule against collateral attack had no application in the present case and that the Court of Appeal had jurisdiction to deal with the language issue.

[…]

[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. [...]

[…]

[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. As mentioned earlier, when a new trial is ordered, conceptually and practically, the situation is almost the same as if the parties were at the beginning of the original trial process. But, there are some differences. One can imagine, for example, the situation of an accused who made no s. 530 application at a first trial on a particular charge, and then requested a second trial in the other official language. In such an eventuality, the Crown prosecutor, who would have gone through the first trial, might have to be replaced for the retrial. The same might be true for a complainant's counsel when dealing with an application under ss. 278.1-278.9 of the *Criminal Code* and for the co-accused's, if applicable. Thus, in my view, it is possible that some circumstances will have to be considered when a new trial is ordered. That is the main reason why s. 530(4) must apply to this situation rather than s. 530(1). That said, I will now examine the question of the proper application of this provision in general and in the case of a retried accused.

(ii) The Language of the Accused

[32] There are two phrases that pose an interpretative challenge in s. 530: "the language of the accused" and the "best interests of justice". The expression "language of the accused" was not addressed at trial or in the Court of Appeal because it posed no problem to the parties. Admittedly, French was the maternal language of the accused and that fact was accepted as justification for invoking s. 530(4). The Attorney General of Canada explained that the definition of the language of the accused has been a contentious issue for many years. In *R. v. Yancey* (1899), 2 C.C.C. 320 (Que. Q.B. (Crown side)), at p. 323, the "habitua[l]" language of the accused was adopted. This solution was accepted in *Piperno v. The Queen*, 1953 CanLII 51 (SCC), [1953] 2 S.C.R. 292, at p. 296, and more recently in *Saraga v. The Queen*, Que. Sup. Ct., No. 500-01-01624L-876, November 18, 1988. Other courts have adopted the maternal language, or first language learned and still spoken; see *R. v. Brown*, Que. Sup. Ct., No. 700-01-3172-840, March 28, 1985, R.J.P.Q. 85-215; *R. v. Lorentz-Aflalo*, Que. Sup. Ct., No. 500-01-006114-877, October 8, 1987. In those cases, the court considered the language of education, the language used at home, the language used for social contacts and the language of the community to which

the accused identifies. In *Saraga, supra*, Martin J. accepted the language of the preferred form of communication.

[33] A simple approach, such as maternal language or language used in the home, is inappropriate inter alia because it does not provide a solution for many situations encountered in a multicultural society and does not respond to the fact that language is not a static characteristic. Some persons insist that they have two maternal languages. Some persons have a maternal language that is neither French nor English, and use in the home either the maternal language, or the maternal language and French, or English, or both English and French. Their language at work may be English or French. Their language in social contacts may not be the same as their language of work. Language of use can change when a person changes employment, marries or divorces, or makes new friends. Many other situations of this nature could be described. This is not necessary.

[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.

[35] The assertion of language is a prerequisite to an application under s. 530(1) or s. 530(4). Once entitlement is established and an application is made under s. 530(4), the judge will be required to determine whether the best interests of justice will be served by granting the application. […]

Parsons v. R., 2014 QCCA 2206 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[32] Assuming that it is even possible to dispense with an "absolute right" in the manner in which it was accomplished in paragraph [20] above, which is doubtful, language difficulties faced by lawyers, if any, can not alone constitute a valid justification for a waiver. It is impossible to imagine that parliamentarians who introduced sections 530 and 530.1 of the *Criminal Code* had in mind that it was easier to violate these provisions and render them unenforceable.

Dow v. R., 2009 QCCA 478 (CanLII)

[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.

[…]

[66] The addition of section 530(1) *Cr. C.* had no practical effect in Quebec insofar as the availability of Superior Court judges and Crown prosecutors who were capable of conducting jury trials in English before English-speaking jurors, and the occurrence of English language jury trials in criminal matters. Indeed, a consultation of the parliamentary debates makes it clear that members from both the government and opposition benches recognized that the proposed legislation sought to extend to the rest of Canada what was already in place in Quebec. […]

[67] To the extent that there have been rare lapses in Quebec in the failure to provide English language trials or interpretation services in accordance with the law, they have not occurred as a result of institutional shortcomings, but rather because of unrelated factors.

[…]

[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.

[72] The circumstances of Mr. Dow's case eloquently illustrate the point. The Superior Court record shows that he never applied formally under section 530(1) *Cr. C.*, yet his trial took place before an English-speaking jury. All of the trappings of an English-speaking trial were in place, including an indictment drafted in English, the presence of an interpreter when required for French-speaking witnesses, the translation into English of several exhibits drafted in French, and the summoning of an array of exclusively English-speaking jurors.

[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.

[…]

[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*.

SEE ALSO:

Petitpas v. R., 2017 NBCA 6 (CanLII)

Denver-Lambert v. R., 2007 QCCA 1301 (CanLII) [judgment available in French only]

R. v. Deutsch, 2005 CanLII 47598 (ON CA)

R. v. Foster, 2015 CanLII 7868 (NL SCTD)

R. v. Deutsch, 2005 ONCJ 529 [hyperlink not available]

ANNOTATIONS – SUBSECTION 530(3) – CASE LAW SUBSEQUENT TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

N.B. – Prior to the passing of Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* in 2008, the justice of the peace or provincial court judge before whom an accused first appears should, *if the accused was not represented by counsel*, advise the accused of his right to apply for an order under subsection 530(1) or (2) and of the time before which such an application must be made. Subs. 530(3) was amended in 2008 and now provides that the justice of the peace or provincial court judge before whom an accused first appears shall, whether or not the accused is represented by counsel, ensure that they are advised of their right to apply for an order under subsection 530 (1) or (2) and of the time before which such an application must be made.

R. v. Caesar, 2015 NWTCA 4 (CanLII)

[8] The appellant relies on *R. v MacKenzie*, 2004 NSCA 10 and *R. v Beaulac*, [1999] 1 SCR 768 for the proposition that the failure to comply with s. 530(3) is a fatal error that undermines the trial. The appellant in *MacKenzie*, however, did have sufficient linguistic proficiency to instruct counsel in French. The breach in that case was substantive. While *Beaulac* identifies the right to a trial in one's own language as being fundamental in nature, those comments should be read as relating to the substantive right to a trial, not the collateral right to notice of the right to apply for that option. When a trial is held absent compliance with the notice provision in s. 530(3), and there is no indication that the trial was unfair (for linguistic or other reasons), the curative power in s. 686(1)(b)(iii) is available.

[9] The appellant argues that proficiency in either of the official languages is irrelevant, and that every accused is entitled to the notice under s. 530(3). That is true. But while proficiency in the language is not relevant to the entitlement to get notice, it is relevant to remedy. *MacKenzie* confirms that the finding of a breach of s. 530(3) leads to a consideration of the appropriate remedy. Here there has been no substantive effect on the fairness of the appellant's trial. The Court is faced with the prospect of ordering a new trial, having the appellant elect a trial in English, and requiring the trial court, the witnesses, and the Crown to simply repeat the process. That could only serve to undermine the finality of criminal proceedings, undermine the jury verdict, and trivialize the importance of the right to a trial in one's first language.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[1] Nicole MacKenzie was charged with speeding. She appeared unrepresented by counsel for arraignment in Provincial Court. Contrary to s. 530(3) of the *Criminal Code* which applies here by s. 7(1) of the *Summary Proceedings Act*, R.S.N.S. 1989 c. 450, the Provincial Court judge did not inform her of her right to apply for a French trial. The Provincial Court tried Ms. MacKenzie in English, convicted and fined her.

[2] Ms. MacKenzie appealed to the Nova Scotia Supreme Court as Summary Conviction Appeal Court ("SCAC"). Justice Edwards ruled that the violation of s. 530(3) contravened ss. 15, 16 and 19 of the *Charter of Rights* and, noting the "serious *Charter* breach", decided that the appropriate remedy was a stay of proceedings rather than a new trial.

[3] The Crown applies for leave and, if granted, appeals based on error of law under s. 839(1) of the *Criminal Code* and s. 7(1) of the *Summary Proceedings Act*. The Crown acknowledges the contravention of s. 530(3) but says that the appropriate remedy was a new trial instead of a stay.

[…]

[7] Section 530.1 states that when an order is granted under s. 530 directing a trial in the official language of the accused, then the accused has specific rights to the use of either official language during the preliminary inquiry and trial.

[8] Ms. MacKenzie was charged with exceeding the speed limit contrary to 106A of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as am. by S.N.S. 2001, c. 12, s. 3. Section 267(1) of the *Motor Vehicle Act* states that the *Act* shall be enforced under the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450.

[9] The *Summary Proceedings Act*, ss. 7(1) and (2)(a) state:

> 7 (1) Except where and to the extent that it is otherwise specially enacted, the provisions of the *Criminal Code* (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, *mutatis mutandis*, to every proceeding under this *Act*.
>
> (2) In applying the provisions of the *Criminal Code* (Canada) to proceedings under this *Act*, the following expressions therein have the following meanings:
>
> (a) "Act of the Parliament of Canada" means an Act of the Legislature;

This incorporates s. 530(3) of the *Criminal Code* for Ms. MacKenzie's speeding charge.

[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) 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] **Accused need not take the initiative**: While the Crown acknowledged the breach of s. 530(3), at the hearing of this appeal it was suggested that, as there was no material before the Provincial Court judge to indicate that Ms. MacKenzie was French-speaking, it was understandable that the Provincial Court judge did not give the s. 530(3) notice. I disagree. 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.

[…]

[16] For these reasons, the absence of material before the Provincial Court to show that Ms. MacKenzie was French-speaking, has no bearing on the Court's obligation to give the s. 530(3) notice.

[…]

[57] In my view section 16(3) of the *Charter* has not constitutionalized s. 530 of the *Criminal Code*. The violation of s. 530 in this case did not constitute a violation of s. 16(3) of the *Charter*.

[58] **Section 530's Quasi-Constitutional Status**: In *Beaulac* at para. 21 under the heading "The Constitutional Background", Justice Bastarache stated that official languages legislation "belongs to that privileged category of quasi-constitutional legislation which reflects 'certain basic goals of our society' and must be so interpreted 'as to advance the broad policy considerations underlying it'." […]

[59] In *Beaulac* the Supreme Court of Canada ruled that the accused's right to apply for a bilingual trial under s. 530(4) was denied. The court ordered a new trial under s. 686 of the Criminal Code. The court did not rule that there had been a breach of the Charter which accessed the remedies under s. 24(1) of the Charter.

[60] The quasi-constitutional status of s. 530 invokes a broad and purposive interpretation of the statutory language. But s. 530 is not entrenched as a provision of the *Charter*. Its breach does not invoke s. 24(1) of the *Charter*.

R. v. Doncaster, 2013 NSSC 357 (CanLII)

[6] Mr. Doncaster suggests that there is an onus upon the Crown to remind the trial judge to fulfill the requirements of section 530 of the Criminal Code. That section does not create such a duty. While it may have negated the successful basis of the appeal if the Crown reminded the judge to do so, the Code places no such burden upon the Crown.

[7] The Crown cannot bear responsibility for the trial court's failure to fulfill a duty that is imposed solely upon it by the Code. In the result, the Crown and Mr. Doncaster are left in the same position, that is, both are subject to the inconvenience and costs associated with the appeal and retrial arising from the trial court's error.

Latour v. H.M.T.Q., 2013 NWTSC 22 (CanLII)

[22] The substance of the exchange between Mr. Latour and the court on October 20 essentially consisted of asking him whether he had a "preference" with respect to his choice of language for the trial. In my view, there is a significant difference between asking a person whether he has a preference between two options and informing him of his right to exercise one option or the other.

[…]

[28] It is clear that Mr. Latour was not initially informed of his right to a trial in French. It is also clear that he later told his counsel that he wished to have his trial in French. He changed his mind a week later. But given what he said during his appearance on January 31, 2012, it is not unreasonable to conclude that he believed he had to choose between proceeding in English on the scheduled date with the assistance of counsel and proceeding in French on the scheduled date, but without counsel. Obviously, there was a third option: proceeding in French, with counsel, on a different date.

[…]

[30] In the circumstances, Mr. Latour's agreement to proceed in English cannot reasonably be considered a true waiver of his right to choose the language of his trial.

Doncaster v. Field, 2013 NSSC 18 (CanLII)

[103] The Appellant is quite correct that the failure to advise an accused of his or her language rights can give rise to a valid ground of appeal – see *R. v. MacKenzie*, 2004 NSCA 10. In this instance however, the Court has been provided with no evidence to support the Appellant's assertion.

[104] The Court has before it, only the transcript of the April 26, 2012 proceeding. As emphasized above, it would not be at the actual hearing that the judge would be required to advise of an accused's language rights, but at their first appearance. There is no evidence before the Court of the hearing when one would expect Section 530 to be addressed. Without evidence, such as a transcript, the Court cannot adequately address the merit of this argument.

R. v. Ohelo, 2009 CanLII 92130 (ON SC)

[1] […] Subsection 530(3) of the *Criminal Code*, R.S.C. 1985, c. C-46 requires that "the justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made". […]

[2] The accused was not advised of his language rights. The accused stated several times that his English was not very good and that his mother tongue was French. Two witnesses called by the accused testified in French. It was clear that he did not understand the finer points of the charges against him.

[…]

[5] In *R. v. Beaulac*, the court concluded that the accused's right to a trial in the official language of his choice had been infringed. In the case at bar, the accused had no counsel and there is no evidence that he knew he was entitled to a trial in French. The lack of notification deprived him of his language rights and the infringement is as serious as the one described in *R. v. Beaulac*.

SEE ALSO:

R. v. Parsons, 2010 QCCM 354 (CanLII)

ANNOTATIONS – SUBSECTION 530(3) – CASE LAW PRIOR TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

[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.

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

[1] Nicole MacKenzie was charged with speeding. She appeared unrepresented by counsel for arraignment in Provincial Court. Contrary to s. 530(3) of the *Criminal Code* which applies here by s. 7(1) of the *Summary Proceedings Act*, R.S.N.S. 1989 c. 450, the Provincial Court judge did not inform her of her right to apply for a French trial. The Provincial Court tried Ms. MacKenzie in English, convicted and fined her. […]

[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) 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] Accused need not take the initiative: While the Crown acknowledged the breach of s. 530(3), at the hearing of this appeal it was suggested that, as there was no material before the Provincial Court judge to indicate that Ms. MacKenzie was French-speaking, it was understandable that the Provincial Court judge did not give the s. 530(3) notice. I disagree. 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

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SEE ALSO:

Canada (Commissioner of Official Languages) v. Canada (Department of Justice), 2001 FCT 239 (CanLII)

R. v. Deveaux, 1999 CanLII 3182 (NS SC)

ANNOTATIONS – SUBSECTION 530(4)

R. v. Beaulac, [1999] 1 S.C.R. 768, 1999 CanLII 684 (SCC)

1. General Introduction and Procedural History

[7] This is the first time this Court has been called upon to interpret the language rights afforded by s. 530 of the *Criminal Code*, R.S.C., 1985, c. C-46. This case concerns the right to be heard by a judge or a judge and jury who speak the official language of Canada that is the language of the accused, or both official languages of Canada. The unique circumstances of the accused provide an opportunity to clarify the scope of the right in ss. 530(1) and 530(4) of the *Code* and to determine the proper scheme of the legislation in cases where a new trial is ordered. For the purposes of this introduction, I will only mention that s. 530(1) creates an absolute right, while s. 530(4) subjects that right to the discretion of the trial judge.

