LANGUAGE RIGHTS IN THE FIELD OF CRIMINAL LAW: WHERE DO WE STAND FOLLOWING THE *BEAULAC* DECISION ?

or

THE END OF AN EPHEMERAL ERA OF JUDICIAL TORMENT

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I. INTRODUCTION

A lot has been written concerning the decision of the Supreme Court of Canada in *R. v. Beaulac*,[1] issued on May 20, 1999. Many authors have justifiably noted the importance of this decision and the new era in the interpretation of language rights it has ushered. Few authors have examined the impact of the *Beaulac* decision on the language rights of accused persons in criminal prosecutions however, even though the decision in *Beaulac* dealt specifically with these rights asguaranteed by sections 530 and 530.1 of the *Criminal Code*.[2] The Supreme Court of Canada was asked to interpret the language rights set out in section 530 for the first time in *Beaulac*. The decision was especially timely because a review of the case law concerning the language provisions of the *Criminal Code* showed that the courts generally, including the Supreme Court itself between 1975 and 1999, seem to be divided between two divergent philosophies governing the interpretation of language rights. Adopting at times a large and liberal approach and at other times a literal and restrictive approach, the lower courts were clearly divided with respect to the precise scope to be given to these provisions and the resulting case law was inconsistent and sometimes even contradictory.

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[1] [1999] 1 S.C.R. 768 [hereinafter *Beaulac*].

[2] R.S.C. 1985, c. C-46. In this article a reference to "the language provisions of the *Criminal Code*", or to "sections 530 and 530.1" includes subsection 849(3), which concerns the language of certain forms.

It also emerged from a review of the case law prior to *Beaulac* that some courts did not hesitate to use the theory of political compromise and the distinction made by Beetz J. in *MacDonald*[3] and *Société des Acadiens*[4] between language rights and the principles of fundamental justice to limit the scope of sections 530 and 530.1 of the *Criminal Code.*

In an article published in 2001, I stated the following: [TRANSLATION] "To the extent that in *Beaulac*, the Supreme Court of Canada not only rejects the restrictive interpretation favoured in *Société des Acadiens* but, more importantly, rules that language rights must 'in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities', it seems clear to us that such an interpretation will no longer be possible in the lower courts and that they will have to adjust their aim".[5]

The purpose of the present article is to determine whether the courts have indeed "adjusted their aim". Since the decision in *Beaulac*, have the courts in all cases given sections 530 and 530.1 a large and liberal interpretation, as the Supreme Court advocated? Can it be said that the restrictive and literal interpretation, paying no heed to the purpose of these sections, is truly a thing of the past? Is there less confusion regarding the distinction between language rights, on the one hand, and the principles of fundamental justice, on the other ? Let us attempt to see where things stand.

II. REMINDER: THE LANGUAGE PROVISIONS IN QUESTION

In accordance with the principle of legislative advancement of language rights expressed in *Jones*[6] and now entrenched in subsection 16(3) of the *Canadian Charter of Rights and Freedoms*,[7] Parliament has, in exercising its power over the criminal law and criminal procedure, enacted a large number of measures designed to extend the language rights of

[3] *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460.
[4] *Société des Acadiens v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549 [hereinafter *Société des Acadiens*].
[5] "Les perpétuels tiraillements des tribunaux dans l'interprétation des droits linguistiques", *Revue de la common law en français*, 2001, Vol. 4:1. The document in question was submitted in August 1998 in fulfilment of the requirements of the Master of Laws program at the University of Ottawa. It was reworked for publication in 2001.
[6] *Jones v. A.G. of New Brunswick*, [1975] 2 S.C.R. 182 [hereinafter *Jones*].

accused persons before the courts. Sections 530 and 530.1 and subsection 849(3) of the *Criminal Code* are only some of these.

Subsection 530(1) provides that on application by an accused whose language is one of the official languages of Canada, a judge must 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 that is the language of the accused or, if the circumstances warrant, who speak both official languages. The times within which an accused may make such an application are set out in paragraphs (*a*), (*b*) and (*c*) of subsection 530(1). These vary in accordance with the nature of the proceedings used to prosecute the offence. Subsection 530(2) applies to a situation where the language of the accused is not one of the official languages. In that case, a judge may, on application by an accused, grant an order directing that the accused be tried before a judge or judge and jury who, in the opinion of the judge, will enable the accused to best give testimony or, if the circumstances warrant, who speak both official languages. According to subsection 530(3), the duty to inform the accused of his or her right to apply for an order under subsection (1) or (2) lies with the justice of the peace or provincial court judge before whom an accused first appears. As the law now stands, this duty is imposed on a judge only where an accused is not represented by counsel. Subsection 530(4) allows the court by which an accused is tried to grant the order provided for in subsections 530(1) and (2) when the accused has not made an application within the prescribed times. Finally, subsection 530(5) states that an order providing that an accused be tried before a court that speaks one of the official languages may be varied to ensure that the accused is tried by a court that speaks both official languages.

Section 530.1 lists the specific rights that may be exercised when an order is made under section 530. It provides that (1) an accused and his or her counsel and any witnesses are entitled to use either official language during the preliminary inquiry and trial (530.1(*a*) and (*c*)); (2) an accused and his or her counsel may use either official language in written pleadings or other documents at the preliminary inquiry and trial (530.1(*b*)); (3) an

[7] Part I of the *Constitution Act, 1982*, comprising Schedule B of the *Canada Act, 1982* (U.K.) 1982, c.11 [hereinafter the *Charter*]

accused is entitled to have a justice presiding over the preliminary inquiry who speaks the same official language as the accused and a prosecutor – except for a private prosecutor – who speaks the same official language as the accused (530.1(*d*) and (*e*)); (4) the court is required to provide an accused, his or her counsel and any witnesses with interpretation services at both the preliminary inquiry and the trial (530.1(*f*)); (5) the record of proceedings during the preliminary inquiry and trial must contain a transcript of everything that was said during those proceedings in the official language in whch it was said and a transcript of any interpretation, as well as any documentary evidence that was tendered in the official language in which it was tendered at the hearing (530.1(*g*)); and, finally, (6) the court must ensure that the judgment – including any reasons for decision – is made available in the official language of the accused (530.1((*h*)).

It should be noted that the *Criminal Code* also contains a provision concerning the language of certain forms. This is subsection 849(3), which came into force on February 1, 1989.[8] Subsection 849(3) provides that the forms provided for in Part XXVIII of the *Criminal Code*, such as warrants and summonses, shall be printed in both official languages.

III. JUDICIAL DECISIONS SINCE BEAULAC

The decision in *Beaulac* undoubtebly marked the dawn of a new era for language rights. Have there been equally substantial upheavals in the criminal context? To answer this question, we merely have to examine the judicial decisions rendered in this area since *Beaulac*. Shortly after the decision, in May 1999, some accused sought to exercice their rights, as interpreted by the Supreme Court. Others attempted to have earlier, pre-*Beaulac*, decisions overturned on the basis of the rules of interpretation set out by the Supreme Court with respect to language rights generally and with respect to sections 530 and 530.1 of the *Criminal Code*. Some attempted to extend the scope of sections 530 and 530.1 while others did not hesitate to raise any failure to comply with sections 530 and 530.1 in a bid to have the charges laid against them quashed. In short, several courts across the country had once again to consider the language provisions of the *Criminal*

[8] Formerly subsection 841(3).

Code and, necessarily, the principles set out by the Supreme Court in *Beaulac.* It is therefore relatively easy to examine these decisions and to note the major trends that emerge from them.

(i) Equal access to services of equal quality

In February 1997, Mr. Réal Brochu, a francophone from Sasktachewan, is accused of drug-related offences. The provincial court of the province refuses his fist request for a trial in the French language on April 27, 1998. A second request is also refused on March 8, 1999. An English-only trial takes place and Mr. Brochu is found guilty on March 11, 1999. He appeals his conviction, arguing, amongst other things, that his right to a trial in French pursuant to section 530 of the *Criminal Code* was denied. On September 7, 1999, after the *Beaulac* decision, the Court of Appeal of Saskatchewan grants his appeal and orders a new trial. Two months later, on November 9, 1999, the accused, still awaiting his trial, requests a stay of proceedings pursuant to section 24 of the Charter. He is of the view that he was not afforded a trial witin a reasonable time in accordance with paragraph 11b) of the *Charter*[9]. It is important to note that, at that time, the accused had spent 8 months behind bars, serving a prison sentence imposed on March 11, 1999.

After having examined the facts surrounding Mr. Brochu's case, including the Crown's refusal to grant Mr. Brochu a trial in the French language as well as its numerous requests for adjournments, Justice Lavoie allows the application and orders a stay of proceedings[10]. Justice Lavoie is of the view that a 33 month delay, between the initial charges and the motion asking for a stay of proceedings, is unacceptable. The Court takes judicial notice of the fact that accused's persons in Saskatchewan have had their trial in French and that that Court has clerks, crown attorneys, defence counsel as well as bilingual judges able to conduct trials in French since 1985.

