The perpetual wrangling of the courts in the interpretation of language rights

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Sommaire

L'article a pour objet de faire un survol des principaux arrêts rendus par la Cour suprême du Canada dans le domaine des droits linguistiques de 1975 à 2000 en accordant une importance particulière aux principes d'interprétation dégagés par la Cour relativement à ces droits. L'auteure examine ensuite également comment les tribunaux canadiens ont appliqué les principes développés par la Cour suprême dans leur interprétation des articles 530 et 530.1 du *Code criminel*. En ce faisant, l'auteure fait ressortir l'importance capitale de l'arrêt *Beaulac*, rendue par la Cour suprême du Canada en mai 1999, non seulement au niveau de l'interprétation des art. 530 et 530.1 mais également au niveau de l'interprétation des droits linguistiques de façon générale.

Abstract

The purpose of this article is to present an overview of the decisions by the Supreme Court of Canada concerning language rights between 1975 and 2000. Special attention is given to the principles of interpretation that were drawn from these decisions. The author then examines how the lower Canadian courts applied the principles laid out by the Supreme Court in their interpretation of ss. 530 and 530.1 of the Criminal Code. In so doing, the author brings out the capital importance of *Beaulac*, rendered by the Supreme Court of Canada in May 2000, not only with respect to ss. 530 and 530.1 of the *Criminal Code* but also with respect to the interpretation of language rights generally.

INTRODUCTION[*]

Canada's last 25 years have been marked by a number of important judgments dealing with language rights. Since 1975, the Supreme Court of Canada has rendered over 20 decisions in which it clarified the content and scope of various language provisions. *Inter alia*, it has ruled on the scope of s. 133 of the *Constitution Act, 1867*[1], s. 23 of the *Manitoba Act, 1970*[2] and s. 110 of the *Northwest Territories Act*[3]. Sections 16, 19(2) and 23 of the *Canadian Charter of Rights and Freedoms*[4] have also been the subject of judicial clarifications by the highest court of the land. More recently, in *R. v. Beaulac*[5], the Supreme Court was for the first time called upon to interpret the language rights provided under s. 530 of the *Criminal Code*[6].

Prior to *Beaulac*, the case law developed by the Supreme Court of Canada on language matters reveals the existence of two diverging interpretive tendencies, as well as two markedly different visions of the role of the courts in interpreting language rights. On the one hand, in terms of legislative bilingualism, language rights have been interpreted in a generous, evolving manner. The Court has taken the same approach with respect to the interpretation of educational rights. On the other hand, in terms of judicial rights, the decisions rendered by the Supreme Court of Canada are based on a much more restrictive approach. The Court refers to language rights as rights based on a "political compromise"[7] designed to ensure a minimal level of protection and, since these rights are fundamentally different from the principles of natural justice, the Court decided that it was not open to the courts "under the guise of interpretation to improve

[*] In this text, the masculine is used to apply to both sexes.
[1] (U.K.), 30 & 31 Vict., c. 3.
[2] 33 Victoria, c. 3 (Canada).
[3] R.S.C. 1886, c. 50.
[4] Part I of the *Constitution Act, 1982*, comprising Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *the Charter*].
[5] [1999], 1 S.C.R. 768 [hereinafter *Beaulac*].
[6] R.S.C. 1985, c. C-46.
[7] *MacDonald v. City of Montréal*, [1986] 1 S.C.R. 460 at p. 501 [hereinafter *Macdonald*]; *Société des Acadiens v. Association of Parents,* [1986] 1 S.C.R. 549 at p. 578 [hereinafter *Société des Acadiens*].

upon, supplement or amend this historical constitutional compromise"[8]. In *Beaulac*, the Supreme Court of Canada rejected this restrictive approach altogether, ruling that the existence of a political compromise has no impact on the scope of language rights, and that language rights must "in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"[9].