[8] The appellant, Jean Victor Beaulac, was charged in 1988 with first degree murder for an offence that occurred in 1981 and went unsolved for many years. He was subsequently tried three times in the Supreme Court of British Columbia for this same murder. His first trial ended in a mistrial because of a conversation between a juror and his wife who had overheard prejudicial

information. The second trial resulted in the conviction of the appellant, but this conviction was overturned by the Court of Appeal on the basis of errors in the jury charge concerning the issue of self-induced intoxication. The third trial also ended in a conviction. The current appeal deals solely with the question of the violation of the accused's language rights.

[9] Section 530 was declared in force in British Columbia on January 1, 1990. Thus, it was not in force until after the January 1989 preliminary hearing at which this accused was ordered to stand trial for the first time. In fact, the first application for a trial before a judge and jury who speak both official languages of Canada was made by the appellant on October 30, 1990 during a voir dire, five days into the first trial, but was denied by Skipp J. After the mistrial ruling, the appellant applied for a retrial before a court composed of a judge and jury who spoke both official languages of Canada. Macdonell J. dismissed the application with written reasons on February 11, 1991: [1991] B.C.J. No. 277 (QL). An application for leave to appeal to the Supreme Court *per saltum* was dismissed without reasons. Although Macdonell J.'s reasons are not directly on appeal, they were relied upon in the subsequent rulings and are therefore highly relevant. Macdonell J. considered what was in the best interests of justice. As discussed later in these reasons, this is the criterion governing the exercise of the judge's discretion under s. 530(4) of the Code. Macdonell J. assessed the appellant's fluency in English based on the transcripts of his evidence at the first trial, which was held in English. He found that his English was not the most refined, but that his message gets across clearly and forcefully. He concluded that no injustice would result from a new trial in English. He also commented on the logistical difficulties connected with mounting a complete trial in French in British Columbia. He finally mentioned that the appellant was in custody and that it was the general policy to proceed with trials of people in custody as quickly as possible. In all of the circumstances, Macdonell J. found that it was not in the best interests of justice that the appellant be tried before a judge and jury who speak both English and French.

[10] The application for a trial before a judge and jury who speak both official languages of Canada was renewed, but dismissed by Rowles J. on June 18, 1991. I note here that she was not the "judge before whom the accused is to be tried", as prescribed by s. 530(4). She decided that s. 530(1) does not apply to a retrial before dealing with the application of s. 530(4). The second trial was heard by Murray J. who dismissed yet another application on October 7, 1991. The conviction of the accused was overturned by the Court of Appeal, which declined to rule on the language of proceedings in its decision of January 21, 1994: (1994), 1994 CanLII 1983 (BC CA), 40 B.C.A.C. 236.

[11] During the pre-trial hearing of July 4, 1994, the accused applied again for a trial before a judge and jury who speak both official languages of Canada. Owen-Flood J., who, like Rowles J., was not the judge before whom the accused would be tried, dismissed the application. The trial proceeded in English and the appellant was convicted. The Court of Appeal assumed that the order made pursuant to s. 530(4) was an order pertaining to the judicial process and that it could therefore be attacked collaterally under the principles articulated in *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333. It dismissed the appeal from conviction on October 29, 1997, upholding the decision of Owen-Flood J. on the language issue: (1997), 1997 CanLII 3579 (BC CA), 120 C.C.C. (3d) 16. It is this decision that is currently under appeal. The respondent did not argue against the appellant's appeal on the basis of the rule against collateral attack. Although it is not technically necessary to deal with this latter issue, I would lift the uncertainty of the Court of Appeal's decision by saying that the order under s. 530(4) governs the judicial process itself, rather than the conduct of the parties, such that traditional concerns as to certainty and the need for the orderly administration of justice are not brought into play. The order would have been subject to review if it had been made by the trial judge, and the appellant should not be penalized for having brought the application in a timely manner prior to the trial rather than at the trial proper. I would therefore conclude that the rule against collateral attack had no application in the present case and that the Court of Appeal had jurisdiction to deal with the language issue.

[…]

(i) Should an Application Be Made Under Section 530(1) or Section 530(4) of the *Criminal Code* in the Case of a New Trial?

[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.

[29] The first issue is therefore to decide if s. 530(1) applies to a new trial or if it falls more properly under the ambit of s. 530(4). Rowles J. dealt summarily with this issue and did not agree that "the subsection should be interpreted in such a way that whenever an order is made for an accused to stand trial [i.e., when a new trial is ordered by a court of appeal], that if application is made by an accused directing that he or she be tried by a court speaking one or both official languages of Canada, the granting of the order should not be a discretionary matter". As a superior court judge, it was her view that the structure of s. 530 takes into account the available modes of trial and requires that only a justice of the peace or provincial court judge make the order sought under s. 530(1).

[30] In my view, this argument does not address the substantive issue raised and is therefore not sufficient to justify the decision. After all, Rowles J. herself was neither a "justice of the peace" nor a "provincial court judge", nor was she the "judge before whom the accused [was] to be tried" at the time she made her decision; yet, she took jurisdiction over the s. 530(4) application. Considering the importance of language rights and the obvious desire of the legislator that language issues be decided as soon as possible in the trial process, I believe Rowles J. was empowered to make such an order. The same reasoning, however, applies to s. 530(1). Furthermore, since the date of her reasons, this Court has had the opportunity of dealing with directions for a new trial. In *R. v. Thomas*, 1998 CanLII 774 (SCC), [1998] 3 S.C.R. 535, at para. 22, Lamer C.J. explains that to order a new trial must mean a "full" new proceeding. It is consistent with this reasoning to hold that the accused ordered to face a new trial is in a position quite similar to that of an accused who is ordered to stand trial for the first time, as contemplated by s. 530(1).

[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. As mentioned earlier, when a new trial is ordered, conceptually and practically, the situation is almost the same as if the parties were at the beginning of the original trial process. But, there are some differences. One can imagine, for example, the situation of an accused who made no s. 530 application at a first trial on a particular charge, and then requested a second trial in the other official language. In such an eventuality, the Crown prosecutor, who would have gone through the first trial, might have to be replaced for the retrial. The same might be true for a complainant's counsel when dealing with an application under ss. 278.1-278.9 of the *Criminal Code* and for the co-accused's, if applicable. Thus, in my view, it is possible that some circumstances will have to be considered when a new trial is ordered. That is the main reason why s. 530(4) must apply to this situation rather than s. 530(1) […].

[…]

[36] The expression "best interests of justice" is the one that has caused difficulty in this case. In another context, the expression has been held to take into consideration both the interests of the accused as well as those of the State; see: *R. v. Bernardo* (1997), 121 C.C.C. (3d) 123 (Ont. C.A.) at p. 131.

[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.

[38] Once the reason for the delay has been examined, the trial judge must consider a number of factors that relate to the conduct of the trial. Among these factors are whether the accused is represented by counsel, the language in which the evidence is available, the language of witnesses, whether a jury has been empanelled, whether witnesses have already testified, whether they are still available, whether proceedings can continue in a different language without the need to start the trial afresh, the fact that there may be co-accuseds (which would indicate the need for separate trials), changes of counsel by the accused, the need for the Crown to change counsel and the language ability of the presiding judge. In fact, a consideration of the requirements of s. 530.1(a) to (h) will provide a good indication of relevant matters.

[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.

[40] The retried accused does not have to justify why he or she is requesting a second trial in his or her official language when he or she failed to do so in the first. The granting of such a request is not an exceptional favour given to the accused by the State; rather, it is the norm. The only relevant factors to consider under s. 530(4) are the additional difficulties caused by an untimely application.

[41] Another important consideration with regard to the interpretation of the "best interests of justice" is the complete distinctiveness of language rights and trial fairness. Unfortunately, the distinctions are not always recognized. [...] 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. [...] I re-affirm this conclusion here in the hope that these rights will no longer be confused. Fairness of the trial is not to be considered at this stage and is certainly not a threshold that, if satisfied, can be used to deny the accused his language rights under s. 530.

[42] While no set infallible method can be provided to ascertain whether it is in the best interests of justice that an application under s. 530(4) be accepted, some guidelines can be provided. I have already explained that trial fairness should not be considered; nor should institutional inconvenience. Additional difficulties caused by a late application, as well as the reasons for this delay, are however relevant factors. The basic principle, however, is that, generally, owing to the importance of language rights and the stated intention of Parliament to insure the equality of French and English in Canada, the best interests of justice will be served by accepting the application of the accused to be tried in his official language. Therefore, it is the denial of the application that is exceptional and that needs to be justified. The burden of this demonstration should fall on the Crown.

[43] That said, it remains that the later the application is made in the trial process, the better must be the reason for the delay in order for the application to be accepted. If the accused makes his or her application in the middle of the trial and can provide no reason for his or her lateness, it may not be accepted, depending on the circumstances.

[44] When a new trial is ordered, however, the presumption in favour of the accused is much stronger because of the similarity between this situation and the one contemplated in s. 530(1). As mentioned in a prior example, although the need to replace the Crown prosecutor is a relevant factor to be considered in such a case, this alone will not be enough to justify the denial of the application, even in the absence of any reason provided by the accused for not making a similar application before the first trial. As stated earlier, the accused is under no obligation to justify his or her actions in that regard, as he or she was under no obligation to make an application in the first trial. Therefore, even if the retried accused must make an application pursuant to s. 530(4), the granting of his or her application will be assured unless, in exceptional circumstances, the Crown is able to show that the application should be denied, based on relevant s. 530(4) considerations.

Denver-Lambert v. R., 2007 QCCA 1301 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

The Langue of the Accused

[21] The first step in applying subsection 530(4) *Cr.C.* involves determining the “language of the accused”. In *Beaulac*, [1999] 1 S.C.R. 768, the Supreme Court confirmed the right of the accused to assert which official language is his or her own language. The only criterion is whether the accused has sufficient knowledge of the chosen official language to instruct counsel and follow the proceedings in this language “regardless of his or her ability to speak the other official language”.

[22] In this case, the trial judge ruled that the appellant’s application was not serious given, in particular, his French-language skills and the fact that the proceedings, including the preliminary inquiry, had been in French up to that point. Yet, these criteria were expressly rejected by the Supreme Court on the fundamental grounds that the language rights under section 530 *Cr.C.* have a distinct origin and role from the right to a fair trial. […]

[…]

The best interests of justice

[25] Because the right set out in subsection 350(4), in contrast to that guaranteed by subsection 350(1), is discretionary, the second step in the application process consists in the judge determining whether he or she "is satisfied that it is in the best interests of justice" that the accused be tried in his or her official language of choice.

[26] The exercise of this decision is, however, unique in that the court must, at the outset, [Translation] "presume that the application should be allowed". In fact, as stated by the Supreme Court, "[t]herefore, it is the denial of the application that is exceptional and that needs to be justified".

[27] The trial judge must therefore primarily examine the reasons for the delay, and, in that context, the first issue that comes to mind is determining what the accused knows about his or her right. […]

[33] The additional difficulties caused by a late application, as well as the reasons for this delay, may be however relevant factors in deciding on the merits of the application. Since, as we have seen, it is the denial of the application under s. 530(4) that is exceptional, the burden of justifying this denial falls on the Crown. The later the application is made in the trial process, the better must be the reason for the delay in order for the application to be accepted.

[34] In this case, it was not on the Crown but rather on the appellant that the trial judge placed the burden of proving that it was in the best interests of justice that he accept the application for a trial in the official language of the appellant's choice.

[…]

[42] In short, the trial judge erred in his application of subsection 530(4) by placing, at both stages of the analysis, the burden of proof on the appellant. He also applied the wrong criterion with respect to the choice of official language made by the appellant.

SEE ALSO:

R. v. Munkonda, 2015 ONCA 309 (CanLII)

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

R. v. Foster, 2015 CanLII 7868 (NL SCTD)

R. v. Le, [2000] O.J. No. 4218 (ON CJ) [hyperlink not available]

ANNOTATIONS – SUBSECTION 530(5) – CASE LAW SUBSEQUENT TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Rice, 2016 QCCS 1920 (CanLII)

Analysis

[46] Without being procedurally punctilious, whether or not an order pursuant to s. 530 was made on that date is an open question.

[47] An order made pursuant to s. 530 is made on application by an accused (see s. 530(1)).

[48] This is quite understandable because the “language of the accused is very personal in nature; it is an important part of his or her cultural identity". Issues of fairness and institutional convenience are not paramount because of the distinctiveness of linguistic rights.

[49] This being said there is considerable force to the argument that the language in which the evidence is available and the language of witnesses is a relevant consideration in order to determine whether a case should be tried before a bilingual jury.

[50] At the time of its oral ruling on June 14, 2014 ordering that the trial be held in English, the Court made this ruling because of the personal nature of linguistic right underlined in *Beaulac*.

[51] Had the accused consented to a trial before a bilingual jury, such an order could have been made.

[52] But the Court also wanted to point out to the parties that the precise contours of the anticipated evidence to be presented by the prosecution was very much in flux because the Court had to make ruling on the admissibility of some evidence and the prosecution had presented a motion to determine what if any evidence needed to be translated and how the evidence could be presented by the prosecution.

[53] In that context, ruling on the issue of whether the trial should take place before a bilingual jury was premature and the Court wanted to leave the issue to be addressed later.

[54] Since the Court has since decided to recuse itself from the case, the issue will have to be addressed by the newly designated case management judge.

[55] Not only does s. 530(5) provide for the variation of such an order, but, "[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed.

ANNOTATIONS – SUBSECTION 530(6) – CASE LAW SUBSEQUENT TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

N.B. – Prior to the 2008 amendment inserting subsection 530(6), there was conflicting case-law on the issue of whether, when the co-accused do not speak the same official language and both avail themselves of their right to be tried before a justice or judge who speak the official language of Canada that is the language of the accused. Does the presence of English and French co-accused constitute a “circumstance” which warrants holding a trial before a justice, judge or judge and jury who speak both official languages of Canada? However, since 2008, the case-law is unanimous to say that co-accused charge with engaging in a common criminal enterprise but ask to have their trial in different official languages should have a joint bilingual trial.

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[50] Section 530 also provides that notwithstanding an accused’s exercise of the right to be tried in his or her official language, the trial or preliminary inquiry must, in certain circumstances, be bilingual and be held in French and English. That was the case here. The Crown chose to include several accused with different official languages in a single indictment. There was nothing to prevent the Crown from doing this, and this possibility is covered by s. 530(6) of the *Criminal Code*. Accordingly, since there were several accused and some of them had chosen to be tried in French while others had chosen to be tried in English, the preliminary inquiry had to be bilingual.

[51] However, it was in no way the appellant’s choice to have a bilingual preliminary inquiry, and in my opinion, his right to a preliminary inquiry in his own language cannot be diminished except to the extent that it is necessary and reasonable in the circumstances.

[52] When an order for a bilingual trial is made, the equality of the two languages established by s. 530 and the duty imposed on the Crown and the court to ensure the equal use of those languages are not discarded. As the Supreme Court of Canada explained, “the basic right of the accused is met in both cases” (*Beaulac*, at para. 49).

[…]

[56] In conceptual terms, a bilingual trial or preliminary inquiry is a merger of a proceeding in French and a proceeding in English. Whether the accused are francophone or anglophone, they do not lose their language rights; rather, and by necessity, each accused’s language rights must be accommodated. Each accused cannot have the right to have all of the evidence presented in his or her own language. Oral evidence can be presented in only one or the other of the two official languages. Similarly, the prosecution and the judge cannot speak both languages at the same time. There will therefore be times when the testimony given by a witness and the comments made by the judge will not be in the official language of one or another of the accused.

[57] However, to the extent possible, and provided that it is reasonable, the language rights of each of the accused must be respected. This means, for example, that if an accused or his or her counsel addresses the court or the prosecution in the language of that accused, the prosecution or the court should interact with that accused or his or her counsel in that language. The duty to deal with each accused in his or her own language does not evaporate and is not diminished by the fact that the proceeding becomes a bilingual proceeding. Proceeding in any other fashion, unless it is required by the situation, would be a violation of the accused’s language rights.