[9] Pursuant to section 11b) of the *Charter*, any person charged with an offence has the right to be tried within a reasonable time.
[10] *R. v. Brochu* (November, 9 1999), Sasktachewan N° 20766865 (P.C. Sask.) Justice Lavoie [hereinafter *Brochu*].

Although Justice Lavoie did not discuss the *Beaulac* decision at any lenght, the *Brochu* case nevertheless illustrates the potential scope of *Beaulac* and of the equality principle that it establishes. The Supreme Court having clearly established that section 530 of the *Criminal Code* grants the accused the absolute right to equal access to services of equal quality from courts of criminal jurisdiction in the official language of his or her choice and that these courts must therefore be institutionnally bilingual in order to ensure the equal use of both official languages, it is difficult to imagine how a 33 month delay, in large part due to the systematic refusal by the Crown to agree to a trial in French, can be justified.[11] The *Brochu* decision also illustrates how the violation of the language rights of accused persons and of the equality principle can have serious consequences. An accused person who, for instance, would have to wait numerous months in order to have his right to a trial in French respected, could then, as Mr. Brochu did, argue that non only was section 530 and the principles established in *Beaulac* violated, but also paragraph 11b) of the *Charter*, thereby opening the door to a remedy under subsection 24(1) of the *Charter*.

(ii) Duty to inform an accused who is not represented by counsel of his or her language rights

Subsection 530(3) of the *Criminal Code*, as it now stands, provides that an accused who is not represented by counsel must be informed of his or her right to apply for an order referred to in subsections (1) and (2), by the justice or provincial court judge before whom the accused first appears. We should note in this connection that the Supreme Court of Canada indicated in the *Beaulac* decision that this right was of "questionable value" because it applied solely to an accused who was not represented by counsel and that "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".[12] We

[11] It is not clear whether Mr. Brochu's request was made in the prescribed time period or not. However, the evidence shows that Mr. Brochu, who was unrepresented at the time, was not advised of his right to a trial in the official language of his choice when he first appeared before a judge pursuant to paragraph 530(3) of the *Criminal Code*. It is therefore probable that his request was made outside the prescribed time frame, as was the case in the *Beaulac* case.

[12] *Supra* note 1, at paragraph 37.

should also note that subsection 530(3) was not considered by the courts prior to the decision in *Beaulac*.

Barely six months after *Beaulac*, in December 1999, a failure to comply with subsection 530(3) was raised in the Nova Scotia Supreme Court in *R. v. Deveaux (G.)*.[13] The accused, whose mother tongue was French, was not represented by counsel when he appeared before a provincial court judge – who failed to inform him of his language rights. He was found guilty of assault following a trial that was conducted in English. The accused appealed from his conviction, arguing that the provincial court judge had violated sections 15, 16 and 19 of the *Charter* by failing to inform him of his language rights in accordance with subsection 530(3) of the *Criminal Code.* Thus, the first issue that arose was whether subsection 530(3) is imperative. Quoting several extracts from the decision in *Beaulac*, the Nova Scotia Supreme Court had no hesitation in finding in the affirmative. It also took the opportunity to note the purpose of the language provisions of the *Criminal Code*, as expressed by the Supreme Court. It also noted the importance of language rights to the official language minority communities and it added that an accused's ability to understand the other official language was not relevant in any way.

The judge continued his analysis and concluded, again quoting *Beaulac*, that a failure to comply with subsection 530(3) of the *Criminal Code* constituted a violation of the rights of the accused protected by sections 15, 16 and 19 of the *Charter*. Having found that rights protected by the *Charter* had been violated, the Court quashed the guilty verdict and ordered a new trial.

Despite this conclusion, which we consider debatable, the fact remains that this was, to the best of our knowledge, the very first case in which a court of law confirmed the imperative nature of subsection 530(3) of the *Criminal Code*.

The issue of non-compliance with subsection 530(3) was raised again, this time in Ontario, scarcely one month later, in *Her Majesty the Queen v. Che Mong Le*[14]. Ms. Le, who was charged with six drug-related offences, was arrested and appeared first before a

[13] (1999), 181 N.S.R. (2d) 81; 560 A.P.R. 81 (N.S.S.C.) [hereinafter *Deveaux*].
[14] (January 31, 2000), Ottawa 5024F (Ont. S.C.) Killeen J. [hereinafter *Che Mong Le*].

justice. At that point, Ms. Le was not represented by counsel. However, during all her other court appearances, Ms. Le was represented by counsel. Following her preliminary inquiry, which lasted 16 days, the judge found that there was sufficient evidence for Ms. Lee to be tried on each of the offences alleged against her. At the commencement of the trial, Ms. Le's counsel argued, *inter alia*, that the justice of the peace had failed to comply with subsection 530(3) of the *Criminal Code* when Ms. Le first appeared. He argued that, given the violation of subsection 530(3), the whole preliminary inquiry that followed was null *ab initio* and must be quashed.

Killeen J. of the Ontario Superior Court of Justice was not impressed by Ms. Le's arguments. He began by noting that the very first appearance was limited to only one of the charges laid against Ms. Le. According to the judge, if there were any illegality, it would relate solely to this first charge and not to the other six. The Court then pointed out that Ms. Le was represented by counsel on all her other appearances before the Court. Furthermore, the question of the failure to comply with subsection 530(3) of the *Criminal Code* was never mentioned at the commencement of or during the preliminary inquiry. The judge went on to note that he was far from convinced that the admitted failure to comply with subsection 530(3) automatically made subsequent proceedings null and void – whether relating to the initial charge or those that were laid later.

It is important to note that Ms. Le's counsel quoted several passages from the *Beaulac* decision in support of his submissions. Killeen J. accordingly briefly examined the facts of that case, stressing that the right that Mr. Beaulac had attempted to assert, which he had been denied, was the right to a *trial* in French. In the case of Ms. Le, on the other hand, the justice of the peace had failed to inform the accused, who was not represented by counsel when she first appeared on only one charge; subsequently, the accused was represented by counsel. His Lordship went on to state the following:

> Section 530(3), in my view, must be interpreted rationally, purposively and contextually. I cannot accept Mr. Gold's proposition that nullification must automatically eventuate for the preliminary hearing proceedings. After all, s. 530, at large, is aimed at protecting the accused's right to a <u>trial</u> in his or her preferred language of the two official languages. While the error in Beaulac was clearly a "substantive

> wrong", to use the language of Bastarache J., at p. 514, I conclude that the error here, if it was an error, was procedural and cannot justify nullification.[15]

Ms. Le's motion to quash the preliminary inquiry was accordingly dismissed. In our view, the judge's finding that the violation of subsection 530(3) must be classified as "procedural" raises some questions. It must be noted however that the two decisions referred to above are relatively short and contain little sustained analysis.

It is a quite different situation in *R. v. MacKenzie*,[16] a recent decision of the Nova Scotia Court of Appeal. The Court, also faced with an argument to the effect that subsection 530(3) had not been complied with, issued a balanced and well-reasoned decision. Ms. MacKenzie, a Francophone, was charged with speeding contrary to paragraph 106(*a*) of the Nova Scotia *Motor Vehicle Act*. When she appeared in the Nova Scotia Provincial Court for her arraignment, she was not represented by counsel. The Provincial Court judge failed to inform her of her right to apply for a trial in French in accordance with subsection 530(3) of the *Criminal Code*.[17] Ms. MacKenzie's trial took place in English, she was found guilty and a fine was imposed on her.

Ms. MacKenzie appealed her case to the Nova Scotia Supreme Court, sitting as the Summary Conviction Appeal Court. Edwards, J., that is the same judge as in *Deveaux*, again ruled that the breach of subsection 530(3) of the *Criminal Code* constituted a violation of sections 15, 16 and 19 of the *Charter* and, noting the "serious Charter breach", found that the appropriate relief was a stay of proceedings rather than a new trial.

The Crown applied for leave to appeal on the ground that there was an error of law under subsections 839(1) of the *Criminal Code* and 7(1) of the Nova Scotia *Summary Proceedings Act*. While admitting that there had been a breach of subsection 530(3), the Crown asserted that the appropriate remedy was a new trial and not a stay of proceedings.

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[15] *Ibid.* at pp. 12 and 13 [the Court's emphasis].

[16] [2004] N.S.J. Nº 23 (N.S.C.A.). Mrs. MacKenzie has filed an application for leave to appeal to the Supreme Court of Canada, docket nº 30359, S.C.C.

[17] Under section 7 of the *Summary Proceedings Act* of Nova Scotia, the provisions of the *Criminal Code*, including sections 530 and 530.1, apply to this charge.

The Nova Scotia Court of Appeal, which consisted of Saunders, Chipman and Fichaud JJ.A., had to answer the three following questions: (1) Was there a breach of subsection 530(3) of the *Criminal Code*? (2) Was there a breach of the *Charter*? and (3) What is the appropriate remedy? The Court's answer to the first question was categorical: the application of subsection 530(3) of the *Criminal Code* is imperative: a provincial court judge must inform an accused of his or her right to apply to the court for an order that the trial be conducted in either official language or in both. Since Ms. MacKenzie was not represented by counsel when she first appeared in court, the provincial court judge was required to inform her of her right to apply to the court for such an order under section 530 and to tell her when to do so. He did not do this and there was accordingly a breach of subsection 530(3).