In judicial matters, the restrictive interpretation of language rights has shown that the fundamental right to use the official language of one's choice before the courts referred to in s. 133 or equivalent provisions, does not include any other rights necessary in order for a trial to be held in one's language, or any corollary obligations on the State to allow such a right to be effectively exercised. In order to remedy this situation, the Parliament of Canada has passed a number of legislative measures, including ss. 530 and 530.1 of the *Criminal Code*[10]. Sections 530 and 530.1 extend well beyond the constitutional guarantees in terms of the use of English and French before the courts. In this respect, they embody the principle enshrined in s. 16(3) of the *Charter*: the advancement of the legislative status of language rights.

Prior to *Beaulac*, the existence of the two diverging philosophies on the interpretation of language rights made it difficult to foresee the outcome of the litigation that soon arose concerning the new language provisions. Which current of case law would the lower courts choose? Would they elect for a restrictive interpretation, or would they espouse a broad, liberal interpretation? The thesis of this paper is that, clearly, the vacillation of the Supreme Court of Canada over the interpretation of language rights, which finally ended with *Beaulac*, trickled down to the lower courts in their interpretation of ss. 530 and 530.1. Wavering between a broad, liberal, and literal, narrow approach, the courts were obviously divided on the precise sense to be given to

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[8] *MacDonald, supra* note 7 at p. 496.
[9] *Supra* note 5 at p. 791. Emphasis added.
[10] Formerly ss. 462.1 *et seq*. Note that Parliament has also passed the new *Official Languages Act*, R.S.C. 1985, c. 31, Part III of which deals with the administration of justice before the federal courts. A number of provinces and territories also jumped on the bandwagon by enacting a number of legislative provisions concerning the use of French and English before courts of criminal jurisdiction. For practical reasons, my study will be limited to the principle of legislative advancement at the

those provisions, which resulted in inconsistent and sometimes even contradictory case law. The case law relating to ss. 530 and 530.1 also shows that a number of principles expressed by the Supreme Court of Canada in *MacDonald* and *Société des Acadiens*, in particular, the basic distinction established by the Court between language rights and the principles of natural justice, as well as the principle to the effect that the two types of rights must not be confused, or invoked in support of each other, have given rise to considerable confusion.

Before summarizing the leading decisions of the Supreme Court of Canada on language rights and using those decisions to examine how the Canadian courts have applied the principles developed by the Supreme Court in their interpretation of ss. 530 and 530.1, we should examine the authority of the federal Parliament to enact such provisions. Part I of this study is accordingly devoted to an analysis of the legislative authority of the federal government and the provinces on the issue of language in criminal proceedings. Part II presents a survey of the leading decisions rendered by the Supreme Court of Canada on language rights, focusing in particular on the principles of interpretation developed by the Court concerning those rights. Part III, entitled "Advancement of Language Rights before the Courts", offers an overview of the contents of ss. 530 and 530.1. Part IV deals with the courts' interpretation of ss. 530 and 530.1 prior to *Beaulac* and the interpretation problems raised by the aforesaid provisions. Finally, Part V of the study deals exclusively with the decision in *Beaulac* and describes its highlights.

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federal level in criminal matters. Thus, the provisions of the *Official Languages Act*, the provincial legislation and the rules applicable to courts of civil jurisdiction will not be considered.

PART I

LEGISLATIVE JURISDICTION REGARDING THE LANGUAGE OF CRIMINAL PROCEEDINGS

1. Ancillary Power

With the exception of s. 133, the *Constitution Act, 1867* does not explicitly deal with language. Sections 91 and 92, which enumerate the powers of the federal Parliament and of the provincial legislatures, do not give either level of government exclusive jurisdiction over this matter. The Supreme Court of Canada has established that the power to pass language legislation is a secondary, "ancillary" power to those expressly vested in each of the two levels of government. Each one may therefore pass language legislation as long as it is related to one of their respective areas of jurisdiction[11]. The Supreme Court adopted the opinion of Professor Hogg on the question, i.e., that

> ...language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.[12]