[…]

[61] Section 530 of the *Criminal Code* imposes “positive obligations” on the attorney general and the courts (*R. v. Bujold*, 276 C.C.C. (3d) 442, at para. 5). This is based on the observation by the Supreme Court that “[l]anguage rights *are not negative rights, or passive rights; they can only be enjoyed if the means are provided*. ... *[T]he freedom to choose is meaningless in the absence of a duty of the State to take positive steps* to implement language guarantees” (*Beaulac*, at para. 20 (emphasis added)). In the context of a bilingual preliminary inquiry in which there are accused using each of the official languages, this duty is to ensure that the two languages are treated equally: in other words, that there is no “primary language”, with the other language merely being “accommodated.” Equality must be the norm and not the exception, and must be achieved without creating conflict.

[62] It follows that an accused should not be required to remind the court and the prosecution of their linguistic obligations. An adversarial approach to language rights risks not only undermining those rights but also creating fear in accused persons that if they insist their rights be respected, they will antagonize the court and the prosecution, and not receive a fair trial.

Gagnon v. R., 2013 QCCA 1744 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[37] If the “circumstances warrant,” and unless there is an improper exercise of the judge’s discretion, an accused who asks for a trial in English only cannot validly object to an order for a bilingual trial. In either case (trial in the accused’s official language or bilingual trial), the accused’s linguistic rights are respected:

[…]

[40] In summary, the applicable principle on this matter is that the decision to order a bilingual trial is in the discretion of the trial judge, whose evaluation must take into account “the circumstances

of the case.” Contrary to the submissions of W. Kyling, the discretion of the trial judge in this matter does not depend on the consent of the accused.

[41] Subsection 530(6) of the *Criminal Code* provides that among the circumstances that can warrant the use of both official languages, is the case of coaccused with different first languages that are to be tried jointly for a common crime. This is the situation of W. Kyling.

R. v. Bellefroid, 2009 QCCS 3193 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[17] With respect, the Court is of the view that it is incorrect to say, as was said at the hearing,

- that a bilingual trial does not respect the rights of the accused;

- that a trial in the language of the accused is an absolute right;

- that the accused’s consent is required for a bilingual trial;

[18] First, if a bilingual trial does not respect the rights of the accused, why does the *Criminal Code* provide for one? It could perhaps be argued that a bilingual trial does not respect the rights of the accused when there is only one accused. However, when there is an Anglophone co-accused and a Francophone co-accused, must two trials always be held, even in cases where the Crown argues, as in the case at bar, that there is conspiracy or a criminal organization?

[19] To answer in the affirmative would be contrary to the prevailing (unanimous?) case law which holds that it is preferable to try together

- alleged conspirators;

- those who have participated in the activities of a criminal organization;

- those who have committed an offence for the benefit of a criminal organization;

- those who were part of a criminal organization and hired someone to commit an offence for its benefit;

[20] Furthermore, to state that a bilingual trial, when there is at least one accused of each language, does not respect the rights of the accused does not take into account the provisions that came into effect on October 1, 2008, which are aimed at protecting the language rights of the accused.

[21] For instance, Parliament added section 530.01 to the *Criminal Code* which provides that a prosecutor shall cause "the portions of an information or indictment against the accused that are in an official language that is not that of the accused. . . to be translated into the other official language. . .and provide the accused with a written copy of the translated text at the earliest possible time." Also, section 530.1(d) was amended and now provides that a justice presiding over the preliminary inquiry shall speak the official language of the accused *or both official languages*.

[22] Section 530.1(e) now provides that the prosecutor shall speak the official language of the accused or both official languages. Finally, section 530.2 was added and provides that, where an order for a bilingual trial is made, the justice or judge may make an order “setting out the circumstances in which, and the extent to which, the prosecutor and the justice or judge may use each official language."

[23] In light of this context, it can be seen that Parliament intended to make it easier to hold a bilingual trial while, in the same breath, respecting the language rights of the accused.

[24] In short, a trial in his or her language, when there are Anglophone and Francophone coaccused, is not an absolute right. What is important is that the trial be fair. The language provisions of the *Criminal Code* ensure a fair trial.

SEE ALSO :

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

Agostini v. R., 2009 QCCQ 17353 (CanLII)

ANNOTATIONS – SUBSECTION 530(6) – CASE LAW PRIOR TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Sarrazin, 2005 CanLII 11388 (ON CA)

[43] […] 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. […]

[…]

[45] Section 530 thus provides for three types of trials, from a linguistic perspective, namely a trial before a trier or triers who (a) speak the official language of Canada that is the language of the accused, (b) speak the official language of Canada in which the accused can best give testimony, or (c) if circumstances warrant, speak both official languages of Canada. Section 530.1 outlines the rights of the accused, and the obligations of the State, in terms of the trial process, when such an order is made.

[…]

[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.

[…]

[54] 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.

SEE ALSO:

R. v. Schneider, 2004 NSCA 99 (CanLII)

530.01 (1) Translation of documents

530.01 (1) If an order is granted under section 530, a prosecutor — other than a private prosecutor — shall, on application by the accused,

> **(a) cause the portions of an information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony to be translated into the other official language; and**
>
> **(b) provide the accused with a written copy of the translated text at the earliest possible time.**

530.01 (2) Original version prevails

530.01 (2) In the case of a discrepancy between the original version of a document and the translated text, the original version shall prevail.

2008, c. 18, s. 19.

N.B. – Prior to the passing of Bill C-13 (*An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* in 2008, the right of an accused to request a written translation of the information or indictment in his or her official language was not expressly stated in the *Criminal Code*. The Court of Appeal for Ontario concluded, in *Simard v. R.* (1995), 27 O.R. (3d) 97 (C.A. Ont.), that to ensure that the interpretation of ss. 11 and 14 of the *Charter* is consistent with the remedial object of s. 530, a fair trial must be initiated by the filing of a charging document entirely translated in writing into the official language of the accused, where so requested by him or her. Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, confirmed the right of the accused to obtain, upon his or her request, the translation of specific portions of the information or indictment. In the case of a discrepancy between the original version of a document and the translated text, the original version shall prevail (see subsection 530.01(2)).

SEE ALSO:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

Bellefroid v. R., 2009 QCCS 4006 (CanLII) [judgment available in French only]

530.1 If order granted

530.1 If an order is granted under section 530:

> **(a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;**

(b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;

(c) any witness may give evidence in either official language during the preliminary inquiry or trial;

(c.1) the presiding justice or judge may, if the circumstances warrant, authorize the prosecutor to examine or cross-examine a witness in the official language of the witness even though it is not that of the accused or that in which the accused can best give testimony;

(d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language of the accused or both official languages, as the case may be;

(e) the accused has a right to have a prosecutor — other than a private prosecutor — who speaks the official language of the accused or both official languages, as the case may be;

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

> **(i) a transcript of everything that was said during those proceedings in the official language in which it was said,**
>
> **(ii) a transcript of any interpretation into the other official language of what was said, and**
>
> **(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and**

(h) any trial judgment, including any reasons given therefore, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

R.S. 1985, c. 31 (4th Supp.), s. 94.

ANNOTATIONS – GENERAL

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[98] At the preliminary inquiry, the appellant asked that the unilingual court reporter be replaced by a bilingual court reporter. The judge simply refused to accede to the request. He replied as follows:

> [TRANSLATION] So in the circumstances I am taking no action in this respect because I am not in charge of administration, I have enough problems to solve without solving everybody's. So – I understand that it would be preferable for our reporters to be bilingual, it is not – I am not going to make orders to get one. So we are going to proceed with the resources available to us this morning.

[99] The appellant renewed his request a few days later. The judge noted his request, but did nothing to address it.

[100] In the appellant's submission, the judge's failure to act is a violation of his rights under ss. 530 and 530.1. The certiorari judge agreed. In addition, the appellant argued that the absence of a bilingual court reporter contributed to the delay in the preparation of the transcripts that were needed in order to bring his application for *certiorari*.

[101] The Crown contended that there had been no violation. It argued that ss. 530 and 530.1 impose no express obligations concerning the presence of a bilingual court reporter. In addition, given technological advances, the preliminary inquiry is tape recorded, and it is not necessary for there to be a court reporter present. Accordingly, the fact that a bilingual court reporter was not present does not constitute a violation of the appellant's linguistic rights.

[102] There has been no decision dealing specifically with the right to a bilingual court reporter during a bilingual trial or preliminary inquiry. In *Beaulac*, however, the Supreme Court of Canada seems to have assumed that a bilingual court reporter would be present in a bilingual trial. At para. 39, the Court explained:

> 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. [Emphasis added.]

[103] In my opinion, the judge's inaction in the circumstances constitutes a violation of the appellant's language rights. The effect of an order for a bilingual trial or preliminary inquiry under s. 530 is that all court personnel whose presence is necessary to the proper conduct of the proceeding must be bilingual. To the extent that the presence of the court reporter is necessary for the proper conduct of the inquiry or the trial, then the judge must ensure that the reporter is bilingual.

[104] It is impossible for us, on appeal, to conclude that in this case the court reporter played no role during the preliminary inquiry. It is quite probable that the court reporter was available, for example, to replay or read back extracts of witness' testimony, in the event that the judge or the parties so requested.

[105] With respect to the Crown's argument that there can have been no violation since there was no express obligation to have a court reporter present, no evidence was presented to us to establish the rules and practices of the court governing whether a court reporter is to be present. The fact remains that the court thought it appropriate to have a court reporter present during this preliminary inquiry. When the appellant objected, the judge did not simply say that the court reporter had no role to play. The judge seemed to be of the opinion that a court reporter should be present. It is therefore reasonable to conclude that in this case, the court reporter was an integral part of the preliminary inquiry and of the proper conduct of that proceeding, and had to be able to work in both languages.

[106] In response to the appellant's complaint, the judge should have determined whether the court reporter might be required to play a role in the proper conduct of the inquiry and, if so, ensured that a bilingual court reporter was present. He should not simply have washed his hands of the problem. If the presiding judge refuses to be responsible for ensuring respect of the accused's language rights in the courtroom, the accused is left with no option for remedying the problem.

[107] I therefore conclude, as did the certiorari judge, that the absence of a bilingual court reporter was a violation of ss. 530 and 530.1. The violation was particularly serious in that the judge refused to act despite the appellant's request.

[108] With respect to the appellant's argument that the absence of a bilingual court reporter caused a delay in the preparation of the transcripts needed for the application for review, the appeal record is not clear or complete on that point. In the absence of a sufficient factual record, in this case, it cannot be concluded that the appellant's language rights were violated on this ground.

Parsons v. R., 2014 QCCA 2206 (CanLII)

[OUR TRANSLATION]

[32] Assuming that it is even possible to dispense with an "absolute right" in the manner in which it was accomplished in paragraph [20] above, which is doubtful, language difficulties faced by lawyers, if any, can not alone constitute a valid justification for a waiver. It is impossible to imagine that parliamentarians who introduced sections 530 and 530.1 of the *Criminal Code* had in mind that it was easier to violate these provisions and render them unenforceable.

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[60] We must, first of all, note that the appelant was unrepresented for a good part of the trial. It would be particularly unjust, in these circumstances, to criticize him for not having made a timely objection to this method, when it was the judge's responsibility to ensure that the accused's linguistic rights where fully respected.

[61] Furthermore, the failure of counsel for the defence, or of the defendant himself, to invoque his rights under s. 530.1 of the *Criminal Code* in a timely manner cannot, by itself, lead to the conclusion of an implied waiver by the accused.

Dow v. R., 2009 QCCA 478 (CanLII)

[79] The next question then becomes, did Mr. Dow validly waive his rights under section 530.1 *Cr. C.*

[…]

[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. [...]

[86] In Mr. Dow's case, there is simply no basis on the record before the Court to conclude that the elevated standard mentioned by Lamer, C.J. to constitute a valid waiver of his rights under section 530.1 *Cr. C.* and section 14 of the Canadian Charter was satisfied by his affirmative answers to the two inquiries from the trial judge I have mentioned in paragraphs [81] and [83]. Nor do they justify the absence of interpretation in the presence of the jury in the three situations I have described in paragraph [52] of these reasons. […]

[87] This is particularly the case since the Crown never suggested in its factum or during oral argument there was a valid reason for Mr. Dow to be asked to waive any of his rights. Whatever that reason may have been, it had nothing to do with any concern for Mr. Dow. One is left with the inevitable conclusion that the request to Mr. Dow was made for the personal convenience of the

trial judge and counsel, which is as far removed as one can imagine from there being a valid reason. Quite simply, the trial judge should not have made any such request of Mr. Dow.

[88] Moreover, a trial judge in such circumstances exercises considerable influence over an accused such as Mr. Dow simply by the disparate nature of their relationship in light of the function the judge exercises and the precarious position of an accused whose liberty is at stake. It is therefore hardly surprising that someone such as Mr. Dow would have responded affirmatively to the trial judge's two requests.

[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 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.*

R. v. Schneider, 2004 NSCA 151 (CanLII)

[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. […]

[…]

[36] [...] As mentioned in para. 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 […]

[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. Potvin, 2004 CanLII 22752 (ON CA)

III. Analysis

(a) Language spoken during proceeding

[22] The appellant argued that a trial in French, pursuant to the provisions of ss. 530 and 530.1 of the *Criminal Code*, is one in which the judge and the Crown prosecutor speak French at all times and where the services of an interpreter are only incidental to the progress of the proceeding. He

maintained that his trial was not consistent with these requirements and that it was actually a bilingual or Anglophone trial, where the use of French was quite secondary.

[23] Firstly, the respondent argued that it is not necessary to interpret s. 530.1 in the case at bar, in view of the fact that counsel for the defence did not object to the use of English until the sixth day of the trial, and after discussions between the parties, he agreed to the use of English for certain witnesses. The respondent submitted that in such circumstances, regardless of the nature of the original order, the judge ordered, and the defence approved (at least regarding the use of English for putting questions) a procedure which somewhat resembled a bilingual trial. Consequently, the respondent submitted that the directions in s. 530.1, which only apply to a unilingual trial, were no longer applicable.

[24] In my opinion, the respondent's arguments as to the alleged consent by the appellant are without foundation. In her memorandum, the respondent made no reference to what happened during the preliminary motion hearing days, as I described it above. When the first five days of testimony are looked at in the context of the trial as a whole, it is unreasonable to conclude that because the appellant made no objection, he changed his mind, [page650] waived his right to a trial in French and agreed to have a bilingual or Anglophone trial. Such a conclusion seems to me all the more unlikely when we take into account the fact that the appellant speaks very little English.

[25] It is worth noting that an accused has the right to claim one of the two official languages as his own, even if he is able to speak the other official language: see *R. v. Beaulac*, at paras. 45-47. Accordingly, I mention Mr. Potvin's very limited ability to speak English here not as the basis of his right to a trial in French, but simply to emphasize the fact that, in the context of the case at bar, it is not reasonable to assume that the appellant would have wanted anything but a trial in French.

[26] I conclude without hesitation that the appellant did not agree to his trial being bilingual. In view of the difficulties which the appellant and his counsel had to face in the preceding days, it is not surprising that counsel for the defence did not object at the start of the trial, with the jury present, when the judge ordered that the translation be simultaneous. In any event, once an order is made that a trial take place in the official language of the accused, the proceeding must be consistent with the requirements without the accused or his counsel being obliged to continually argue the point. It is the judge's responsibility to ensure that the trial proceeds in French.

[27] Secondly, the respondent argued that even if s. 530.1 applied in the case at bar, those provisions did not impose on the judge and Crown prosecutor any duty to speak exclusively in the language which was the official language of the accused. In the respondent's submission, the provisions allowed the Crown prosecutor and judge to use either language at their option, provided they were *able* to speak the language of the accused. The respondent maintained that, therefore, it is sufficient for the Crown prosecutor, judge and the jury to be able to understand and assess, without interpreters, the testimony given or the argument presented in the official language of the accused during the hearing.