By applying and extrapolating from the principles set out in the *Beaulac* decision, the Court of Appeal continued by noting that it was not for the accused to take the initiative and to show in any way whatsoever that he or she was a Francophone in order to obtain the required information. It should be noted in this regard that although the Crown acknowledged that subsection 530(3) had been breached, it argued on appeal that the Provincial Court judge was justified in not given the information prescribed by subsection 530(3) since the documents filed before him did not indicate at all that Ms. MacKenzie was a Francophone. The Court of Appeal rejected this argument:

> The only condition that triggers the requirement for a notice is that when the accused first appears, he or she must not be represented by counsel. 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.[18]

The Court of Appeal then considered the decision in *Beaulac* in greater detail and clearly and concisely summarized the principles governing the relationship between subsections 530(1) and (3) of the *Criminal Code*. These deserve to be noted:

[18] *Supra* note 12 at paragraph 12. Emphasis added.

1. Ms. MacKenzie had an absolute right under s. 530(1) to a trial in her own language. If "circumstances warrant" the court may order that the judge or jury be bilingual further to the concluding words of s. 530(1).

2. Her right is not subsumed into her separate right to a fair trial. Section 530(1) states an independent right to access a public service that is responsive to her linguistic and cultural identity.

3. It is for Ms. MacKenzie to decide whether English or French is her "own language" for trial provided only that she is capable of instructing counsel in her chosen official language.

4. Ms. MacKenzie's assertion of language is the prerequisite to the application under s. 530(1) for a trial in French.

5. Effective notice is a prerequisite to the assertion of a language by an unrepresented accused. Because Ms. MacKenzie was unrepresented, the court was required to notify Ms. MacKenzie under s. 530(3) of her right to apply for a trial in either official language and the time within which that application must be made. Ms. MacKenzie's right to notice is as absolute as are Ms. MacKenzie's rights which flow from that notice. In *Beaulac* Justice Bastarache (para. 37) noted "the questionable value" of s. 530(3) because even when accused have counsel, the counsel may fail to advise their client of a right to a trial in either official language. Obviously there is no basis to dilute the required notice to unrepresented persons.

6. On her first appearance, at the time of the required notice under s. 530(3), it was unnecessary that Ms. MacKenzie identify herself as French-speaking, or state her preference for French. If she was unrepresented, she was entitled to notice regardless of her actual or apparent proficiency in either French or English. If the Provincial Court judge neglects to provide the notice then, if the Crown wishes to avoid the trial process inefficiency which has occurred here (two appeals, and a stay or new trial), Crown counsel should consider reminding the Provincial Court judge of s. 530(3).

7. If Ms. MacKenzie applied for a French trial under s. 530(1), then the judge may determine whether French is "the language of the accused". When the accused chooses French or English, the inquiry is limited to whether she can instruct counsel in her chosen language. This is the only point when a judge assesses language proficiency. There is no such assessment before the notice under s. 530(3).[19]

For these reasons, the Court found that the lack of documentation before the Provincial Court establishing that Ms. MacKenzie was a Francophone had no impact on the duty of

the court to give the accused the notice provided for in subsection 530(3) of the *Criminal Code*.

The question that then arose was whether there had also been a breach of the *Charter*, and in particular of section 15, subsections 16(1) and 16(3) and subsection 19(1). If so, the Court could grant relief under subsection 24(1) of the *Charter*. If not, it had to consider the relevance of the general power of criminal courts to order a stay of proceedings. The Court dismissed the arguments concerning section 15 (equality right) and subsection 19(1) (right to use English or French in the courts and before Parliament) rather summarily. With respect to section 15, the Court noted that appeal courts had on many occasions reiterated that language is not an analogous ground; that sections 16 to 23 of the *Charter* specifically refer to language rights and that if language were also referred to in such a general provision as subsection 15(1), sections 16 to 23 would have little meaning.[20] Consequently, the Court of Appeal found that there was no breach of subsection 15(1) of the *Charter.*

As far as subsection 19(1) was concerned, the Court stated that, according to the interpretation given to "any court of Canada", the reference was solely to courts established under federal legislation.[21] The provincial court that arraigned and tried Ms. MacKenzie was not "established by Parliament". It was established by the *Provincial Court Act* of Nova Scotia. Consequently, there could not have been a breach of subsection 19(1) of the *Charter.*

Ms. MacKenzie also relied on subsections 16(1) and (3) of the *Charter*. Subsection 16(1) states that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in "all institutions of the Parliament and government of Canada". Purusant to subsection 16(3), nothing in the *Charter* limits the authority of Parliament or of a legislature to advance the equality of status or use of English and French.

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[19] *Supra* note 12, at paragraph 15.
[20] *Supra* note 12, at paragraph 33.
[21] *Supra* note 12, at paragraph 36.

First, with respect to subsection 16(1), the Court noted that it refers solely to "the institutions of the Parliament and government of Canada". The Nova Scotia Provincial Court is not an "institution of the Parliament of Canada". It was established by the Nova Scotia Legislative Assembly. The fact that the Provincial Court applies the *Criminal Code* does not alter this fact; it also applies the laws that create provincial offences.[22] Nor is the Provincial Court an institution of the government or of the executive. However, courts are referred to in section 19 of the *Charter*, and not in subsection 16(1). Furthermore, the fact that subsection 16(2) of the *Charter* expressly refers to the institutions of New Brunswick confirms that the words "institutions of the Parliament and government of Canada" in subsection 16(1) of the *Charter* excludes provincial institutions. In short, the Court was of the view that the language rights provided for in subsection 16(1) of the *Charter* did not apply to the Provincial Court's arraignment and trial of Ms. MacKenzie.

As far as subsection 16(3) of the *Charter* is concerned, the Court pointed out that this provision codifies the "principle of advancement". It ensures the constitutional validity of an Act of Parliament or of a provincial legislature that advances the equality of status or use of English and French. The Court asserted that subsection 16(3) does not have the effect of constitutionalizing legislation of this kind or of entrenching it in the *Charter*. Breaches of such acts do not lead to a remedy under subsection 24(1) of the *Charter*. In short, a breach of subsection 530(3) is not a breach of subsection 16(3) of the *Charter* that would provide access to relief under subsection 24(1).[23]

We should note, finally, that the Court also rejected Ms. MacKenzie's argument concerning the unwritten constitutional rule of protection of minorities. After quoting

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[22] *Supra* note 12, at paragraphs 42 and 43.

[23] It is important to note that this is the fourth decision of a provincial court of appeal that has repeated and confirmed the statement of the Supreme Court of Canada in *Beaulac* that subsection 16(3) "has formalized the notion of advancement of the objective of equality of the official languages of Canada in the *Jones* case", which permits Parliament to add to the existing rights. The four courts of appeal have confirmed that the effect of this provision is to protect and not to constitutionalize the measures taken to promote linguistic equality. Subsection 16(3) does not therefore confer rights. See *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505 (Ont. C.A.); *Moncton (ville) v. Charlebois*, [2001] N.B.J. No. 480 (N.B.C.A.) and *Westmount (ville) et al. v. Québec (Procureur général)* (October 16, 2001), Montreal No. 500-09-011131-018 (Que. C.A.).

lengthy passages from the *Reference re Secession of Quebec*,[24] the Court pointed out that it was not necessary to examine the scope or extent of its normative force. In effect, it was clear, in the Court's view, that this principle does not amend the text of the *Charter*.

Turning now to the appropriate relief, the Court of Appeal felt that absent any breach of the *Charter*, the Summary Conviction Appeal Court should have taken as its starting point section 686 of the *Criminal Code*, to which subsections 822(1) of the *Criminal Code* and 7(1) of the Nova Scotia *Summary Proceedings Act* refer. According to section 686, when a summary conviction appeal court allows an appeal from a conviction, it shall quash the conviction and, depending on the circumstances, (a) direct a judgment or verdict of acquittal to be entered, or (b) order a new trial. The provision does not provide specifically for a stay of proceedings. This said, it is no longer disputed today that the courts have an inherent and residual discretionary power to prevent abuse of the judicial process. However, absent any abuse, appeal courts do not have the authority to order a stay of proceedings. The Court then explained that if there had been an abuse of process or a breach of the *Charter*, the Summary Conviction Appeal Court would have been required to consider whether a stay was the just and appropriate remedy at common law or under s. 24(1). In this context, the Summary Conviction Appeal Court did not consider the test set out in *R. v. O'Connor*,[25] where the Supreme Court of Canada held that a stay of proceedings was justified only where there was evidence to show that, without the stay, the abuse would continue and that there was no remedy short of a stay which would prevent this continuing abuse.