[28] There is little precedent on this point. The Quebec Court of Appeal had to consider the question of the language used by the Crown prosecutor in a unilingual trial in *R. v. Cross*, 1998 CanLII 13063 (QC CA), [1998] R.J.Q. 2587, 128 C.C.C. (3d) 161 (C.A.), notice to discontinue appeal, [1999] 3 S.C.R. xi; see also the related case of *R. v. Montour*, [1998] Q.J. No. 2630 (QL) (C.A.). In *R. v. Cross*, the accused had obtained an order that his trial be unilingually in English. The four Crown prosecutors assigned to argue the case, Francophones, told the judge they intended to use French occasionally when the jury was not present. The trial judge at once pointed out that para. 530.1(e) of the *Criminal Code* [page651] did not allow this. Counsel accordingly challenged the constitutional validity of para. 530.1(e) of the *Criminal Code* in the Quebec courts, based on s. 133 of the *Constitution Act, 1867*, which provides *inter alia* that:

> . . . 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.

[29] The Quebec Court of Appeal affirmed the constitutionality of para. 530.1(e). The court concluded that the judge could not, without infringing s. 133, prohibit the prosecutor from speaking the official language of his choice. At the same time, under the provisions of the *Criminal Code*, the Attorney General had to ensure that the prosecutor he assigned to the case was not only capable of speaking the language of the accused, but also willing to do so throughout the trial. The Court of Appeal added:

[TRANSLATION]

> If at some point during the trial the prosecutor felt unable to do full justice to his or her instructions using a language other than his or her own, and indicated an intention to speak French or English as he or she is allowed to do by s. 133, the judge clearly could not compel him or her to speak the official language that was not his or her own. In such a case, the judge should stay the hearing to enable the Attorney General to find a replacement prepared to continue the case in the language of the accused. If this proves to be impossible within a reasonable time, a judge presiding over a jury trial might have to declare a mistrial.

[30] I agree with this interpretation of the scope of para. 530.1(e). Further, I feel that the same conclusion applies to the accused's right to be tried before a "judge and jury who speak" the official language that is the language of the accused. In my view, this interpretation is the only one which can meet the objective of the statutory provisions, as the Supreme Court of Canada held in *Beaulac*.

[31] In *Beaulac*, at para. 25, the Supreme Court held 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." At para. 34, the court defined the purpose 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 emphasis).

[32] If it were enough for the judge and prosecutor to understand French, without it being necessary for them to use it during the proceeding, there would be little difference between, on the one hand, the right to a unilingual trial in the official language of one's choice, and on the other, the right to the assistance of an interpreter already provided for in s. 14 of the *Canadian Charter of Rights and Freedoms*. The right to the assistance of an [page652] interpreter ensures that the accused will be able to understand his or her trial and make himself or herself understood, and that the trial will thus be fair: see *R. v. Beaulac*, at para. 41. However, as noted by the Supreme Court in *Beaulac*, at paras. 25 and 41, "language rights are . . . 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 more limiting interpretation suggested by the respondent might indeed ensure that the accused was understood by the prosecutor, the judge and the jury in his or her original language, without the intermediary of translation; however, in the context of linguistic equality, it seems to the court just as important for the accused to be able to understand what the judge and prosecutor say in the original language used by them during the hearing. There is no question that the requirement for the judge and Crown prosecutor not only to understand French but to use it may give rise to inconvenience in certain situations, but that fact is not relevant. In *Beaulac*, Bastarache J. says this clearly, at para. 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.

[34] Accordingly, I have to conclude that the appellant's language rights set out in s. 530 and para. 530.1(e), requiring that the judge and Crown prosecutor speak the official language of the accused, were infringed.

(b) Transcript of translation

[35] As noted above, the appellant alleged there was also a breach of para. 530.1(g), since no transcript of the interpretation was entered in the record during the first five days of testimony. On this point also, the respondent argued that there was consent by the appellant. I have already dismissed this argument as unreasonable in the circumstances. The infringement of para. 530.1(g) is accordingly clear. [page653]

(c) Remedial provision

[36] Finally, the respondent maintained that the remedial provision in para. 686(1)(b) should be applied in the case at bar. The respondent acknowledged that in *Beaulac* the Supreme Court held that s. 530(1) gives the accused an absolute and substantial right, not a procedural right which may be departed from. Consequently, an infringement of this right does not result in the application of the remedial provision mentioned in para. 686(1)(b). However, the respondent submitted that s. 530.1 represents procedural provisions pursuant to the right set out in s. 530(1), and consequently para. 686(1)(b)(iv) can be applied to an infringement of s. 530.1. The respondent argued that, unlike *Beaulac*, the appellant did not reject a priori his right to a trial before a judge and jury speaking the official language that was spoken by the accused. The question here is actually whether all the procedural provisions were observed.

[37] In my opinion, the result that follows in the case at bar does not depend on the classification of the provisions in s. 530.1 as procedural rather than substantive. The right set out in s. 530 is a substantive and significant right, and s. 530.1, as the title indicates, provides certain clarifications for implementing that right. A trial will not necessarily be vitiated every time a few words are spoken in an official language other than that of the accused. However, a unilingual trial ordered under s. 530 must be essentially consistent with the provisions of s. 530.1. In the case at bar, I agree with the appellant's argument that his trial was not consistent. Overall, his trial was much more like a bilingual, or even largely Anglophone, trial. Consequently, there is no basis for applying the remedial provision and a new trial must be ordered.

SEE ALSO:

Petitpas v. R., 2017 NBCA 6 (CanLII)

Roy Martin v. R., 2011 QCCA 1179 (CanLII)

Stuart v. R., 2007 QCCA 924 (CanLII)

Latour v. H.M.T.Q., 2013 NWTSC 22 (CanLII)

ANNOTATIONS – PARAGRAPH 530.1(B)

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[77] Section 530.1(b) gives the accused the right to use either official language in written pleadings or other documents at the preliminary inquiry and trial. The Crown is not given the same right. This suggests that the written pleadings and other documents relating to the preliminary inquiry must be prepared by the Crown in the language of the accused to whom those documents are addressed.

[78] That interpretation is also consistent with the purpose of the notices: to give the accused "reasonable notice" of the Crown's intention to introduce certain communications or documents in evidence at the trial or preliminary hearing (see the text of ss. 189(5) and 540(8) of the *Criminal Code*). It seems reasonable to me to require that the notices be in the language of the accused. In Ontario, anglophone accused expect that the notices sent to them by the Crown will be in their language, English, and not French. Sending a notice in French to an anglophone accused would be unreasonable. A francophone accused is entitled to expect the same treatment.

ANNOTATIONS – PARAGRAPH 530.1(C)

R. v. T.D.M., 2008 YKCA 16 (CanLII)

[37] Part XVII of the Code is the only federal statute dealing with language right in the context of criminal proceedings before provincial and territorial courts. As T.D.M. did not invoke those provisions, they did not apply at his trial. Accordingly, there is no conflict or incompatibility in this case between the language rights conferred by Part XVII and those conferred by s. 5 of the *Languages Act*. However, even if Part XVII had applied to T.D.M.'s trial, the paramountcy doctrine would not have rendered s. 5 inoperative.

[38] Part XVII of the Code focuses on the language rights of an accused. Nothing in these provisions restricts the language rights of witnesses. I cannot find any operational incompatibility between federal legislation permitting an accused to choose the official language of criminal proceedings and territorial (or provincial) legislation permitting a witness in such proceedings to choose the language in which he or she will testify. The witness's choice can be respected without interfering with the accused's choice. If the accused or others are unable to understand the official language chosen by a witness then, as occurs whenever a witness testifies in a language different from that in which proceedings are being conducted, an interpreter can be used. It is not a matter of one provision saying "yes" while the other says no", or that "compliance with one is defiance of the other": Canadian Western Bank at para. 99, quoting from *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.

[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.

[40] Indeed, Parliament has accepted that when an accused has elected to have criminal proceedings in one official language, a witness is entitled to testify in the other. Section 530.1(c) of the Code provides:

> any witness may give evidence in either official language during the preliminary inquiry or trial.

Once again, when regard is had to the French version, it is apparent that what is being conferred is a right to use either official language: *les témoins ont le droit de témoigner dans l'une ou l'autre langue officielle à l'enquête préliminaire et au procès*.

[41] Further, Parliament has acknowledged that the provinces and territories have authority to legislate with respect to language rights in criminal proceedings, provided those laws are not inconsistent with federal legislation. This can be seen in s. 532 of the Code, which reads:

> Nothing in this Part or the *Official Languages Act* derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

"Province" includes Yukon: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35.

[42] Lastly, although not relevant to this appeal, I note that several amendments to Part XVII of the Code recently came into force: see *An Act to amend the Criminal Code (criminal procedure, language of accused, sentencing and other amendments)*, S.C. 2008, c. 18, ss. 18 - 21, proclaimed in force, October 1, 2008, by SI/2008-71, Canada Gazette Part II, Vol. 142, No. 13, p. 1621. I do not see anything in these changes that would render s. 5 of the *Languages Act* incompatible with Part XVII.

Peters v. La Reine, 1999 CanLII 20718 (QC CA)

[32] Appellant contends that the trial judge erred in law in not affording the defence a full opportunity to cross-examine Detective Prince with respect to an oral statement which he alleged was made to him by the accused. In particular, defence counsel complains that he was not permitted to test the credibility of Detective Prince by cross-examining him in English to ascertain his comprehension of the English language in order to test the accuracy of his comprehension of the oral statement he testified that the accused had made to him.

[...]

[35] There can be little doubt that the oral declaration made by the accused was an important ingredient of the proof of the crown and that it played a significant role in the decision of the trial judge to convict appellant [...].

[36] In my respectful opinion, however, the trial judge erred in refusing to permit appellant to cross-examine Prince in order to test his comprehension as to what the accused said and his credibility as to what was clearly an important piece of evidence - a statement allegedly made by the accused which the trial judge considered very incriminating, in the form related by Prince.

[37] With respect, this was not a case where the right of Detective Prince to testify in his own language was in question. That was not the issue. The issue was whether or not Prince had understood what the accused had said to him in English and whether Prince's comprehension of English was sufficient to permit him to understand and to relate accurately the statements that were made to him in English.

[38] Nor was this an issue of having the Court determine the niceties of the English language.

[39] Once Detective Prince had testified in his examination-in-chief, as to the statements made to him during his interview, then surely the defence, in cross-examination, was entitled to test the reliability of Prince's comprehension of what was said. It was not sufficient for the trial judge simply to accept Prince's affirmation that his comprehension of the English language was adequate. He had to allow the defence to test that affirmation

[40] The issue of the capacity of the witness in this case to comprehend what was said to him is no different, in principle, from the capacity of a witness to have observed the events to which he has testified. The right to test this capacity by cross-examination has never been doubted. Such a witness could have been asked, on cross-examination, whether he was able to see a given object in the court room, for example. [...]

[46] Long before the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, it was well established law that the right to make full answer and defence in a criminal trial includes the right to cross-examine fully. Any improper interference by the trial judge with this right will usually be a sufficient ground for quashing a conviction (*R. v. Lizotte* [1951] S.C.R. 115, 130). With the advent of the Charter, that rule became even more compelling as part of the supreme law of our land (*R. v. Garofoli* [1990] 2 S.C.R. 1421, 1462; *R. v. Seaboyer* [1991] 2 S.C.R. 577, 608).

[47] The trial judge does, of course, have discretion to limit cross-examination on grounds of relevance or abuse. But I see no abuse here and the capacity of the witness to understand what was being said to him by the accused was clearly relevant to the reliability of his evidence. Defence counsel should have been afforded a reasonable opportunity to test his reliability on cross-examination. He was permitted no opportunity whatever to pursue this.

SEE ALSO:

Dow v. R., 2009 QCCA 478 (CanLII)

ANNOTATIONS – PARAGRAPH 530.1(E)

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[66] The respondent acknowledges its obligation to assign a bilingual prosecutor to a bilingual preliminary inquiry. However, the Crown contends that since a bilingual prosecutor was present in this case, the presence of two additional unilingual prosecutors did not violate the appellant's rights.

[67] I do not accept that argument. Although the question of the bilingualism of a team of prosecutors has not been specifically addressed in the case law, the decisions of the courts suggest that all Crown prosecutors in a bilingual trial must be bilingual and capable of participating fully in the trial in both languages. At para. 40 of *Sarrazin*, this court explained that it is generally understood that a bilingual trial is a trial where the judge and prosecutors – plural – are bilingual. The Quebec Court of Appeal adopted a similar position in *Gagnon*, at para. 60, stating, [translation] "the *representatives* of the Crown are also required to be institutionally bilingual" (emphasis added). Additionally, in *R. v. Dow*, [2009] R.J.Q. 679, at para. 89, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 204, the Quebec Court of Appeal held that

courtroom interpretation services are provided for the benefit of witnesses and accused persons, and not for the prosecutor. This suggests that all representatives of the Crown must be bilingual.

[68] The right granted to the appellant in ss. 530 and 530.1 is to have his preliminary inquiry conducted in French, and includes the right to address the Crown in his language. That right exists throughout the preliminary hearing, whoever the prosecutor representing the Crown may be at any given time. I see no reason why the appellant would lose that right simply because the preliminary inquiry has become a bilingual proceeding.

[69] In this case, the two unilingual prosecution counsel handled virtually the entire case. If counsel for the appellant made an objection in French to the testimony called by one of the anglophone prosecutors, that prosecutor was unable to reply in French. She had to use the interpretation service or ask the bilingual prosecutor to answer. The appellant was therefore forced to make a choice. He could make the objection in French, but in so doing he would cause delays and risk irritating the court. Or, he could make the objection in English, which would be simpler for everyone but would not respect the appellant's choice to have his preliminary inquiry proceed in French. Or he could choose not to make an objection. The anglophone accused were not required to make those kinds of choices.

[70] It seems to me to be highly likely that Sgt. Paul, a Montreal police officer whose first language is French, gave his testimony in English because his testimony was prepared and presented to the court by an anglophone prosecutor. The fact that Sgt. Paul's evidence was presented by an anglophone prosecutor is also why, after a comment from the judge asking why he would testify in English when all his notes were written in French, the prosecution continued to question him in English. This is a good example of indirect effects stemming from the fact that some of the Crown counsel assigned to a trial or preliminary inquiry are unilingual. Prosecution counsel, in that case, cannot be neutral when it comes to the choice of the language of the witness' testimony when they themselves are not bilingual. French is accommodated rather than offered as of right.

Gagnon v. R., 2013 QCCA 1744 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[62] While the notion of a fair trial is not used to determine the suitability of a bilingual trial, it is different if the accused is unable to properly understand the conduct of the proceedings by the trial judge. The requirement of proof beyond a reasonable doubt is that this level of conviction is achieved if the decision maker is able to understand all aspects of the proceedings before him. Procedural fairness is not achieved when evidence, rendered partially inaccessible due to the language used by a speaker can, in some instances, lead to a conviction.

[63] The bilingual juror is one who, without the help of interpretation, can easily assess the probative value of the evidence while remaining sensitive to the subtleties surrounding its presentation, regardless of the official language used. This level of understanding allows him to understand the true meaning of the instructions, often technical, from the judge to the jury. Also, when the time comes, the bilingual juror will effectively participate in jury deliberations in both official languages without being overwhelmed by the ease of others to communicate their own opinion on the evidence heard.

[64] By taking a few words from the respondent's factum, we can summarize the essential qualities of a bilingual juror:

- He or she can easily follow the evidence, regardless of whether it is presented in French or English.