In the circumstances, before the Summary Conviction Appeal Court could consider a stay of proceedings, it would have to conclude that the abuse in the specific case was such that it constituted an abuse of process at common law, constituted a denial of the principles of fundamental justice protected by section 7 of the *Charter* or deprived Ms. MacKenzie of her right to a fair trial under paragraph 11(*d*) of the *Charter*. The Summary Conviction Appeal Court did not consider these issues before imposing the stay of proceedings. According to the Court of Appeal, there was nothing in the case to indicate that it was the

[24] [1998] 2 S.C.R. 217.

"clearest of cases" (1) where there was "overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice", (2) where there was a breach of the principles of fundamental principles of justice protected by section 7 of the *Charter*, or (3) where Ms. MacKenzie was deprived of her right to a fair trial under paragraph 11(*d*) of the *Charter*. Nor is there anything in the record to indicate that the Provincial Court judge knowingly failed to give the accused the notice prescribed by subsection 530(3) of the *Criminal Code*, or that this was a systematic failing of judges throughout Nova Scotia.

In short, subsection 530(3) of the *Criminal Code* was not complied with in this case. However, there was no abuse of process and Ms. MacKenzie cannot complain that there was a breach of the principles of fundamental justice and her right to a fair trial protected by section 7 and paragraph 11(*d*) of the Charter. Consequently, a stay of proceedings was not an option for the Summary Conviction Appeal Court. It should have ordered a new trial under paragraph 686(2)(*b*) and subsection 822(1) of the *Criminal Code* The Court accordingly granted leave to appeal, allowed the appeal, set aside the stay of proceedings and ordered a new trial.

This was therefore one of the first important cases since *Beaulac* in which an appeal court was called upon to read and apply principles set out in *Beaulac* to the issue before it. The Court noted the absolute right of every accused to be tried in the official language of his or her choice and distinguished this right from the right of every accused to a fair and impartial trial. It ruled that the right of an accused who is not represented by counsel to be informed of this right is "as absolute" as that right, and this seems to contrast with the view of Kileen J. in *Che Mong Le*.

This having been said, will this decision be sufficient? Will judges now comply with the duty imposed on them? It is widely known that the obligation imposed by subsection 530(3) is not always respected[26]. However, it needs to be recalled that it applies solely to accused persons who are not represented by counsel. What is the situation for other

[25] [1995] 4 S.C.R. 411.

accused persons? Do their counsel inform them of their language rights? Bastarache J. suggested in *Beaulac* that it was unrealistic to assume that counsel would be aware of this right and that they would effectively inform the client in all cases absent an obligation to do so[27]. In this regard, we should mention two initiatives designed to publicize language rights. In Ontario, the Rules of Professional Conduct for lawyers have been amended to impose a duty on lawyers to inform their clients of their language rights.[28] A similar provision exists in New Brunswick.[29]

(ii) Does section 530.1 apply to "bilingual" trials?

Subsection 530(1) of the *Criminal Code* provides that on the application of an accused whose language is one of the official languages of Canada, a judge 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 the accused or, if the circumstances warrant, who speak both official languages. Subsection 530(2) governs the situation where an accused's language is not one of the official languages. In that case, a judge may, on an application by the accused, grant an order directing that the accused be tried before a judge or judge and jury who, in the opinion of the judge, will enable the accused to best give testimony or, if the circumstances warrant, who speak both official languages. Section 530.1 of the *Criminal Code* then lists the specific rights that may be exercised when an order is made under section 530. The opening words of section 530.1, however, do not refer to an order that the accused be tried before a judge or judge and jury who speak both official languages. In fact, the opening words refer solely to the two other types of order contemplated in section 530,

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[26] See the study entitled *The equitable use of English and French before the courts in Canada* (Commissioner of Official Languages, Novembre 1995, Supply and Services Canada 1995, cat. No.: SF/1995f ISBN: 0-772-23039-5) at p. 105.

[27] *Supra* note 12.

[28] See Commentary to Rule 1.03(1): "A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable (a) subsection 19 (1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament, (b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused, (c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and (d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions."

[29] See chapter 3 "Quality of Service", commentary 3 and chapter 4 "Advising clients", commentary 11.

namely an order directing that the judge speak the official language that is the language of the accused or an order that the judge speak the official language in which the accused can best give testimony.[30] The question accordingly arose as to whether section 530.1 of the *Criminal Code* applies when the order made under section 530 provides that the accused be tried before a judge or judge and jury who speak both official languages. The case law prior to *Beaulac* included contradictory decisions.[31] It could have been argued that the Supreme Court of Canada had resolved all ambiguity in this regard since it stated, in *obiter*, in the *Beaulac* decision, that section 530.1 applies to a trial before a judge or judge and jury who speak both official languages.[32] However, these statements seem to have gone unnoticed, at least by certain courts that have stated the contrary.

Indeed, in another decision of the Nova Scotia Court of Appeal, *R. v. Schneider*,[33] the Court concluded, after examining the wording of section 530.1, that this section did not apply when an order directing a bilingual trial is made. The appellants in that case were found guilty of harassment and mischief following a joint trial conducted in both official languages. They lost their appeal to the Summary Conviction Appeal Court. They subsequently applied for leave to appeal to the Court of Appeal on several grounds, including the fact that their language rights had been breached. Relying on paragraphs 530.1(*e*) and 530.1(*g*), they asserted that the prosecutor at the trial did not speak French fluently, that the documents filed in English at the trial had not been translated into French and that the transcript of the trial was incomplete and erroneous. These arguments were all rejected by the Court of Appeal, which expressed an opinion concerning them despite the fact that, in the Court's view, section 530.1 simply did not apply in the case because of the order for a bilingual trial:

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[30] The opening words of section 530.1 read as follows: "Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of the accused or in which the accused can best give testimony…".

[31] *Supra* note 5, at pages 66 to 78.

[32] It stated the following, at paragraph 49: "No argument was made concerning the discretion of the judge to order a trial before a judge and jury who speak both official languages of Canada as opposed to a trial before a judge and jury who speak only the language of the accused. There is therefore no issue to be decided with regard to the type of order that should have been made in the present case. I would only say on this question that the basic right of the accused is met in both cases. Therefore, s. 530.1 applies in both cases. Its provisions provide a useful backdrop against which the trial judge can determine, in his

Section 530.1 opens with:

> Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,
>
> This order is a condition of the particular rights which follow.
>
> The individual subsections of s. 530 specify three types of orders, namely orders which direct a trial either (1) in "the official language of Canada that is the language of the accused" (2) or in "the official language of Canada in which the accused...can best give testimony" or (3) "if the circumstances warrant" before a judge or jury "who speak both official languages of Canada".
>
> The opening words of s. 530.1 clearly apply only to the first and second types of order. Annie and Marguerite Schneider were tried further to the third type of order, for a bilingual trial before a bilingual court, to which s. 530.1 does not apply.[34]

This statement by the Nova Scotia Court of Appeal can appear surprising given its previous decision in *MacKenzie* and the fact that it was undoubtedly quite familiar with the decision in *Beaulac*. Already, in 1998, we wrote that it seemed wrong to us to conclude that section 530.1 does not apply when a bilingual trial order is made. Such a conclusion has absurd results that cannot be ascribed to Parliament and that it cannot have intended. We were of the view that a strictly literal interpretation of the opening words of section 530.1 adopted in a series of decisions prior to *Beaulac* should be reviewed[35]. The recent *Schneider* case illustrates that this issue has not yet been resolved in spite of Justice Bastarache's comments in *Beaulac*.

It is important to note that in the recent decision *R. v. Potvin*,[36] the Ontario Court of Appeal dealt with a similar argument by the Crown. In that case, which we shall consider later, the appellant argued as his main ground of appeal that his right to a unilingual French trial had not been respected and that, far from being conducted in French, his trial

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discretion, whether the circumstances of the case warrant the appointment of a judge, or a judge and jury who speak both official languages of Canada" [emphasis added].

[33] 2004 NSCAF 99 (August 17, 2004).

[34] *Ibid*., at paragraphs 28 to 30.

[35] Note that the Commissioner of Official Languages in his study entitled *The equitable use of English and French before the courts in Canada*, *supra* note 26, recommends that the introduction be amended so that section 530.1 explicitly states that it applies to bilingual trials, thereby avoiding any ambiguity.

was bilingual if not English instead. More specifically, the appellant argued that there was a breach of paragraphs 530.1(*d*), (*e*) and (*g*) of the *Criminal Code*. The respondent maintained initially that it was not necessary for the Court to interpret these provisions, since the circumstances showed that the accused had consented to proceedings that more closely resembled a bilingual trial, despite the initial order for the holding of a unilingual trial. The respondent maintained that accordingly, the instructions in section 530.1, "which only apply to a unilingual trial, were no longer applicable". Second, the respondent contended that "even if s. 530.1 applied in the case at bar", these provisions did not impose any obligation on the judge and Crown prosecutor to speak exclusively in the language that was the official language of the accused. According to the respondent, these provisions permit Crown prosecutor and the judge to use either language, as they choose, provided that they have the ability to speak the language of the accused.

The Ontario Court of Appeal, unlike its Nova Scotia counterpart, did not express itself very clearly or categorically on this particular question. In fact, it merely repeated the arguments raised by the Crown – before rejecting them for other reasons.

(iii) The situation of co-accused speaking different official languages

The second thorny issue relating to bilingual trials is whether, when co-accused do not have the same official language and each asserts his or her right to be tried before a judge who speaks the appropriate official language, these accused must be tried separately or jointly on the basis of the principle that the parties in a common enterprise must be tried jointly.

In other words, does the presence of co-accused one of whom speaks English and the other French constitute a "circumstance" that justifies a trial before a judge or judge and jury who speak both official languages? Most of the decisions prior to *Beaulac* ruled that such a situation was in fact a circumstance that justified the holding of a bilingual trial,

[36] (June 16, 2004) C37983 (C.A.O.). Justice Louise Charron.

thus respecting the principle of joint trials even though some judges in Quebec appear to take a different approach.[37]

In the *Beaulac* decision, this issue did not arise directly. However, in his examination of the meaning of "the best interests of justice" and the discretionary power provided for in subsection 530(4), Bastarache J. included the following factor in his list of factors that the trial judge must consider: "the fact that there may be coaccuseds". He then added, in parenthesis, "which would indicate the need for separate trials".[38] It could accordingly be argued that the question was resolved in this *obiter* of Bastarache J. in *Beaulac*.

The recent case of *R. v. Schneider*, discussed above, seems to confirm the view expressed in most of the decisions prior to *Beaulac*. In that case, the two co-accused, Marguerite and Annie Schneider, a mother and daughter, were jointly charged with criminal harassment and mischief. On their first appearances, Marguerite Schneider opted for a trial in French whereas Annie Schneider opted for one in English. Judge Randall held that a joint trial would be held with interpretation. Subsequently, Annie Schneider requested that the trials be severed. Chief Judge Batiot refused the severance and confirmed that the defendants would be tried at the same time in a bilingual trial. One month later, Annie Schneider appeared before Judge Curran to again request severance of the joint trial and that her trial be held in English and her mother's in French. Judge Curran refused the request and confirmed that there would be a bilingual joint trial. Thus, the trial was conducted in both official languages. Annie accordingly argued in the Nova Scotia Court of Appeal that she was deprived of her right to a trial in English under section 530.

On this specific question, the Court of Appeal rejected this argument and expressed its agreement with the view that the circumstances justified the holding of a bilingual trial.

> In our view Judge Randall, Chief Judge Batiot and Judge Curran acted within their permitted discretion under s. 530(5). The Crown's witnesses spoke only English. Marguerite Schneider speaks only French. So an interpreter would have been necessary in any event for Mrs. Schneider's trial. The Crown's evidence against both defendants

[37] See *R. v. Forsey* (1995), C.C.C. (3d) 354 (Que. S.C.) and *R. v. Bouchard* (September 13, 1995), Montreal 500-01-001861-951 (Que. S.C.)
[38] *Supra* note 1 at paragraph 38.

> and the defences were very similar and, for the most part, identical. The same witnesses would testify. Annie Schneider represented herself and her mother. If there had been two trials, Annie Schneider would twice present a similar defence. There was no need for separate duplicative trials[39].

In support, the Court of Appeal relied on *R. v. McNamara (No. 1),*[40] where the Ontario Court of Appeal stated that appellate courts in various Canadian provinces had also held that accused persons allegedly acting in concert or engaged in a common enterprise should be jointly tried and that the trial judge's discretion in refusing severance would not be disturbed unless the decision had resulted in a miscarriage of justice. It also referred to *R. v. Lapointe*,[41] where the Court indicated that it was clear from the wording of subsections 530(1), (2), (4) and (5) of the *Criminal Code* that Parliament recognized the possibility, if the circumstances warranted, of holding joint trials in which one accused spoke English and the other French.

In conclusion, the Court of Appeal said that it agreed with these principles and agreed that the circumstances in the case justified the holding of a joint bilingual trial rather than two trials, one in French with translation and the other in English. There was no error on the part of either the Provincial Court or the Summary Conviction Appeal Court.

It should be noted, however that, as in any joint trial, this general rule will probably continue to be set aside on occasion, possibly on the basis of *Beaulac* and the "absolute right" to be tried in the official language of one's choice. The province of Quebec seems to prefer such an approach. This is what emerges from the decision in *Giovanni Stante v. The Queen*.**[42]** In that case, the accused Stante, whose first language was English but who spoke French fluently, was charged jointly with the accused Steve Deschatelets. He requested a trial in English while the Crown argued that the Court should order that a bilingual trial be held.

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[39] *Supra* note 31, at paragraph 21.
[40] (1981), 56 C.C.C. (2d) 193.
[41] (1981), 64 C.C.C. (2d) 562 (Ont. Gen. Sess. Peace), at pages 574 and 575.
[42] (October 29, 2001) No. 500-01-005412-009 (Quebec Superior Court), J. Fraser Martin J.

The Court essentially decided to set aside the general rule that co-accused should be tried jointly. It was of the view that this rule could not be used to dilute the absolute right of every accused to be tried in the official language of his or her choice:

> As I have previously held in *R. v. Forsey*, 95 CCC (3) p. 1, the words "if the circumstances warrant" set out in Section 530(4), (and my comment would apply equally to a consideration of the same words in Section 530(1)), while sufficiently wide to encompass jointly indicted accused, were never intended to sanction a watering down or dilution of an accused's rights in order to sanctify the principle that persons engaged in a common enterprise should invariably be jointly tried.
>
> I should add however that, notwithstanding the utility and the attractiveness of the notion of a bilingual trial, it is not and must not be regarded as a panacea for all ills which may arise particularly in cases where jointly indicted accused possess different languages.[43]

The Court added that holding a "bilingual trial" presupposes that the accused have the ability to speak and understand both languages perfectly. It did not go so far as to say that the consent of the accused was required but, from a practical standpoint, it was of the opinion that this was almost the case. It is interesting to note that Martin J. also added that it would be contrary to the spirit and the letter of the *Beaulac* decision to state that because Stante spoke French, the circumstances justified breaching his absolute right to be tried in English.

In sum, it is not clear whether Crown counsel should seek to avoid severing the trials when co-accused who do not have the same official language assert their respective right to be tried before a judge or judge and jury who speak their official language and where these co-accused would otherwise be tried jointly. Should the Court, in those circumstances, order a bilingual trial given that these circumstances justify an order for a trial before a judge or judge and jury who speak both official languages ? In some cases, a joint trial serves the public interest and a bilingual trial respects the language rights of the accused without violating the public interest to any great extent. However, as with any joint trial, this general rule may be set aside if the best interests of justice require that the trial be severed or if it is established that a joint trial would cause injustice to one or

more of the accused (regardless of the application of the language rights provided for in sections 530 and 530.1 of the *Criminal Code).*

(iv) The right to a prosecutor and a judge who speak one's official language

Let us return now to the recent case of *R. v. Potvin* in the Ontario Court of Appeal, the reasons in which were given by the honourable Louise Charron J.A., recently appointed to the Supreme Court of Canada. The main point at issue in that case was to what extent section 530.1 of the *Criminal Code* requires that the official language of the accused be used, to the exclusion of the other, during a "unilingual" trial, that is when the order made under section 530 requires that the accused be tried before a judge or judge and jury who speak the accused's official language, as opposed to both official languages.

Mr. Potvin was charged with several serious offences, including attempted murder, attempted strangling with intent to commit sexual assault and aggravated sexual assault. In accordance with section 530 of the *Criminal Code,* following Mr. Potvin's application to this effect, the court granted an order directing that he be tried before a judge and jury who spoke French. He was convicted on all counts with the exception of attempted murder. An overall sentence of four years and nine months' imprisonment was imposed. Mr. Potvin appealed from his conviction and his sentence. As his main ground of appeal, he argued that his right to a unilingual French trial had been breached and that, consequently, the Court of Appeal must order a new trial in accordance with the directions given by the Supreme Court in *Beaulac*.

In support of his argument that his trial had been bilingual if not English, the appellant relied on the fact that the first five days of testimony had proceeded almost solely in English, and that he had not been provided with a transcript of the simultaneous translation into French. During these five days, eleven witnesses testified for the Crown, including the main witness, the complainant in the case. Furthermore, the judge and Crown counsel used English for very much of the time. According to the appellant, a trial in French in accordance with the provisions of sections 530 and 530.1 of the *Criminal Code* is one in which the judge and Crown counsel speak French at all times and where

[43] *Ibid*. at paragraphs 6 and 10.

the services of an interpreter are merely accessory to the conduct of the proceedings. He argued that his trial was not in accordance with these requirements and that it was instead a bilingual or even an English-language trial where the use of French was completely subsidiary. Finally, he noted that his trial was conducted in this way despite the objections of his counsel.

After rejecting the respondent's first argument, according to which the accused had consented to have a bilingual or English-language trial, the Court considered the respondent's second argument – that if the provisions of section 530.1 were applicable, which the Crown denied, it did not impose a duty on the judge and Crown counsel to speak exclusively in the language that was the official language of the accused. According to the respondent, these provisions permitted Crown counsel and the judge to use either language as they chose provided that they had the ability to speak the language of the accused. The respondent argued that it was accordingly sufficient for Crown counsel, the judge and the jury to be able to understand and weigh, without interpretation, the testimony given or the submissions made in the official language of the accused during the proceedings.