- He or she can follow the language used by lawyers when raising questions or objections and easily understand the responses of witnesses and the court's decisions.

- He or she may deliberate in both languages, can speak and easily understand either language used by other members of the jury.

- A proper understanding of the evidence, the judge's instructions, and jury deliberations enable him or her to participate effectively in the verdict.

[…]

[89] The requirement that proceedings, evidence and instructions to the jury be conducted in the original language of the trial is absolute and without exception. As soon as the use of one of the two official languages is no longer possible due to the insufficient comprehension of one of them by the judge or jury, there is an infrignement (sic) to the right of the accused to have a trial before an institutionally bilingual court of justice. When analysed in the light of the previously mentioned incidents, the infringement in this case is patent.

Dow v. R., 2009 QCCA 478 (CanLII)

[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. This importance is reflected in the fact that the last three of Mr. Dow's other grounds of appeal challenge the correctness of separate interlocutory judgments. There is no reason why the standard this Court has determined for Crown counsel in Cross should be any different for trial judges

R. v. Sarrazin, 2005 CanLII 11388 (ON CA)

[57] *Potvin* makes it clear that the judge and prosecutor must not only speak and understand the official language chosen by the accused; they must use it: paras. 32-33. However, I do not read this as requiring the judge and prosecutor to use that language exclusively if circumstances warrant a bilingual trial, without severance, where multiple accused in a common enterprise or conspiracy case have elected to be tried in different official languages.

R. v. Potvin, 2004 CanLII 22752 (ON CA) [judgment available in French only]

[OUR TRANSLATION]

[26] I conclude without hesitation that the appellant did not agree to his trial being bilingual. In view of the difficulties which the appellant and his counsel had to face in the preceding days, it is not surprising that counsel for the defence did not object at the start of the trial, with the jury present, when the judge ordered that the translation be simultaneous. In any event, once an order is made that a trial take place in the official language of the accused, the proceeding must be consistent with the requirements without the accused or his counsel being obliged to continually argue the point. It is the judge's responsibility to ensure that the trial proceeds in French.

[27] Secondly, the respondent argued that even if s. 530.1 applied in the case at bar, those provisions did not impose on the judge and Crown prosecutor any duty to speak exclusively in the language which was the official language of the accused. In the respondent's submission, the provisions allowed the Crown prosecutor and judge to use either language at their option, provided they were able to speak the language of the accused. The respondent maintained that, therefore, it is sufficient for the Crown prosecutor, judge and the jury to be able to understand and

assess, without interpreters, the testimony given or the argument presented in the official language of the accused during the hearing.

[…]

[32] If it were enough for the judge and prosecutor to understand French, without it being necessary for them to use it during the proceeding, there would be little difference between, on the one hand, the right to a unilingual trial in the official language of one's choice, and on the other, the right to the assistance of an interpreter already provided for in s. 14 of the *Canadian Charter of Rights and Freedoms*. The right to the assistance of an interpreter ensures that the accused will be able to understand his or her trial and make himself or herself understood, and that the trial will thus be fair: see *R. v. Beaulac*, at para. 41. However, as noted by the Supreme Court in *Beaulac*, at paras. 25 and 41, "language rights are . . . 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 more limiting interpretation suggested by the respondent might indeed ensure that the accused was understood by the prosecutor, the judge and the jury in his or her original language, without the intermediary of translation; however, in the context of linguistic equality, it seems to the court just as important for the accused to be able to understand what the judge and prosecutor say in the original language used by them during the hearing. There is no question that the requirement for the judge and Crown prosecutor not only to understand French but to use it may give rise to inconvenience in certain situations, but that fact is not relevant. […]

[…]

[37] In my opinion, the result that follows in the case at bar does not depend on the classification of the provisions in s. 530.1 as procedural rather than substantive. The right set out in s. 530 is a substantive and significant right, and s. 530.1, as the title indicates, provides certain clarifications for implementing that right. A trial will not necessarily be vitiated every time a few words are spoken in an official language other than that of the accused. However, a unilingual trial ordered under s. 530 must be essentially consistent with the provisions of s. 530.1. In the case at bar, I agree with the appellant's argument that his trial was not consistent. Overall, his trial was much more like a bilingual, or even largely Anglophone, trial. Consequently, there is no basis for applying the remedial provision and a new trial must be ordered.

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

[OUR TRANSLATION]

[36] I accept the proposition that once trial has begun, the judge cannot, without violating s. 133, prohibit the Crown prosecutor who wishes to do so, from speaking French even if the accused whose official language is English obtained a prior order that he or she will be tried before a judge and jury who speak the official language that is the language of the accused. With respect for the contrary opinion, in my view this does not end the matter. In fact, I am of the opinion that the question as to which language the Crown prosecutor will speak must be posed at an earlier stage, when the Crown prosecutor chooses the language in which he or she will conduct the proceedings.

[37] I accept the proposition of the Attorney General of Canada that s. 530.1 imposes, in a case like the one at bar, an obligation on the Attorney General of Quebec to choose a Crown prosecutor who is capable and agrees to conduct proceedings in the official language of the accused. However, I do not accept the proposition of the appellants that the fairness of the trial requires it to be so. Section 14 of the *Charter* provides for the right to the assistance of an interpreter when a party in any proceedings does not understand or speak the language in which

the proceedings are conducted, as stated by Beetz J. in *Macdonald*, for the majority, at pp. 499 and 500.

[38] [...] It is undisputed that the adoption of s. 530.1 falls within the jurisdiction of the Parliament of Canada. Its validity is accepted across Canada except in Quebec owing to s. 133, in Manitoba owing to s. 21 of the *Manitoba Act of 1870*, and New Brunswick owing to s. 19 of the *Charter* […]

[39] […] I conclude that s. 530.1 imposes on the Attorney General of Quebec, who is responsible for the administration of justice in that province, an obligation to ensure compliance with s. 530.1 by assigning to a case, when s. 530.1 applies, a prosecutor who is capable of speaking the official language of the accused and who agrees to do it. To hold the contrary would require me to conclude that an accused whose language is French is entitled to a prosecutor who speaks his language across Canada, except in Quebec, Manitoba and New Brunswick. . . . Such a conclusion seems to me to be clearly unsustainable.

[40] In the case where both interpretations of the statute are arguable, the one that favours the validity of the legislation should be adopted, as noted by Deschênes J. in *Blaikie* […]

[41] Where an order under s. 530 has been made, a prosecutor whose first language is different from that of the accused may certainly agree, and this is common, to argue the case in the language of the accused. Normally, it is to be expected that the prosecutor will comply with that undertaking. If during the trial, the prosecutor feels unable to do justice to his or her mandate by using a language other than his or her own and indicates an intention to speak French or English as s. 133 permits, the judge could certainly not compel the prosecutor to use an official language that is not the prosecutor's own. In such a case, the judge would have to adjourn the hearing to allow the Attorney General to find a replacement ready to continue the case in the language of the accused. If this proves to be impossible within a reasonable period of time, the judge presiding at a jury trial may have to declare a mistrial.

[…]

[43] I therefore propose to allow the appeal, and declare that s. 530.1 of the *Criminal Code* is valid and has effect in Quebec.

LSJPA – 0915, 2009 QCCQ 3897 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[9] In *R. v. Dow*, the Court of Appeal insists on the obligation of the trial judge and the Crown prosecutor to address each other in English when the accused requests that his trial be conducted in that language. This obligation applies at all times during the trial. No distinction can be made depending on whether they are hearing a witness or whether the Court and Crown counsel are discussing points of law. […]

[10] Applying these principles to the case at bar, the Court unhesitatingly concludes that the use of French during the preliminary remarks, the Crown prosecutor's legal submissions, and the interventions of the Court on these occasions constituted a violation of the accused's right to be tried in English.

[11] Does this mean that the interlocutory judgments must also be rendered in the language of the accused?

[12] The Court of Appeal's answer in *R. v. Dow* is definitely in the affirmative: […]

[13] The act of judging is a demanding intellectual exercise. It requires rigorous analysis of the rules of law applicable to the case, an accurate determination of the facts revealed by the evidence, and the application of the rules of law to the factual framework determined by the judge.

[14] Interlocutory judgments, particularly when dealing the admissibility of an accused's statement to police officers or evidence possibly collected in violation of a right guaranteed by the *Canadian Charter of Rights and Freedoms*, must also comply with these requirements.

[15] The changing nature of the law and the sophistication of its complex rules require the exercise of rigour, precision, accuracy, and nuance. It would certainly have been more practical, even preferable, for the undersigned French-speaking judge to use his mother tongue to achieve these goals in an interlocutory judgment.

[16] Nevertheless, the Court considers itself bound by the conclusions of *R. v. Dow* and has the obligation to apply its precepts.

[17] Furthermore, in *R. v. Beaulac*, the Supreme Court found that in the matter of institutional bilingualism, administrative inconvenience is not a relevant factor. As the Court of Appeal indicated in the previous excerpt, it will henceforth be incumbent on the authorities of the Court of Quebec to assign to such cases judges who are able to meet all the requirements in both official languages.

R. v. Musasizi, 2010 QCCM 17 (CanLII)

[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. […]

[34] In *R. v. Dow*, Justice Hilton J. A. summarizes very well the findings of Justice Charron J.A. in *Potvin* and the reasoning of Justice Bastarache in *Beaulac* concerning the use of the two official languages in Canada in the same proceedings. […]

[35] What does “quelques mots” mean?

[36] The scope of this expression cannot be extended to save proceedings that are more of a bilingual nature.

[37] When key elements of evidence are introduced while using an official language other than the one chosen and requested by the defendant, we have fled the territory of “quelques mots” and entered the wonderland of scaling the level of linguistic rights infringements.

[38] “Quelques mots” means “quelques mots”, something trivial in nature, nothing more.

[…]

[48] The problematic situation in the present case does not lie with the lack of judges or prosecutors able and willing to speak one of the official languages chosen by the defendant ; at the Montreal Municipal Court, there are plenty of bilingual judges and Crown Prosecutors.

[49] It lies with the lack of good judicial practice to ensure that the Court orders pursuant to section 530.1(d) and (e) are relayed to the Court administrators so they can take the proper measures to make sure that the defendant’s trial is conducted in its entirety by a judge and a

prosecutor who are able and willing to speak one of the official languages chosen by the defendant.

[50] In the present case, the defendant through his lawyer, made a timely and proper application, pursuant to sections 530 and 530.1 of the *Criminal Code* to have a unilingual English trial.

[51] His application was granted and an order was given by the presiding judge to have a trial conducted in its entirety in English.

[52] On the other hand, through a good faith oversight, this order was not noted in the written court record.

[53] As for the application for the assistance of an interpreter, it was granted and duly noted in the written court record. At the trial date, the interpreter was present.

[…]

[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.

[58] As for the argument put forward that only “quelques mots” in French were used and should be tolerated, it cannot succeed in the present case. Key elements of evidence and interlocutory decisions were made in French or a mix of French and English. It has coloured the proceedings as bilingual to the point of profoundly vitiating the absolute linguistic rights of the defendant.

[59] So much so that under these circumstances, we are left with only one remedy, to start anew.

SEE ALSO:

Bordo v. R., 2013 QCCA 1745 (CanLII) [judgment available in French only]

Gagnon v. R., 2013 QCCA 1744 (CanLII) [judgment available in French only] (application of section 14 of Quebec's *Jurors Act*)

Roy Martin v. R., 2011 QCCA 1179 (CanLII)

Bujold v. R., 2011 NBCA 24 (CanLII)

LSJPA -- 0856, 2008 QCCA 2232 (CanLII)

Stuart v. R., 2007 QCCA 924 (CanLII)

Cross v. Teasdale, 1998 CanLII 13063 (QC CA) [judgment available in French only]

R. v. Weinberg, 2014 QCCS 320 (CanLII)

R. v. Oliynyk, Lepage and Ferris, 2006 BCSC 85 (CanLII)

R. v. Seenivasam, 2004 CanLII 54502 (ON SC)

R. v. Montour, [1991] Q.J. No. 800 (QC SC) [hyperlink not available]

R. v. Le, [2000] O.J. No. 4218 (ON CJ) [hyperlink not available]

ANNOTATIONS – PARAGRAPH 530.1(G) – CASE LAW SUBSEQUENT TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

N.B. – Since the *Rodrigue* decision in 1994, the legal principles governing the issue of evidence disclosed before the trial seem to be relatively well established: paragraph 530.1(g) of the *Criminal Code* does not impose any obligation on the Crown, based on language rights, to disclose evidence in the official language of the accused. On this point, the applicable principles are the same as those that apply to all criminal trials.

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[82] In this case, the appellant did not ask the judge to require that the Crown prepare a translation of the disclosure or the wiretaps, or to prepare a summary of them in French. What he did argue is that the Crown did everything to accommodate the anglophone accused and did nothing to acknowledge the presence of the accused persons who had exercised their right to a preliminary proceeding in French. The most flagrant example is that the Crown not only prepared a transcript of all of the wiretaps that were in English and provided it to the anglophone accused, but also prepared a transcript of the English translation of all of the wiretaps where the original language was French or another language. In addition, the anglophone accused received a detailed index (three volumes) of those wiretaps in English.

[83] This contrasts sharply with what the francophone accused received. They received no index in their language and did not even receive a transcript in French of the wiretaps where the original language used was French. In at least one case, the version of the intercepted text placed in evidence was the translated English version of an intercepted text where the original language was French.

[84] The Crown argued that with the exception of the latter intercepted text, which should have been introduced in French, there are no grounds for complaint. According to the Crown, in a bilingual trial or preliminary inquiry, the Crown may choose to prepare the disclosure and any other documents in English or French. In this case, the fact that it chose to do so in English only meets its language obligations.

[85] In my opinion, the only conclusion that can be drawn from the fact that virtually all of the documents were prepared in English only is that Crown counsel decided to prepare everything for the preliminary inquiry in English and to do the minimum to meet the obligations they were under because the preliminary inquiry was bilingual. That approach to the preliminary inquiry is very possibly a result of the fact that two of the counsel assigned by the Crown to prosecute the charges were not bilingual and thus had to work with English versions of all the documents and evidence. The result is that all their efforts helped facilitate the job of counsel for the anglophone accused and they did not even provide the minimum, a transcript of the French wiretaps in French, for the francophone accused.

[86] It is important to note that the voluminous documentation prepared by the Crown included more than just disclosure. The transcripts of all the wiretaps, including translations of the wiretaps in other languages, and the three-volume index, were tools developed by the prosecution to facilitate the job of the lawyers, witnesses, and preliminary inquiry judge. If there had been only anglophone accused, the documents prepared by the Crown would have been substantially the same. However, if the accused had all been francophone, all or certainly a good portion of the documents would certainly have been in French. If the Crown had wanted to treat the two language groups in a genuinely equal manner, it would have made an effort to meet the needs and expectations of both language groups. A bilingual trial or preliminary inquiry should not mean that the Crown can choose to give preference to one language, thereby facilitating the job of the accused who use that language, and do nothing for the accused who use the other. Indeed, the Crown's own policy provides that at a bilingual proceeding, "documents prepared by Crown counsel must be in both official languages where practicable." Here, all the documents prepared by the prosecution and appended to the notices were in English only.

[87] Any third party aware of the different treatment of the two language groups could not help but conclude that the francophone accused were put at a disadvantage and that the anglophone accused were given an advantage. The effect of the approach taken by the Crown was to treat the applicant's request for a preliminary hearing in his own language as if there were a primary official language, in this case English, and a duty to accommodate when it came to the use of the other official language, namely French. That approach does not respect the governing principle established in *Beaulac*: the "equality of the two languages" (at para. 39).

[88] It seems to me that in a case such as this one, the transcript should, at a minimum, be in the original language of the wiretaps where the wiretaps were in French or English. Where a language other than English or French was used, the translation could be into either official language. It would then be up to counsel for accused who wanted a transcript or index to be prepared in their language to make the request to the judge.

[89] The judge may, having regard to considerations such as cost, delay in making the request, the delays that might arise from responding to the request, whether counsel and the accused are bilingual, and the principles I have stated, require that the prosecution provide a translation of some of the documents or produce summaries in the language of the accused, depending on what is just and reasonable in the circumstances.

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[56] What can we learn from these instructions? The above decisions all conclude that consecutive interpretation has more advantages than simultaneous interpretation. It also allows the accused or his counsel to detect and react to any deficiencies in the interpretation. It is, for the moment at least, the only method to record the translation and to retranscribe it.

[57] The aim of paragraph 530.1(g) *Crim. Code* is to ensure the parties obtain the complete record of proceedings and their interpretation. The *Dow* and *Martin* decisions, in highlighting the conditions in the various courthouses in Quebec, argue that consecutive interpretation has now become a method that cannot be ignored. Although preferable in all circumstances to any other form of interpretation, consecutive interpretation is in any event deemed inevitable in any case where the court is not able to guarantee the accused, except by this method, full compliance with paragraph 530.1g) *Crim. Code*.

[58] The record does not show that the judge turned his mind to the issue of the appropriateness of the method of interpretation and its consequences. By ordering simultaneous interpretation rather than consecutive interpretation, the judge had to ensure that at all times the file would include the entire recording of the interpretation, which did not occur. This is an error which, as discussed below, has irreparably breached the appellant's language rights.

Nguyen v. R., 2013 QCCA 1127 (CanLII)

[2] The issue raised by Appellant is that of the right of an accused to consecutive translation from and to one of the official languages to and from another language. Since the Appellant received whisper interpretation during his trial, which was not recorded, it is not possible to verify the adequacy of the translation from French to Vietnamese that was provided to him.

[...]

[6] Appellant's position is that the appellant is entitled to a new trial because the quality of the interpretation cannot be verified. The requirement for such a verification is not part of the linguistic requirements provided in s. 530.1g) of the *Criminal Code*.

Stockford v. R., 2009 QCCA 1573 (CanLII)

[8] The appeals raise three issues.

[9] First, Appellants, who neither speak nor understand French, complain that the material disclosed to them by the Crown was not translated into English in its entirety.

[10] The material disclosed ran to some 700,000 pages consisting mainly in the transcript of electronic surveillance.

[11] Justice Réjean Paul dealt with this issue in a judgment dated October 24, 2001, some three years before the trial. He properly noted that Appellants should accept the consequences of not choosing a bilingual attorney. He, again properly, emphasized that section 530.1 *Cr. C.* does not require the Crown to translate all the evidence for purposes of disclosure. He spoke to the sheer volume of the disclosed evidence. He ordered the translation of the summaries relating to the various counts with which the Appellants were charged as well as that of an index of the documentary evidence.

[…]

[13] It is readily apparent that these provisions do not generate a duty for the prosecution to provide a translation of the evidence which is disclosed, since in fact the only requirement is that the evidence be incorporated in the record in the language in which it was presented in court. Section 530.1 *Cr. C.* does not, therefore, require a systematic translation of all documents which

may be presented or produced during the course of a criminal trial, and even less does it require that evidence be disclosed in the language of the accused. It does, however, guarantee the right of an accused to the assistance of an interpreter to translate documents presented in court. In point of fact, all the evidence adduced in the court record in the case at hand was duly translated.

[…]

[16] It has been held that "[t]he right to disclosure of the evidence established under Stinchcombe is the right to disclosure of the evidence as it exists at any particular time before the trial".

[17] I share that view. Courts have adopted the practice of ordering the translation of evidence filed at trial as seen fit to preserve the accused's right to a full and fair defence. With respect to material disclosed in accordance with the principles of Stinchcombe, however:

> The right is a right to the disclosure of the evidence as it exists, not the right to have the assistance of the prosecution in the sense of enhancing the ability of counsel for the defence, or of the accused himself, to assess and evaluate the significance or the weight that could be attached to a certain item of evidence.

[18] I find it useful to point out that in his judgment of December 19, 2001, Justice Martin raised the possibility for the accused to request the translation of specific items of the disclosed evidence:

> Beyond that there may well arise other questions of translation. What for example requires to be translated and how far translation should go may well arise. In the same manner as the Court may resolve specific disputes with regard to disclosure, the same holds true with regard to translation.

[19] Not only have Appellants not submitted any specific request for translation of items of evidence disclosed, they were unable, by the time of the hearing on their appeals, to show in what way their right to a full and fair defence had been infringed by the lack of translation of all the material disclosed or to point to any piece of evidence that impacted negatively on that right because of a lack of translation.

[20] One might add that an amendment to Section 530 *Cr. C.* by Bill C-13, which came into force on October 1, 2008, provides the following:

> 530.01 (1) Translation of documents – If an order is granted under section 530, a prosecutor – other than a private prosecutor – shall, on application by the accused,
>
> (a) cause the portions of an information or indictment against the accused that are in an official language that is not that of the accused or that in which the accused can best give testimony to be translated into the other official language; and
>
> (b) provide the accused with a written copy of the translated text at the earliest possible time.
>
> (2) Original version prevails – In the case of a discrepancy between the original version of a document and the translated text, the original version shall prevail.

[21] That is the only amendment to be found in the *Criminal Code* dealing with the translation of documents. One must therefore conclude that the prevailing jurisprudence is authoritative and that Parliament is satisfied with the state of the law reflected by that jurisprudence.

[27] When I have regard to the context and purpose of s. 530.1 and the modern meanings and usage of the English word "transcript" and the French word "transcription," I find in the two versions a common meaning, rather than discordance. Where an order under s. 530 has been made to protect an accused's linguistic rights, whether for a bilingual or unilingual trial, and the evidence at that trial is recorded, the sound recording that is the official record of the proceeding must include everything that is said in the official language in which it is said. That includes any translation from one official language to the other. The legislative objective is to ensure the record of proceedings contains everything said in both languages, not only by the witnesses, but also by the interpreter. The interpretation of s. 530.1 must assure the attainment of that objective as Parliament has directed in s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21.

[28] The meaning of "transcript" and "transcription" in s. 530.1(g) is broad enough to include a copy or reproduction of an audio recording. The audio recording is the original record of proceeding. It is the primary source that is consulted in the event of a dispute as to the accuracy of a written transcript. It is the best evidence of what was said. When a trial judge made the only notes taken at a trial, those notes were the best evidence. When a stenographer took down in shorthand the words spoken in court, the transcription of those notes into writing was the best evidence of what was said. That "transcript" became the original record of proceeding. But the meaning of the word "transcript" is not frozen in the days of shorthand reporters. It has evolved in the courts as in life beyond the courts to include a copy or reproduction by any means.

[…]

[30] This common meaning for "transcript" and "transcription" as including a copy or reproduction of an audio recording not only permits the two provisions to achieve the same legislative object in the same way, it also accords with the intent of Parliament in adopting Part XVII of the *Criminal Code*. The Supreme Court of Canada has held that the purpose of s. 530 is "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": *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 34. The Court added (at para. 39) that "[t]he governing principle is that of the equality of both official languages."

[31] Whether an accused opts for a unilingual English or French trial, or for a bilingual trial, Part XVII aims at putting that accused on the same footing as any other accused, no matter where in Canada and irrespective of the official language chosen. Part XVII is not intended to put an accused who invokes it in a better position to obtain a written transcript of an audio recording than an accused who does not. That would be the practical effect of the appellant's submission that any accused who invokes Part XVII is entitled automatically to have a written transcript prepared for inspection. I say "practical" because an accused has no need for an order under s. 530 for a unilingual trial in his or her preferred official language if the judge, court officers and prosecutor are speaking that language.

[32] The appellant argues that the English version bears a narrower interpretation that should prevail because penal statutes are to be construed strictly and in favour of the accused, citing *R. v. Abbas*, [1984] 2 S.C.R. 526 in support. I do not agree. Neither s. 530 nor s. 530.1 are penal in effect. The latter is a procedural provision that "provides certain clarifications for implementing" an accused's significant and substantive right under the former to a trial by a judge or judge and jury who speak the official language of the accused or the official language in which the accused can best give testimony: *R. v. Potvin* (2004), 69 O.R. (3d) 641 at para. 37 (C.A.).

[33] For these reasons, I conclude that s. 530.1 does not mandate the preparation of a written transcript at the close of the Crown's case or at any other time. If an accused wishes to inspect the record of proceedings, he may listen to the audio recording or obtain a copy of it in accordance with the provincial legislation and the practice of the court and the Court Services

Branch of the Ministry of the Attorney General. In my view, the trial judge was correct in her interpretation of the *Criminal Code*. It does not require a written transcript be made available for inspection by every accused person at the close of the Crown's case or during or following the trial.

SEE ALSO:

Wilcox v. R., 2014 QCCA 321 (CanLII)

Gagnon v. R., 2013 QCCA 1744 (CanLII) [judgment available in French only]

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

Roy Martin v. R., 2011 QCCA 1179 (CanLII)

Dow v. R., 2009 QCCA 478 (CanLII)

Deschambault v. R., 2010 QCCS 6851 (CanLII) [judgment available in French only]

Bellefroid v. R., 2009 QCCS 4112 (CanLII) [judgment available in French only]

Bellefroid v. R., 2009 QCCS 4006 (CanLII) [judgment available in French only]

R. v. Saprikin, 2015 ONCJ 79 (CanLII)

ANNOTATIONS – PARAGRAPH 530.1(G) – CASE LAW PRIOR TO THE 2008 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Rodrigue, 1994 CanLII 5249 (YK SC)

[11] Section 530.1 also stipulates that the record of the preliminary inquiry and the trial must include all the proceedings in the original official language, a transcript of everything that was interpreted, as well as documentary evidence in the language in which it was presented at the hearing. These provisions do not therefore generate a necessity for the translation of the evidence which is disclosed, since in fact the only requirement is that the evidence be incorporated in the record in the language in which it was presented in court. These provisions must be distinguished from subsection 530.1(h) which requires that written judgments be made available in the official language of the accused.

[12] The provisions of section 530.1 do not therefore require systematic translation of all documents which may be presented or produced during the course of a criminal trial, and even less do they require that evidence be disclosed in the language of the accused; the fact that the accused has a right to an interpreter will, however, ensure that the accused is able to understand the contents of these documents at the time of the trial and the preliminary inquiry.

N.B. – The appeal of this judgment was dismissed on other grounds by the Yukon Court of Appeal and the application for leave to appeal to the Supreme Court of Canada was dismissed.

SEE ALSO:

R. v. Tran, [1994] 2 S.C.R. 951, 1994 CanLII 56 (SCC)

Roy Martin v. R., 2011 QCCA 1179 (CanLII)

R. v. Simard, [1995] O.J. No. 3989 (ON CA) [hyperlink not available]

Directeur des poursuites criminelles et pénales v. Auger, 2008 QCCS 3224 (CanLII)

R. v. Shyshkin, 2007 CanLII 16444 (ON SC)

R. v. Rose, 2002 CanLII 45358 (QC SC)

Stadnick v. La Reine, 2001 CanLII 39664 (QC SC)

An Application For An Order Of Mandamus, 2000 BCSC 1408 (CanLII)

R. v. Mills, 1993 CanLII 4558 (NS SC)

R. v. Bouthillier, [1991] Q.J. No. 2450 (QC SC) [hyperlink not available] [judgment available in French only]

R. v. Maurice Frenette, 2007 NBPC 33 (CanLII)

R. v. Hunt, 2007 QCCQ 1405 (CanLII)

Mathias v. R., 2006 QCCQ 13383 (CanLII)

R. v. Smuk (April 3, 2000), Montréal 73-000946-992 (QC CQ) [hyperlink not available]

R. v. Cameron, [1999] Q.J. No. 6204 (QC CQ) [hyperlink not available]

R. v. Breton (1995), 28 W.C.B (2nd) 525 (YK TC) [hyperlink not available]

ANNOTATIONS – PARAGRAPH 530.1(H)

R. v. Munkonda, 2015 ONCA 309 (CanLII)

[90] At the beginning of the preliminary inquiry, the appellant brought a motion to remove the Crown prosecutors who were not bilingual from the file. The motion was argued in French but the judge gave his decision in English, followed by a brief summary in French. The appellant argued that by doing this, the preliminary inquiry judge failed to respect the accused's language rights. The *certiorari* judge found for the appellant.

[91] The respondent argued that the preliminary inquiry judge did not err and was entitled to proceed as he did. In the respondent's submission, the essence of the decision was set out in the French summary, and so the appellant's rights were respected.

[92] I am not persuaded by the respondent's arguments. An analysis of the two texts, in French and English, clearly shows that the English version laid out the judge's complete reasons, including the judge's justification and reasoning. The French version is merely a summary, and does not present all of the elements that are needed in order to understand the basis of the judge's decision.

[93] Section 530 gives the appellant the right to appear before a judge who speaks his official language. For the preliminary inquiry, that right is granted by s. 530.1(d). In addition, the court's obligation to make judgments available in the language of the accused is set out in s. 530.1(h), which reads as follows:

> any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

[94] The Quebec Court of Appeal has already considered the meaning of s. 530.1(h). It concluded that the obligation to make judgments available in the official language of the accused that is set out in s. 530.1(h) applies to all judgments, including interlocutory judgments (*R. c. Clohosy*, 2013 QCCA 1742*, at paras. 78-82*). Accordingly, the phrases "du jugement" in French and "any trial judgment" in English that appear in s. 530.1(h) include all decisions made in the course of a trial (*Clohosy*, at para. 79).

[95] The accused is entitled to receive the complete decision in his or her language. A summary or synopsis is not sufficient. As the Quebec Court of Appeal explained, [translation] "When a judgment is only partially written in the language of the accused, the accused's rights have only been partially respected. Section 530.1(h) requires more. The language rights of an accused cannot be accommodated by half measures" (*Clohosy*, at para. 81).

[96] In my opinion, the fact that an interlocutory judgment was given orally in no way lessens the judge's obligation to make the decision and the reasons available in full in the language of the accused. The Quebec Court of Appeal has held that oral interlocutory judgments given during the trial must be made available in the language of the accused (*Dow*, at para. 93). This is based on the obligation imposed on the judge by ss. 530 and 530.1(d) to address the accused in his or her own language. Section 530.1(h) merely specifies that the obligation extends to decisions given in writing.

[97] In this case, the appellant's objection to the participation of the unilingual Crown prosecutors was made in French and the appellant was entitled to receive the judge's decision, including his reasons, in his own language. Argument took place in French, except that counsel for some of the co-accused stated in English that they supported the appellant's position. An incomplete summary of the reasons in French is not sufficient. Where argument took place in the language of the accused, the judge must give the judgment in full in the language of the accused, and the preliminary inquiry judge did not do this.

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

[OUR TRANSLATION]

[78] The appelant alleges that a series of judgments made before the verdict was rendered were written in French only, in violation of paragraph 530.1(h) of the *Criminal Code*...

[79] This provision creates an obligation for the court to make its judgments available in the official language of the accused. The English version is more precise in this regard: "any trial judgment […] issued in writing […] shall be made available by the court in the official language that is the language of the accused" [emphasis added by the court].

[80] Yet, among the numerous interlocutory judgments made by the judge, ten were written in French only, and two were written in both official languages. [Brief] in some cases, the rule enacted by paragraph 530.1(g) [sic] was completely ignored, while in others, it was only partially respected.

[81] When only half of a judgment is written in the accused's language, his right is only half respected. Paragraph 530.1(h) of the *Criminal Code* requires more. Linguistic rights cannot be satisfied by half-measures.