Referring to the *Beaulac* decision and the rule that all language rights must be given a large and liberal interpretation and that they are separate from the principles of fundamental justice, Charron J.A. rejected these arguments:

> 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."

> 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. [44]

The Court of Appeal accordingly agreed that the language rights of the appellant provided for in section 530 and subsection 530.1(*e*) of the *Criminal Code,* which require that the judge and Crown counsel speak the official language of the accused, were breached in this case.

The law is thus clearer with respect to the extent to which the language of the accused must be preferred to the other in the conduct of unilingual trials. The interpretation given by the Court of Appeal seems to us to be in accordance with the spirit and the purpose of sections 530 and 530.1 and the directions of the Supreme Court. We find it quite legitimate to interpret sections 530 and 530.1 as imposing the almost exclusive use of the language of the accused by the prosecutor and the judge in a unilingual trial. This was, moreover, the conclusion reached by the Quebec Court of Appeal in *Cross* and *Montour*,[45] even though this specific issue was not directly raised in those cases. In fact, the decision seems to have been rendered on the basis that section 530.1 requires that the language of the accused be used at all times without exception by the prosecutor in unilingual trials.

It should be noted, however, that Charron J.A. seems to have wished to avoid possible future disputes when she added, later in her judgment, that "A trial will not necessarily be vitiated every time a few words are spoken in an official language other than that of the

[44] *Supr*a note 28, at paragraphs 32 and 33.
[45] *Cross v. Teasdale*, [1998] R.J.Q. 2587 (C.A.); *Québec (P.G.) v. Montour,* Que. C.A., Montreal, 500-10-000187-912, September 2, 1998. The application for leave to appeal to the Supreme Court of Canada was granted but the Attorney General of Quebec discontinued the appeal.

accused. However, a unilingual trial ordered under s. 530 must be essentially consistent with the provisions of s. 530.1."[46]

We should note, finally, that Charron J also found without hesitation that there had been a breach of subsection 530.1(*g*) of the *Criminal Code*. According to this paragraph, the record of the preliminary inquiry and the trial must include everything that was said in the original official language and a transcript of any interpretation, "and any documentary evidence that was tendered during those proceedings in the official language in which it was tendered". The appellant alleged that there had also been a breach of subsection 530.1(*g*) because no transcript of the interpretation had been included in the record during the first five days of testimony. According to Charron J.A., the violation of subsection 530.1(*g*) was "clear".

(v) Disclosure of evidence before trial

Since the 1994 decision in *Rodrigue,* the legal principles governing the question of evidence disclosed before trial seem to be relatively well established: paragraph 530.1(*g*) of the *Criminal Code* does not impose any duty on the Crown on the basis of language rights to disclose evidence in the official language of the accused.[47]

In this regard, the applicable principles are those that also apply to all criminal trials. To the extent that an accused might be entitled to obtain a translation of the evidence disclosed at the Crown's expense, this right would exist not on the basis of the language rights in the *Criminal Code,* but rather under the principles of fundamental justice that guarantee the right of every accused to make full answer and defence and to a fair and impartial trial.[48]

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[46] *Supra* note 28, at paragraph 37.

[47] *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455 (Y.S.C.), appeal dismissed on other grounds (1995), 95 C.C.C. (3d) 129 (Y.C.A.), leave to appeal refused (September 7, 1995), N° 24585 (S.C.C.); *R. v. Breton* (July 9, 1995), Whitehorse TC-94-10538 (Y.T.C.), notice of appeal filed on June 6, 1995 in the Yukon Supreme Court; *R. v. Mills* (1994), 124 N.S.R. (2d) 317 (N.S.S.C.) and *R. v. Simard* (1995), 27 O.R. (3d) 97 (Ont. C.A.), application for leave to appeal dismissed on September 12, 1996 (S.C.C.).

[48] *Ibid.*at p. 479: "It is possible that in other circumstances, an accused might persuade a court that the accused would find it so difficult to prepare a case without a translation paid for out of his own resources that it would be ineffective to such an extent that the accused would not be able to make full answer and defence at his trial".

Has the decision in *Beaulac* changed the situation with respect to this issue? Does a large and liberal interpretation of the language provisions of the *Criminal Code* allow us to conclude that the Crown has a duty to disclose evidence before trial in the official language of the accused? It would seem not. In fact, since the decision in *Beaulac* the courts have tended to confirm the principles laid down in *Rodrigue*.

The Court of Quebec was the first to do so, shortly after *Beaulac*, in *R. v. Cameron*.[49] The accused in that case asked his counsel after 11 days of trial to withdraw from the case and the Court granted an adjournment in order to give the accused time to find another counsel. The accused then retained unilingual Anglophone counsel. He began by bringing a motion for the proceedings to be set aside on the ground that his right to a trial in English had been breached; this was not granted. He then requested that his trial continue in English, which the Court granted, and brought a motion requesting translation into English of several documents, arguing that *Beaulac* had overturned the earlier case law on this issue. The Court did not agree:

> The Defense submits that these decisions don't apply any longer since the Supreme Court of Canada in *R. v. Beaulac* gave new and liberal interpretation of language rights under s. 530.1. I agree that the *Beaulac* decision obliges this Court to liberally interpret sections 530 and 530.1, and this is what I did when I decided to continue the trial in English and to render my oral decisions in that language, even if the text of section 530.1 is not clear on that point. Yet it does not give this Court the power to rewrite section 530.1. It is clear in section 530.1 that there is no obligation to translate documentary evidence, disclosure or transcripts of proceedings. That does not mean that the Court cannot order such translation, if it is needed to ensure a fair trial and a full defense and answer.[50]

The case law since *Beaulac* therefore confirms that *Rodrigue* still represents the current state of the law on this issue. It also confirms that there may very well be circumstances that justify the translation of certain evidence without this being a requirement of the law

[49] [1999] Q.J. No. 6204 (October 14, 1999), Quebec Court (Penal and Criminal Division). Judge Jean Sirois.

[50] *Ibid*. at paragraph 15. See also, to the same effect, the decision in *R. v. Rose* - Quebec Superior Court, a decision rendered from the Bench (January 23, 2002), at paragraph. 27: "I had already alluded to the fact that there is, in my respectful view, no constitutional right to a translation into English language, and I adopt the reasoning in *Rodrigue*, 91 CCC (3rd) 445".

under section 530.1. In two more recent decisions, also from Quebec, the Court ordered that certain documents be translated to enable the accused to make full answer and defence. In *R. v. Smuk*,[51] Bonin J. granted in part the motion of the accused requesting that the evidence be translated and required the Crown to translate a document on the basis of the right to a fair and equitable trial. The document in question was an affidavit – which had essentially been used on many occasions to obtain search warrants that made it possible to seize documents and eventually to charge the accused. The Court expressed the view that, in the circumstances, the affidavit was of the utmost importance to the accused. It contained most of the Crown's allegations against the accused, and this eventually led to his being charged. The judge stated that, on the basis of the right to a fair and impartial trial, it was important for the accused to have this document translated.

Similar reasoning was applied by the Quebec Superior Court in *R. v. Stadnick*,[52] a mega-trial arising from the "Opération Printemps", the goal of which was to stop members of the Hell's Angels. The accused Stadnick and Stockford, represented by an Anglophone lawyer, had first succeeded in obtaining a separate trial in English. They subsequently brought a motion requesting that the evidence be translated into English. Réjean Paul J. granted the request in part and ordered that a summary of the extensive evidence be translated into English with respect to each of the charges laid against them. The judge relied on the right of the accused to make full answer and defence – and not on the language provisions of the *Criminal Code*. In fact, the judge repeated that these provisions did not impose any duty in this regard.

> I cannot stress enough that there is no correlative obligation in the Criminal Code under s. 530.1 for the Crown to provide a systematic translation of all the documents and evidence that is disclosed. This is clearly established in the common law.
>
> On the other hand, it is not my duty to rewrite the law, specifically, section 530.1 of the Criminal Code by adding a provision which Parliament did not choose to include. I am further convinced of that conclusion by the fact that, nearly 6 years after the submissions of the Commissioner's of Official Languages (November 1995) Report on

[51] (April 3, 2000). No. 73-000946-992.
[52] Quebec Superior Court, October 24, 2001, [2001] Q.J. No. 5226. Application for leave to appeal refused, [2002] S.C.C.A. No. 413.

> "The equitable use of English and French before the Courts in Canada", Parliament did not follow his recommendations.[53]

In short, as decided in *Rodrigue*, which is still the leading case on this issue, circumstances may arise in which the principles of fundamental justice require that some of the evidence be translated. In this connection, the recent decisions referred to above definitively set precedents. In any event, only a case-by-case analysis is capable of determining whether translation is necessary or not in light of the specific circumstances of each case.