[82] We should mention that it was not necessary for the appelant to make a formal request to the court to ensure the respect of the rights granted to him by this provisions.

530.2 (1) Language used in proceeding

530.2 (1) If an order is granted directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages, the justice or judge presiding over a preliminary inquiry or trial may, at the start of the proceeding, make an order setting out the circumstances in which, and the extent to which, the prosecutor and the justice or judge may use each official language.

530.2 (2) Right of the accused

530.2 (2) Any order granted under this section shall, to the extent possible, respect the right of the accused to be tried in his or her official language.

2008, c. 18, s. 21.

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531. Change of venue

531. Despite any other provision of this Act but subject to any regulations made under section 533, if an order made under section 530 cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried, the court shall, except if that territorial division is in the Province of New Brunswick, order that the trial of the accused be held in another territorial division in the same province.

R.S., 1985, c. C-46, s. 531; R.S., 1985, c. 27 (1st Supp.), s. 203; 2008, c. 18, s. 21.

ANNOTATIONS

R. v. Finn, 2006 QCCS 2300 (CanLII)

[17] Section 531 *Cr. C.* provides that the court "… shall …" order a change of venue if a trial in the chosen language "… cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried." The French version of the section states "… ne peut raisonnablement être respectée dans la circonscription territoriale où l'infraction serait autrement jugée."

[18] No reported cases were referred to which have interpreted s. 531 *Cr. C.* I hold that the use of the terms "conveniently" and "'raisonnablement", in the respective English and French versions of the section, requires the Court to consider a number of factors before deciding that an order for change of venue will issue. Amongst those factors, in no particular order, are

- the number of persons who must be convened and the associated costs in order to insure that a twelve person jury can be selected;

• the ties of the accused and/or the complainant/victim to the judicial district where the alleged crime took place;

• any hardship which a change of venue could inflict upon the accused and, to a lesser extent, upon the Crown;

• the notoriety of the crime in the judicial district where it is alleged to have taken place;

• the basic rule that an offence is to be tried there where it is alleged to have occurred.

[19] This list should not be considered as exhaustive. Nor can one state that any particular factor will always carry more weight in the analysis than others. Thus, contrary to the submission of the defence, there may be cases where costs and convenience alone will trump the basic rule that the case is to be tried there where it arose.

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532. Saving

532. Nothing in this Part or the Official Languages Act derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

1977-78, c. 36, s. 1.

SEE ALSO:

R. v. T.D.M., 2008 YKCA 16 (CanLII)

R. v. Bauer, 2005 ONCJ 337 [hyperlink not available]

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533. Regulations

533. The Lieutenant Governor in Council of a province may make regulations generally for carrying into effect the purposes and provisions of this Part in the province and the Commissioner of Yukon, the Commissioner of the Northwest Territories and the Commissioner of Nunavut may make regulations generally for carrying into effect the purposes and provisions of this Part in Yukon, the Northwest Territories and Nunavut, respectively.

R.S.,1985, c. C-46, s. 533; 1993, c. 28, s. 78; 2002, c. 7, s. 144.

533.1 (1) Review

533.1 (1) Within three years after this section comes into force, a comprehensive review of the provisions and operation of this Part shall be undertaken by any committee of the Senate, of the House of Commons or of both Houses of Parliament that may be designated

or established by the Senate or the House of Commons, or by both Houses of Parliament, as the case may be, for that purpose.

533.1 (2) Report

533.1 (2) The committee referred to in subsection (1) shall, within a year after a review is undertaken under that subsection or within any further time that may be authorized by the Senate, the House of Commons or both Houses of Parliament, as the case may be, submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

2008, c. 18, s. 21.1.

Part XX – Procedure in Jury Trials and General Provisions

Empanelling Jury

638. (1) Challenge for cause

638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

> **[...]**
>
> **(f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.**

R.S., 1985, c. C-46, s. 638; R.S., 1985, c. 27 (1st Supp.), s. 132, c. 31 (4th Supp.), s. 96; 1997, c. 18, s. 74; 1998, c. 9, s. 6.

ANNOTATIONS

R. v. Jimenez Leon, 2012 ONSC 575 (CanLII)

[3] Absent an Order pursuant to section 530(1), language competency of prospective jurors can properly be ascertained by the trial judge in the vetting process of the panel. […]

R. v. Nelson, [2000] O.J. No. 5241 (ON CJ) [hyperlink not available]

[11] At a very simple level, [paragraph 638.(1)(f)] can be expressed as follows: Counsel can challenge a juror on the basis that he or she does not speak English or French or both, where the accused is required by a s. 530 order to be tried in English or French or both, as the case may be. From this simplification it is apparent that the commas separate the first main clause from its two subordinate clauses and the various "or's" only apply within their respective clauses.

[12] The clause beginning with "where" is a subordinate clause which creates a condition precedent for the main clause. In other words, the "where" clause modifies the first part of the sentence, creating a condition which must be satisfied before the court will allow counsel to

challenge a juror for cause. From this reading, it is clear that counsel can challenge a juror on his or her ability to speak English, French or both languages only where there has been a s. 530 order.

[13] This "plain meaning" reading of the statute is congruous with the purpose of s. 638(1)(f). The purpose of this section is apparently to allow counsel to challenge jurors in the proficiency in English or French or both languages, where there has been an order of the court under s. 530 that the accused be tried in English, French or both languages. Section 638(1)(f) grants counsel an opportunity to ensure that the s. 530 order is complied with. Reading s. 638(1)(f) in the manner proposed by counsel for Ms. Nelson would be contrary to this purpose. It simply does not make sense to read s. 638(1)(f) out of context with s. 530.

[14] Applying the "ordinary meaning" rule, I find that counsel can only challenge a juror for cause based on his or her proficiency in an official language where there has been an order made pursuant to s. 530.

SEE ALSO:

R. v. Seenivasam, 2004 CanLII 54502 (ON SC)

Part XXI – Appeals – Indictable Offenses

Powers of the Court of Appeal

686. (1) Powers

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

> **[…]**
>
> **(b) may dismiss the appeal where**
>
> > **[…]**
> >
> > **(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or**
> >
> > **(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;**

[…]

686. (5) New trial under Part XIX

686. (5) Subject to subsection (5.01), if an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:

> **(a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;**
>
> **(b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX, other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;**
>
> **(c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and**
>
> **(d) notwithstanding paragraph (*a*), if the conviction against which the accused appealed was for an offence mentioned in section 553 and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.**

[…]

686. (8) Additional powers

686. (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

R.S., 1985, c. C-46, s. 686; R.S., 1985, c. 27 (1st Supp.), ss. 145, 203; 1991, c. 43, s. 9; 1997, c. 18, s. 98; 1999, c. 3, s. 52, c. 5, s. 26; 2015, c. 3, s. 54(F).

ANNOTATIONS

R. v. Beaulac, [1999] 1 SCR 768, 1999 CanLII 684 (SCC)

4. Procedural Considerations

[50] The text of s. 530 does not provide a clear indication of the proper judge or tribunal before whom an application must be made or the proper time for making an application when a new trial is ordered. In my view, the answers to these questions must therefore be found in the legislative intent. The purpose of s. 530(4) will best be served if the application is made as soon as possible. This suggests that the ideal time and place for the application is before the Court of Appeal itself, in a manner similar to the one prescribed by s. 686(5) of the *Code*. Such an order can be made by the court pursuant to s. 686(8) of the *Code*. An application can be made, or inferred, in a case like this one when the language right is at the heart of the appeal. It is not likely that an application will be made in other cases. I would therefore suggest that it would be good judicial policy for courts of appeal to systematically ask the accused if he or she wants to

make an application under s. 530 before they order a new trial if there are obvious signs that this is a possibility.

[51] If no application is made at the time when the new trial is ordered, it would be appropriate for the accused to make an application before or at the time when the trial date is set. This application must be considered timely under s. 530(4) in the case of the retried accused. The provision makes it clear that the accused can apply for a trial in his official language at a later time, but delays constitute important factors to be weighed by the judge exercising the discretion.

5. The Remedy

[52] The respondent relies on s. 686(1)(*b*)(iii) and s. 686(1)(*b*)(iv) of the *Criminal Code*. Her position is that the trial was fair. The position of the appellant is based on the contrary premise. He argues that the language used at trial has a strong impact on findings of credibility and that there is a real possibility that the jury could have come to another result had it heard the evidence presented in French and the evidence presented in English directly, in the French and English languages.

[53] Section 530 is not concerned with assuring a fairer trial or a more reliable verdict. In my view, there is an analogy to be made in this case with *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, where the Court refused to apply the s. 686 proviso to a violation of s. 14 of the *Charter*. Lamer C.J. said, at p. 1008:

> Section 686(1)(*b*)(iii) is designed to avoid the necessity of setting aside a conviction for minor or "harmless" errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred. Section 686(1)(*b*)(iv), a relatively new provision of the Code introduced in 1985, is also designed to permit a court to dismiss an appeal from a conviction, but in cases of procedural irregularity where the Crown can show that the accused suffered no prejudice.

At p. 1009, he continues:

> While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Therefore, I find as a matter of law that a violation of s. 14 of the *Charter* precludes application of both s. 686(1)(*b*)(iii) and s. 686(1)(*b*)(iv) of the *Code*.

[54] Given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, as described here, and the objective of s. 686, I believe that the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity. Accordingly, s. 686(1)(*b*) has no application in this case and a new trial must be ordered. Clearly, there must be an effective remedy available for breach of s. 530 rights. The application of the s. 686 proviso would make it illusory.

[55] Since the language in which the new trial is to be held is the very object of this appeal and the appellant has affirmed his request for a trial to be held before a judge or judge and jury who speak both official languages of Canada, I would hold that the appellant's application be granted.

Roy Martin v. R., 2011 QCCA 1179 (CanLII)

[84] The last thing to decide is the consequences of the failure to provide a procedure that would have allowed the recording of the parts translated outside the jury.

[85] I am of the opinion that par. 686(1)(b) *Cr.C.* may be applied since this case does not involve a violation of a constitutional right, specifically s. 14 of the *Charter*, nor a substantive right recognized under s. 530 *Cr.C.*, specifically the right to a trial in the official language of one's choice, but an error in the choice of the translation method, from which there is no indication of any prejudice, real or apparent. The appellant does not allege any specific violation, arguing rather that any violation of an aspect of linguistic rights must automatically result in an order for a new trial. With all due respect, that is not the state of the law as Justice Charron, of the Ontario Court of Appeal at the time, noted in *Potvin*, *supra*, at paras. 36 and 37.

Dow v. R., 2009 QCCA 478 (CanLII)

[98] In light of the failure to fully respect Mr. Dow's rights under governing appellate case law interpreting section 530.1 *Cr. C.*, and section 14 of the *Canadian Charter*, the curative provisions of sub-section 686(1)(b) *Cr. C.* cannot be applied.

[99] Despite the inapplicability of sub-section 686(1)(b) *Cr. C.* can it nevertheless be said that Mr. Dow's rights were sufficiently respected to the point that the Court should not intervene? After all, the failure to comply with certain aspects of section 530.1 *Cr. C.* and section 14 of the *Canadian Charter* took place for the most part outside the presence of the jury. Mr. Dow was provided with simultaneous translations when voir dire testimony, legal argument and interlocutory judgments occurred in French in that context.

[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.

[102] Mr. Dow's trial was not an example of the substantive equality required to an extent that was much more than merely trivial.

[103] In such circumstances, it would be wrong for the Court to close its eyes to what happened to Mr. Dow and simply express the hope that it doesn't happen again to some other accused. He was entitled to a trial that fully respected his language rights, and that is what he should now have.

R. v. Potvin, 2004 CanLII 22752 (ON CA)

[36] Finally, the respondent argues that the remedial provision at s. 686(1)(b) should apply to the present matter. The respondent acknowledges that in *Beaulac*, the Supreme Court of Canada ruled that s. 530(1) grants the accused an unconditional and substantive right, and not a procedural right which can be waived. Consequently, the violation of this right does not trigger application of the remedial provision provided for at s. 686(1)(b). However, the respondent submits that s. 530.1 amounts to a procedural implementation of the substantive right granted by s. 530(1) and consequently that s. 686(1)(b)(iv) may apply to a violation of s. 530.1. The respondent furthermore argues that, contrary to the *Beaulac* affair, the appellant was not initially

refused his right to a trial before judge and jury who speak his official language. The issue here is rather one of compliance with the relevant procedural provisions.

[37] In my view, the resolution of this matter does not depend upon classifying s. 530.1 as procedural rather than substantive. The right set forth at s. 530 is a substantive and fundamental right. Section 530.1, as the heading indicates, provides certain particulars concerning the implementation of this right. It does not necessarily follow that a trial is necessarily tainted each time a few words are spoken in the official language which is not that of the accused. However, the unilingual trial ordered in the present matter pursuant to s. 530 must essentially satisfy the provisions of s. 530.1. In the present matter, I agree with the appellant's argument that his trial was anything but that. For the most part, his trial bears much more resemblance to a bilingual trial, even in large part to a trial conducted in English. Consequently, there is no reason to apply the remedial provision and a new trial must be ordered.

Latour v. H.M.T.Q., 2013 NWTSC 22 (CanLII)

[31] The violation of the right set out in section 530 of the *Criminal Code* is an error of law. Subparagraphs 686(1)(b)(iii) and 686(1)(b)(iv) of the *Criminal Code*, which allow the court to dismiss an appeal even when an error of law has been committed, apply to summary conviction appeals. *Criminal Code*, section 839.

[32] However, an appeal court cannot rely on these provisions to uphold the conviction of an accused whose section 530 rights have been violated. The Supreme Court of Canada decided this issue in *Beaulac*:

> Given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, as described here, and the objective of s. 686, I believe that the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity. Accordingly, s. 686(1)(b) has no application in this case and a new trial must be ordered. Clearly, there must be an effective remedy available for breach of s. 530 rights. The application of the s. 686 proviso would make it illusory.
>
> *R. v. Beaulac*, *supra*, at paragraph 54 […]

[34] Two remedies could be granted by this Court: a new trial or a stay of proceedings.

[35] A stay of proceedings is a remedy available under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in cases where the state has violated a right guaranteed by the *Charter*. Here we are not dealing with a *Charter* violation. However, it has long been recognized that even when the *Charter* is not engaged, the court's inherent and residual powers include the power to order a stay of proceedings to prevent an abuse of process. […]

[36] It has also been clearly established, however, that this measure should be reserved for the clearest and most blatant cases of abuse of process, where irreparable prejudice has been caused. One of the purposes of a stay of proceedings in such cases is to prevent the abuse from continuing. *R. v. MacKenzie*, *supra*, at paragraph 88.

[37] I conclude that a stay of proceedings is not justified in this case. Although there was a violation of section 530, there was no indication of bad faith on the part of the authorities. It is most unfortunate that Mr. Latour was not clearly informed of his rights from the start. The fact is that, probably because his rights were not explained to him clearly, the positions he took regarding the language of trial were somewhat ambivalent, and at times contradictory, over the course of the proceedings.

[38] It goes without saying that an accused should never have to choose between legal representation and exercising his or her language rights. However, when considered in context,

what happened in this case is not an abuse of process that would justify resorting to the exceptional measure of ordering a stay of proceedings.

[39] Moreover, there is another remedy available (holding a new trial) that will ensure that Mr. Latour's rights are respected. This is not a situation in which a stay of proceedings is the only way to prevent the violation of rights from continuing.

[40] A new trial must be held, and, clearly, it must be held in French. There is no ambiguity in this respect: Mr. Latour stated during the hearing of his appeal that he would have asked to have his trial in French had he been informed of his right. He said that what he was seeking in this appeal was a new trial to be held in French.

SEE ALSO:

Gagnon v. R., 2013 QCCA 1744 (CanLII) [judgment available in French only]

Clohosy v. R., 2013 QCCA 1742 (CanLII) [judgment available in French only]

Pool v. R., 2011 QCCA 1198 (CanLII) [judgment available in French only]

Bujold v. R., 2011 NBCA 24 (CanLII)

R. v. T.D.M., 2008 YKCA 16 (CanLII)

LSJPA -- 0856, 2008 QCCA 2232 (CanLII) [judgment available in French only]

Denver-Lambert v. R., 2007 QCCA 1301 (CanLII) [judgment available in French only]

R. v. MacKenzie, 2004 NSCA 10 (CanLII)

R. v. Doncaster, 2013 NSSC 357 (CanLII)

Bellefroid v. R., 2009 QCCS 4006 (CanLII) [judgment available in French only]

LSJPA – 0915, 2009 QCCQ 3897 (CanLII) [judgment available in French only]

Zak v. R., 2008 QCCS 1268 (CanLII)

R. v. Musasizi, 2010 QCCM 17 (CanLII)

Part XXIII – Sentencing

718.2 Sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

> **(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,**

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

[...]

shall be deemed to be aggravating circumstances;

1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95; 2001, c. 32, s. 44(F), c. 41, s. 20; 2005, c. 32, s. 25; 2012, c. 29, s. 2; 2015, c. 13, s. 24, c. 23, s. 16; 2017, c. 13, s. 4.

Part XXVIII – Miscellaneous

Forms

849. (3) Official languages [formerly s. 841]

849. (3) Any pre-printed portions of a form set out in this Part varied to suit the case or of a form to the like effect shall be printed in both official languages.

2002, c. 13, s. 84.

ANNOTATIONS – SUBSECTION 849(3) – CASE LAW SUBSEQUENT TO THE 2002 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Lavoie, 2014 NBPC 43 (CanLII)

[1] This case involves, inter alia, two questions that remain unanswered to date in the New Brunswick case law, namely: (1) are peace officers under an obligation to draw up entry warrants in both official languages? and (2) is a court that is asked to rule on a statement's admissibility required to consider s. 20(2) of the *Charter*?

[2] The defendant is facing two counts under the *Society for the Prevention of Cruelty to Animals Act*, c. S-12, R.S.N.B. *("SPCA Act").*

[…]

[9] Officers Parish and Bishop arrived at the defendant's kennel at about 10:00 a.m. Corporal Parish knocked on the door and noticed that the licence to operate had expired on October 1, 2011. As no one answered, he entered and identified himself. The defendant immediately came to greet him. Corporal Parish asked the defendant the language in which he wished to be served. The defendant replied, [TRANSLATION] "In French."

[10] Corporal Parish, being a unilingual English speaker, contacted a bilingual RCMP officer to assist him. […]

[…]

[12] Constable Doucet arrived on the scene some 30 to 45 minutes later, where she would act primarily as an interpreter between Corporal Parish and the defendant. A more thorough inspection resumed with her, the two SPCA officers and the defendant in attendance.

[13] Given the circumstances, Corporal Parish served the defendant with a Notice of Seizure for four dogs: two spaniels, a Shih Tzu and a Schnauzer. The Notice was drawn up in both official languages and Constable Doucet explained its content to the defendant. Officer Bishop then transported the four dogs to the Oromocto Veterinary Hospital, where they were examined by Dr. Legge.

[14] On October 27, 2011, the SPCA officers returned to the kennel and presented the defendant with a warrant issued under the *Entry Warrants Act*, R.S.N.B. 2011, c. 150 ("Entry Warrants Act"). The warrant was drawn up only in English. However, Constable Saulnier, a bilingual RCMP member, explained its content to the defendant. The dogs' accommodations having hardly changed, Corporal Parish gave the order to seize the other 129 dogs. Constable Saulnier explained the Notice of Seizure, which was in both official languages, to the defendant.

[…]

III. ISSUES

[30] In addition to those set out in the introduction, the issues come down to the following:

a) Is the exclusion of evidence necessarily the appropriate remedy for the infringement of the defendant's language rights on October 25, 2011?

b) On October 27, 2011, was it incumbent upon the SPCA officers to present the defendant with an entry warrant written in French? […]

[…]

[44] On the face of it, I must say that in my opinion, there was no infringement of the defendant's language rights on October 25, 2011, from the time Constable Doucet, a bilingual RCMP member, reached the kennel. Indeed, upon her arrival, a thorough inspection resumed at which Constable Doucet, the SPCA officers and the defendant were present.

[…]

[75] [...] I, therefore, find that peace officers in New Brunswick have an obligation to use the pre-printed portions of the forms set out in Part XXVII of the *Criminal Code*, in particular Form 5, Warrant to Search, in both official languages. In my view, s. 849(3) requires it.

[76] I have also noticed that there is a whole range of decisions in the Canadian jurisprudence interpreting s. 849(3) of the *Criminal Code*. Some suggest that failure to use the pre-printed portions of the forms in both official languages is merely a formal defect. The fact remains that this argument, although undoubtedly attractive, is not entirely convincing in that it fails to acknowledge the uniqueness of the province of New Brunswick as laid down in ss. 16(2) and 20(2) of the *Charter*. We have to remember that peace officers in that province have a duty to comply with the language requirements that s. 20(2) of the *Charter* imposes on New Brunswick institutions. This is also the principle that emerges from *Losier*, *supra*, a landmark decision on language rights in New Brunswick. As Bastarache J. stated unequivocally in *Beaulac*, [1999] S.C.J. No. 25, language rights must be given a large and liberal interpretation by the courts.

SEE ALSO:

R. v. Car-Fre Transport Ltd., 2015 ABPC 280 (CanLII) [judgment available in French only]

ANNOTATIONS – SUBSECTION 849(3) – CASE LAW PRIOR TO THE 2002 AMENDMENTS TO THE *CRIMINAL CODE*

R. v. Moore, [1988] 1 S.C.R. 1097, 1988 CanLII 43 (SCC)

[58] [Lamer J.] Since the enactment of our Code in 1892 there has been, through case law and punctual amendments to s. 529 and its predecessor sections, a gradual shift from requiring judges to quash to requiring them to amend in the stead; in fact, there remains little discretion to quash.

[59] My understanding of s. 529, when read in its entirety, is that it commands the following to the trial judge: absent absolute nullity and subject to certain limits set out in subs. (9), the judge has very wide powers to cure any defect in a charge by amending it; if the mischief to be cured by amendment has misled or prejudiced the accused in his defence, the judge must then determine whether the misleading or prejudice may be removed by an adjournment. If so, he must amend, adjourn and thereafter proceed.

Noiseux v. Belval, 1999 CanLII 13667 (QC CA)

[4] This appeal concerns a matter of statutory interpretation, and not of linguistic rights or constitutional values.

[...]

[23] In my view, subs. 841(3) of the Code does not conflict with section 133 of the *Constitution Act*, since it imposes an obligation on the state to print bilingual forms, while permitting individuals to choose either language when using them.

[24] It does not in any way diminish the right of any person to use either English or French in any process or pleading of any court in Canada or in Quebec.

[25] Moreover, the evident objective of subs. 841(3) is to facilitate the comprehension, through bilingual forms, of criminal proceedings by the persons concerned. There is no contradiction between this disposition and section 133 of the *Constitution Act*. Since section 133 provides that either French or English may be used in the proceedings, subs. 841(3) does not impose any restriction on this constitutionally protected right.

[...]

[39] For the reasons stated, I believe, with respect for the contrary opinion of Justice Otis, that the unilingual informations in this case do not comply with the mandatory requirements of subs. 841(3) of the *Criminal Code*.

[40] This does not mean, however, that informations with pre-printed portions in only one of Canada's two official languages are absolute nullities.

[41] Neither the informant nor the defendant was prejudiced by the use in this case of an information in which the pre-printed portion was in French only. Like the justice who received the information, they are both French-speaking.

[42] Moreover, the matter has not previously been considered by this Court.

[43] In these circumstances, I believe the defect in the informations - their unilingual pre-printed text - can be cured by appending to them what they should have contained in the first place: pre-printed portions in the other official language.

[44] I would so order, allow the appeals for that sole purpose, and, as proposed by Justice Otis, return the files to the trial courts to be proceeded with according to law.

R. v. Lavoie et al., [1990] Q.J. No. 2642 (QC SC) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[8] It is true that s. 841(3) (*Cr.C.*) provides that any pre-printed portions of a form set out in Part XXVIII must be printed in both official languages. Although the French version of the provision might suggest that it is enough to have separate English and French forms, I believe the English version removes any ambiguity:

> "Any pre-printed portions of a form set out in this Part varied to suit the case or of a form to the like effect shall be printed in both official languages."

[9] Irrespective of the suspect's last name or the language generally spoken by him, the pre-printed portion of the promise to appear under ss. 498 and 501 (*Cr.C.*) must be bilingual, and the blanks must be filled in by the police officer on duty. [...]

[…]

[11] Just like a subpoena and a summons, a promise to appear is merely a way to ensure that a citizen will appear before the Court. Barring a jurisdictional defect (such as where a person is ordered to appear before a court that has no jurisdiction) or some prejudice to the offender (such as where the person, by reason of his language, was unable to understand the obligations he had subscribed to), it is my opinion that the defects in this procedural document do not affect the jurisdiction acquired by the Court before which the accused (or counsel on his behalf) appears.

Perry v. R., [1989] B.C.J. No. 1616 (BC SC) [hyperlink not available]

Here, I do not regard either the inability of the informant to fully understand the French portions of the form or the translation error as matters of substance. The accused has not been mislead or prejudiced thereby. The English words of the form and the particulars of the two counts typed thereon in that language, which he understands, comply with the requirements of the *Criminal Code* and inform him fully of the case he must meet.

I hold, as did the Provincial Court Judge, that it was reasonable and proper for the informant to rely upon the English language portion of the bilingual form. The fact that the French translation was inaccurate did not mislead or prejudice the accused. That defect may be cured by amendment when the matter comes again before the Provincial Court. [...]

I find that an English-speaking informant is entitled to disregard the French portions of the form of information. I hold further that if the omission of the French version of the words "and does believe" from this particular form are perceived to be a defect therein, then that defect may be cured by amendment in the case of an English-speaking accused.

R. v. Société d'électrolyse et de chimie Alcan Limitée, [1994] Q.J. No. 2394 (QC CQ) [hyperlink not available] [judgment available in French only]

[OUR TRANSLATION]

[93] The recognition that failure to comply with the provisions of section 841(3) of the *Criminal Code* will make a unilingual information absolutely null and void involves a misunderstanding of the informant's right to express him or herself in the language of his or her choice.

R. v. Goodine, 1992 CanLII 2618 (NS CA)

In my opinion, the learned summary conviction appeal court judge failed to properly balance the interests s. 841(3) was enacted to promote with Parliament's intention, as expressed in s. 601 of the Code, to give the courts extremely broad powers of amendment respecting indictments, counts therein and informations. Furthermore, the summary conviction appeal court judge failed to properly consider the statements of the Supreme Court of Canada on the subject of defects in form or substance of informations and indictments in the cases have mentioned. The information was not defective other than its failure to comply with s. 841(3) of the Code.

Notwithstanding the mandatory language in s. 841(3) of the Code, s. 32 of the *Interpretation Act* provides that deviations from a prescribed form, not affecting substance or calculated to mislead, do not invalidate the form used. Form 2, as provided in the Code, is just that - a form. The defect was one of form, not substance. With respect, the learned summary conviction appeal court judge did not correctly interpret or apply s. 32 of the *Interpretation Act*.

The fact that s. 841(3) is expressed in mandatory terms does not lead to the conclusion that an information that fails to comply with the section is a nullity. If the use of mandatory language led to such a conclusion, then the amending powers of s. 601 of the Code would be meaningless. Section 581 mandates that a count in an indictment contain sufficient detail of the circumstances of the offence to give the accused reasonable notice of the act or omission to be proven against him. Yet when a count is poorly worded it can, generally, be amended as provided by s. 601. Given the broad power of amendment that had been conferred on judges by s. 601, had Parliament intended, when it enacted s. 841(3), that the failure to use the bilingual forms would result in an information being a nullity, it would have said so in the clearest of language.

For these reasons I have concluded that the information was not a nullity; it was capable of being amended by the Provincial Court judge.

[…]

Crown counsel stapled a blank bilingual form to the information. Section 601(7) does not prescribe how an amendment is to be endorsed on an information or indictment. The method chosen by Crown counsel to amend the information was sloppy but pragmatic under the circumstances as the amendment had been granted by Judge Stroud. As the respondent's mother tongue is English, there was no prejudice to the respondent as a result of the manner in which the amendment was purportedly endorsed on the information. The Crown could have followed the usual practice of filing an amended information retyped on the bilingual form. Another appropriate method would be to type or write upon the information in the proper place the French version of the pre-printed portion of the form so that the information would comply with the requirement of s. 841(3) of the Code.

In excising the power to amend informations, the issue of prejudice to the accused must be considered by the trial judge as required by s. 601(4). As previously noted, pursuant to s. 795 the provisions of s. 601 apply to summary conviction proceedings. The information on the unilingual form did not prejudice the accused whose mother tongue was English.

In summary, the information as initially drafted was not invalid and there was no need to amend it. As a consequence, it was not fatal that the method used by the Crown was less than perfect. Use of unilingual forms more than two years after s. 841(3) amendment is a sloppy practice which

should not be continued in the future. However, the respondent was fully informed of the charge against him.

R. v. Diep, [1991] A.J. No. 622 (AB PC) [hyperlink not available]

In his written brief, Crown counsel makes reference to the *Official Languages Act* and to the intention of Parliament relevant to the passing of s. 841(3) of the *Criminal Code*. He concludes that s. 841(3) created a procedural requirement of symbolic significance only and that non-compliance with that section without more does not justify the quashing of a warrant or the exclusion of evidence. Defence counsel does not in his brief take the position that s. 841(3) does anything more than set out a procedural requirement. In any event, I agree with the Crown's submissions in that regard and therefore defence counsel's arguments based on non-compliance with s. 841(3) fails.

R. v. Keenan, [1990] M.J. No. 668 (MB PC) [hyperlink not available]

Parliament in its wisdom has mandated the use of bilingual forms in matters pertaining to criminal law by the promulgation of s. 841(3) of the *Criminal Code*. This requirement cannot be ignored or circumvented by the use of other forms which have been varied to suit the case or are to the like effect as those forms which are set out in Part XXVIII of the *Criminal Code*.

I find that the use of the word “shall” in s. 841(3) of the *Criminal Code* indicates that the provision is mandatory and not directory. Section 28 of the *Interpretation Act*, I.A., R.S.C. 1970, c. I-23 provides: “28. ‘Shall’ is to be construed as imperative.”

In the result, I conclude that the search warrant in question is subject to the wording “to the like effect”. As it is a form to the like effect as Form 5 and as it was issued in contravention of the mandatory provisions of s. 841(3), it is therefore invalid.

SEE ALSO:

R. v. Murphy, 1995 CanLII 4315 (NS CA)

R. v. Robinson, 1992 CanLII 2487 (NS CA)

Brisebois v. R. (September 25, 1992), Montreal 505-36-000051-922 (QC SC) [hyperlink not available]

Cotton v. The Queen, [1991] Q.J. No. 2341 (QC SC) [hyperlink not available] [judgment available in French only]

R. v. Langlois, 1991 CanLII 1004 (BC SC)

Davies v. R., [1991] O.J. No. 40 (ON CJ) [hyperlink not available]

R. v. Tripp, [1990] O.J. No. 2172 (ON CJ) [hyperlink not available]

R. v. Young (April 17, 1990), Scarborough (ON CJ) [hyperlink not available]

R. v. Shields, [1990] O.J. No. 2534 (ON Dist.) [hyperlink not available]