(vii) Proceedings incidental to the trial

Sections 530 and 530.1 of the *Criminal Code* provide that the language rights protected by these provisions apply at the preliminary inquiry and the trial.[54] A criminal trial clearly consists of several other stages, separate from the preliminary inquiry and the trial, during which the rights of the accused may be affected but which are not subject to the language provisions of sections 530 and 530.1 of the *Criminal Code*. Obviously, the constitutional and legislative provisions of some of the provinces and territories permit the use of English and French in courts of criminal jurisdiction in all or some proceedings.

This said, since sections 530 and 530.1 of the *Criminal Code* apply in principle only to the preliminary inquiry and the trial, it was legitimate to assume that following *Beaulac*, attempts would be made to extend the scope of sections 530 and 530.1 to include other proceedings incidental to the preliminary inquiry and the trial. A similar argument was successfully raised in the Nova Scotia Supreme Court in *R. v. Schneider*.[55]

Annie Schneider was found guilty of assault and disturbing the peace following a trial conducted in French in the Nova Scotia Provincial Court. The judge imposed a fine of $500 on her. She made several arguments on appeal, including the allegation that her language rights had been breached. She argued, *inter alia*, that she had not had an

[53] *Ibid*. at paragraphs 16 and 17.
[54] This is also the case with respect to para. 530.1(*e*), although it does not refer to the preliminary inquiry. See *Edwards v. Lagacé*, [1998] R.J.Q. 1471 (S.C.).
[55] 2003 NSSC 209 (February 24, 2003). The Honourable Arthur J. Leblanc J.

opportunity to request an adjournment in French before a judge who understood French. The specific question the Court had to answer was accordingly whether Annie Schneider's right to be tried in French also included the right to address the court in French on a preliminary motion such as a request for adjournment.

Following a brief review of a number of decisions that considered the meaning of the word "trial" and the point at which a "trial" commences, the judge noted that a number of conclusions had been reached on this point. He referred to the decision of the Supreme Court in *R. v. Barrow*,[56] in which the Court stated that the meaning of "trial" varied according to the provision of the *Criminal Code* in question, because its sections protected different interests.

Subsequently, the judge noted that it was necessary to consider the wording of section 16 of the *Charter* and section 530 of the *Criminal Code* to determine when the "trial" commenced for the purposes of section 530. The judge then quoted extensive passages from *Beaulac* in the belief that section 530 of the *Criminal Code* as well as section 16 of the *Charter* were the basis for the right of every accused to be tried in the official language of his or her choice.[57]

In reply to the Crown's argument that section 16 of the *Charter* and section 530 of the *Criminal Code* must be interpreted restrictively because other provisions of the *Criminal Code* specifically include pre-trial proceedings in the definition of "trial", Leblanc J. stated that he did not accept this argument because of the rule of interpretation set out in *Beaulac* to the effect that language rights must be given a large and liberal interpretation in all cases.

Leblanc J. accordingly concluded that:

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[56] [1987] 2 S.C.R. 694.

[57] This portion of the decision seems debatable. In our view, the case law rather suggest that: 1) section 530 of the *Criminal Code* is an illustration of the principle of legislative progression of language rights found at paragraph 16(3) of the *Charter*; 2) it is section 530 of the *Criminal Code* that grants all accused with a right to be tried in the official language of hir or her choice; 3) the principle of substantive equality, recognized by paragraph 16(1) of the *Charter*, applies to all language rights, including section 530 of the *Criminal Code* but is not the source of a constitutional obligation to adopt such legislative provisions.

> Given the expansive approach to the right to be tried in French provided by section 530, and the interest being protected by the section as it was interpreted in *Beaulac*, it seems necessary that the "trial" for the purpose of that section must encompass such essential pre-trial motions as an application for an adjournment
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> …
>
> Once Ms. Schneider elected to be tried in French, it was incumbent on the Provincial Court to arrange for her to appear in person or through an on-the-record telephone contact with the trial judge prior to the actual trial date. To state that an accused has a right to be tried in French without giving the accused the opportunity to make pre-trial applications in French would infringe the fundamental rights of the accused.[58]

To the best of our knowledge, this is the only decision that has found that sections 530 and 530.1 of the *Criminal Code* apply to proceedings other than the trial and the preliminary inquiry[59]. It could obviously have very substantial consequences not only in Nova Scotia but also in other jurisdictions if the same argument is successfully made in other cases[60].

(viii) New obligations for counsel

We saw at the beginning of this article that subsection 530(3) of the *Criminal Code* is imperative – and that any accused who is not represented by counsel who first appears before a judge or judge and jury has the right to be informed of his or her language rights.

What will be done when the judge does not give the notice required by the *Criminal Code*? Do Crown counsel then have a responsibility in this regard? Two recent cases

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[58] *Supra* note 45, at paragraphs 34 and 46.

[59] See however the decision of Justice of the Peace L. Sclisizzi, Ontario Court of Justice, August 7, 2002, in *R. v. Larocque*, in which the judge seems to indicate that an accused, with the Crown's consent, is entitled to a bail hearing in the official language of his choice, even outside the prescribed regions under the *Courts of Justices Act*.

[60] Since the November 12 to 14, 2004 conference, the decision of the Nova Scotia Court of Appeal (Justices Roscoe, Oland and Fichaud) in this matter was released. Both the Cronw and Ms. Schneider had appealed the decision of Justice Leblanc. See *R. v. Schneider*, 2004 NSCA 151. The Crown's appeal was allowed on the basis that there was no breach of Ms. Schneider's language rights pursuant to either s. 16 of the *Charter* of s. 530 of the *Criminal Code*. Ms. Schneider's appeal was allowed on the ground that the trial judge did not exercice his discretion to dismiss the adjournment application judicially. A new trial was ordered.

appear to suggest that this is so. First of all, in *MacKenzie*, the Nova Scotia Court of Appeal, after confirming the imperative nature of subsection 530(3), commented as follows:

> On her first appearance, at the time of the required notice under s. 530(3), it was unnecessary that Ms. MacKenzie identify herself as French-speaking, or state her preference for French. If she was unrepresented, she was entitled to notice regardless of her actual or apparent proficiency in either French or English. If the Provincial Court judge neglects the notice then, if the Crown wishes to avoid the trial process inefficiency which has occurred here (two appeals, and a stay or new trial), Crown counsel should consider reminding the Provincial Court judge of s. 530(3).[61]

Camille Vautour J. also spoke to the same effect in *Charlebois v. Ville de St-Jean*:[62]

> It is not the responsibility of the judge alone to inform the defendant of these language rights. Counsel for the prosecution, who represented the prosecution on this appearance, had a duty to inform the judge of these provisions so that he can perform his duties as protector of the Constitution.[63]

Since subsection 530(3) of the *Criminal Code* is not always complied with, we do not consider that it would be too onerous to make Crown counsel responsible for ensuring that the accused is in fact aware of his or her language rights. It is also possible to consider imposing a duty on the Court to inform all accused from the Bench of their language rights, whether they are represented by counsel or not. However, if the judges before whom unrepresented accused appear do not systematically inform them of their language rights – then we cannot expect any better results from expanding the scope of the obligation imposed on judges under section 530. In order to be truly effective, such a

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[61] *Supra* note 12, at paragraph 15. Emphasis added.

[62] *Ville de Saint-Jean v. Charlebois et 042504 NB INC* (February 25, 2004), Saint John, No. 04939902 (N.B. Prov. Ct.), a decision of Judge Vautour delivered from the Bench. Section 530 of the *Criminal Code* was not in issue in this case. It was rather paragraph 19(2) of the *Charter* and, more specifically, paragraph 20(2) of the *Official Languages Act* of New Brunwick which indicates that a person who is alleged to have committed an offence under an Act or a regulation of the Province or under a municipal by-law (this was the case for Mr. Charlebois) has the right to have the proceedings conducted in the language of his or her choice "and shall be informed of that right by the presiding judge before entering a plea". When Mr. Charlebois first appeared before the Provincial Court, the judge required him to speak to him in English. In his decision, Justice Camille Vautour ordered a stay of proceedings.

[63] *Ibid*. at p. 15.

measure should accordingly be accompanied by a range of measures designed generally to publicize the language rights of accused persons in criminal proceedings.

(ix) Right of accused to an information that is completely in his or her language

As was indicated earlier, subsection 849(3) of the *Criminal Code* provides that the forms provided for in Part XXVIII, such as warrants and summonses shall be printed in both official languages. Informations and indictments must meet this requirement. The obligation created by subsection 849(3), however, applies solely to the pre-printed part of the forms. The hand-written parts, which are filled in by hand by the informants or persons laying charges, are completed in English or in French at the choice of the informant. It is possible therefore for an accused to receive an information or an indictment in which the hand-written part has been completed in the official language that is not that of the accused person. Although Parliament expressly indicated in section 530.1 a number of consequences flowing from an order directing that an accused be tried before a court that speaks his or her official language, it was silent on the question of the hand-written parts of indictments and informations. Contradictory decisions have accordingly been rendered as some courts have wanted to "fill the void" left by Parliament.[64]

With the 1995 decision in *R. v. Simard*,[65] however, the law seemed to be clear since the Court had put an end to discussion of this issue. According to that decision, an interpretation that is consistent with achievement of the remedial purpose of section 530 of the *Criminal Code* must be sufficiently broad for a fair trial to commence on the basis of pleadings that are translated into the official language of the accused. The Ontario Court of Appeal has ruled that an accused is responsible for deciding whether he or she requires this translation in order to make full answer and defence and a judge who

[64] See especially *Belleus v. R.*, May 13, 1991, in Télé-Clef 3, p. 43 (Ont. Gen. Div.) and *R. v. Boutin*, [1992] O.J. No. 3733 (Ont. Prov. Div.), on line: QL (OJ).
[65] *R. v. Simard* (1995), 27 O.R. (3d) 97 (Ont. C.A.), application for leave to appeal to the S.C.C. denied [1996] C.S.C.R. No 86 (QL).

receives such a request must exercise his or her power to require that a written translation of the information be prepared and, where necessary, to grant an adjournment.[66]

In a recent case entitled *R. v. Warsama et al.,* a new issue arose concerning informations: in the context of a trial to be conducted in the official language of the accused, is a simple translation of the information written in the other official language sufficient or must the information necessarily be written in the language chosen by the accused? In that case, the informations had been prepared on the standard bilingual forms and the officer responsible for the swearing the informations wrote the hand-written parts in English. All the accused indicated afterwards that they wished to have a bilingual trial and the Crown gave each of them translations of the parts of the informations in question in accordance with the principle laid down in *Simard*. According to the defence, *Beaulac* had reversed the *ratio decidendi* in *Simard* and the accused were entitled to obtain the informations in French – and not mere translations.

In a decision dated June 25, 2001, the Ontario Court of Justice[67] accepted this argument. Referring to *Beaulac* and the principle of real equality and the fact that an information is a document that marks the commencement of a charge, informs the accused of the complaints laid against him and sets the limits of the trial, the judge ruled that it was reasonable for an accused who requests a trial in French in a timely manner to have the right to receive the information in French. A translation, according to the judge, [TRANSLATION] "would be at best an accommodation and a confirmation of the inequality of the right to a trial in French". "As a result of my analysis of the scope of the judgment in *Beaulac*", the judge continued, "I find that s. 530 requires that the information be in the language chosen by the accused". The judge declared the informations involving Mr. Boutin and the others to be of no force or effect.

Khawly J.'s decision was appealed by the Attorney General of Ontario. Daudlin J. of the Superior Court allowed the appeal and reversed the judgment of Khawly J.[68] He

[66] Some parts of this judgment seem questionable to us: *supra* note 5, at p. 56.
[67] *R. v. Warsama*; *R. v. Samatar*; *R. v. Jean-Marie Kayishema*, and *R. v. Daniel Joseph Boutin* (June 25, 2001), (Ont. C.J.) Khawly J. (interlocutory judgment).
[68] (June 7, 2002), Cases No. 395 SCA, 396 SCA, 397 SCA and 398 SCA, [2002] O.J. No. 2245 (Ont. Sup. Ct.) (QL). Daudlin J.

expressed the opinion that [TRANSLATION] "the action of the person laying the information is outside the infrastructure referred to in *Beaulac*", that the *Simard* decision was not overturned by *Beaulac"* and that it "continues to be valid caselaw that this court and the lower courts must therefore continue to respect". He accordingly ordered that the accused be tried. The decision of Daudlin J. had been appealed before the Ontario Court of Appeal. However, the case has since been striken for the hearing list. This means that the principles set out in the *Simard* decision do indeed still apply: although indictments and informations need not be translated pursuant to s. 530.1, in the context of a section 530 order, sections 11(a) and 14 of the *Charter* give the accused the right to obtain a written translation of the aforesaid documents.

(x) Forms

A second question arises with respect to the forms referred to in the *Criminal Code*, resulting this time from the exact wording of its subsection 849(3). The French version provides that "Sont imprimés dans les deux langues officielles les textes des formules prévues à la présente partie". The English version of this provision seems broader and states: "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." What documents other than those expressly referred to in Part XVIII can be classified as "documents to the like effect, varied to suit the case"?

We consider it legitimate to ask this question, following our reading of the *Mallais* décision, a recent case from New Brunswick.[69] The accused in that case was charged with possession of drugs for the purpose of trafficking. He obtained an order directing that he be tried in French. Before the trial commenced, the agent of the Crown prosecutor served notice on the accused of the Crown's intention to call expert testimony in accordance with subsection 657.3(3) of the *Criminal Code*.[70] The notice in question was in English

[69] *R. v. Pierre Mallais*, June 17, 2004, New Brunswick Provincial Court, unreported decision from the Bench.

[70] This provision reads as follows: "657.3 (1) In any proceedings, the evidence of a person as an expert may be given by means of a report accompanied by the affidavit or solemn declaration of the person, setting out, in particular, the qualifications of the person as an expert if (*a*) the court recognizes that person as an expert; and (*b*) the party intending to produce the report in evidence has, before the proceeding, given to the

(although the attachment to the notice, a summary of the expert testimony, was in French). The accused then brought a motion alleging a violation by the Crown of his language rights and requesting either a stay of proceedings or exclusion of the expert testimony. In his factum, the accused relied more specifically on paragraph 530.1(*e*) of the *Criminal Code*, according to which an accused is entitled to have the prosecutor – other than a private prosecutor – speak the same official language as the accused. He also relied on subsection 20(1) of the *Charter*. In his decision from the Bench, the judge granted the motion and agreed that the prosecutor in the case violated the language rights of the accused.[71] He decided, by way of remedy, to exclude the evidence.

Subsection 849(3) of the *Criminal Code* was not accordingly relied upon by the accused or referred to by the judge when it would have been quite possible to ask whether the notice in question, required under section 657.3(1) was a "form to the like effect, varied to suit the case". In fact, although the notice in question is not expressly listed among the forms in Part XVIII, it actually resembles several of these forms, since it is also official in nature. In any event, in the specific context of this case, it is clear that the notice in question should have been sent to the accused in French under subsection 20(1) of the *Charter* and paragraph 530.1(*e*) of the *Criminal Code*.

IV. CONCLUSION

What conclusions can be drawn from the decisions since *Beaulac*? In my opinion, this overview allows us to draw the following conclusions.

- The decision in *Beaulac* made a definite impact in the criminal law context and many, if not all, courts of criminal jurisdiction in Canada are familiar with the decision ; the vast majority of judges now adopt a large and liberal interpretation of sections 530 and 530.1 of the *Criminal Code*;
- The principles laid down by the Supreme Court in *Beaulac* are relatively well understood and applied by the lower courts;

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other party a copy of the affidavit or solemn declaration and the report and reasonable notice of the intention to produce it in evidence. (Emphasis added.)

[71] The judge does not specifically mention the provisions he believes have been violated in the case – he refers solely "to the provisions of section 530 of the Code".

- The distinction between language rights, on the one hand, and the principles of fundamental justice, on the other, is better understood;
- The *Beaulac* decision had not prevented some counsel from presenting arguments to justify a restrictive interpretation of sections 530 and 530.1 of the *Criminal Code*;
- Subsection 530(3) of the *Criminal Code* is imperative. The judge before whom an accused first appears must inform the accused of his or her language rights. The judge has no discretion in this regard. It would seem that Crown counsel also have a responsibility in this respect in the event that the judges forget. It is not clear what the consequences of a breach of subsection 530(3) of the *Criminal Code* are for the validity of subsequent proceedings if such proceedings have taken place and the violation is raised late;
- The issue of the application, or not, of subsection 530.1 of the *Criminal Code* when a bilingual trial is odered has not been resolved;
- It is impossible without considering the specific circumstances of each case to determine whether in the case of co-accused, each of whom asserts the right to be tried in the official language of his or her choice, the circumstances justify a "bilingual" trial;
- An order directing a "unilingual" trial suggests that the judge and Crown counsel will actually use this language most of the time;
- *Beaulac* did not change the law with respect to disclosure of the evidence. The principles laid down in *Rodrigue* still apply;
- In Nova Scotia, the right to be tried in the official language of one's choice under section 530 of the *Criminal Code* includes the right to have proceedings incidental to the trial conducted in that language also[72];
- *Beaulac* has not yet changed the law with respect to the issue of the language of informations. The principles set out in the *Simard* decision still apply today;
- It is not clear what forms of a like nature other than those listed in Part XVII of the *Criminal Code* might be subject to subsection 869(3).

[72] See however note 60 which deals with the recent decision of the Nova Scotia Court of Appeal on this matter.

One final conclusion seems to us to be beyond dispute: there will undoubtedly be no more "about-faces" by the Supreme Court in the field of interpretation of language rights in the judicial sphere like that which we witnessed in 1986. What seemed "perpetual wrangling" by the courts in the interpretation of these language provisions when I was writing my thesis in 1998, ended up being no more that an ephemeral era of judicial torment in the long journey of the progression of language rights in Canada.