2. Distribution of Powers with Respect to Language in Criminal Proceedings

The distribution of powers with respect to language in criminal proceedings was

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[11] See to this effect *Jones* v. *A.G. of New Brunswick*, [1975] 2 S.C.R. 182 [hereinafter *Jones*]. See also M. Bastarache, "Le bilinguisme dans le domaine judiciaire" in M. Bastarache, dir., *Les droits linguistiques au Canada*, Montreal, Éditions Yvon Blais, 1986, 125 at p. 127; A. Tremblay and M. Bastarache, "Les droits linguistiques" in G.A. Beaudoin and E. Ratushny, *Charte canadienne des droits et libertés*, Montreal, Wilson et Lafleur, 1989, 723 at pp. 723-725; B. Pelletier, "Les pouvoirs de légiférer en matière de langue après la Loi constitutionnelle de 1982" (1984), 25 C. de D. 227 at pp. 243-248.

[12] *Devine v. Quebec (A.G.),* [1988] 2 S.C.R. 790 at p. 807.

analysed by the Supreme Court of Canada in 1975 in *Jones*. In that case, the Court uphold the validity of ss. 11(1), (3) and (4) of the *Official Languages Act*[13] concerning the use of English and French in proceedings before judicial or quasi-judicial bodies established under federal authority, and in criminal proceedings before any court exercising criminal jurisdiction. The Court based the jurisdiction of the federal government on its residual power, but also on s. 101 of the *Constitution Act, 1867*, which vested in the federal government power to establish federal courts, as well as on s. 91(27), which gave the federal government jurisdiction in relation to criminal law, including criminal procedure. The jurisdiction of the federal government to regulate criminal procedure thus allows the federal government to make language provisions in criminal matters. Laskin C.J. makes this abundantly clear:

> It was the submission of counsel for the Attorney General of Canada, which I accept, that the language in which criminal proceedings are conducted, whether documents are involved or oral conduct only or both, may be brought within the legislative authority conferred by s. 91(27) of the *British North America Act*; and so far as s. 91(27) is alone the source of authority for the specification of language in which the criminal law is to be written or in which criminal proceedings thereunder are to be conducted, Parliament's authority is paramount[14].

On the issue of provincial jurisdiction over language in criminal matters, the Supreme Court in the same decision upheld the validity of s. 14 of the *Official Languages of New Brunswick Act*[15], which dealt with the use of English and French before the courts of criminal jurisdiction of that province. The Court based provincial jurisdiction on s. 92(14), which granted the provinces jurisdiction over the administration of justice, including the constitution, maintenance and organization of courts of criminal jurisdiction. Therefore, the provinces may also regulate the use of languages in criminal proceedings. In case of conflict between provincial and federal legislation, the federal laws shall prevail. This is an application of the "doctrine of

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[13] R.S.C. 1970, c. O-2.
[14] *Jones, supra* note 11 at p. 191-192.
[15] S.N.B. 1969, c. 14.

concurrency of legislative authority subject to the supremacy of federal legislation in case of conflict"[16].

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[16] *Jones, supra* note 11 at p. 198. See also G. Levasseur, *Le statut juridique du français en Ontario,* Ottawa, Les Presses de l'Université d'Ottawa, 1993, at p. 59.

PART II

VACILLATION OF THE SUPREME COURT OF CANADA OVER THE INTERPRETATION OF LANGUAGE RIGHTS

Part II is devoted to an overview of the leading decisions of the Supreme Court of Canada concerning constitutional language rights in order to explain its frequent vacillation on the subject prior to *Beaulac* in 1999.

A. Broad, Liberal Interpretation: from 1975-1986

Apart from a decision on the right to education in the language of the minority guaranteed in s. 23 of the *Charter*, the decisions rendered during this period deal with s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870*. As we will see, the broad, liberal interpretation of language rights prevailed in these decisions.

(a) *Jones*

The Supreme Court initiated its analysis of s. 133[17] in *Jones*. As was noted *supra*, the appellant in the case challenged, *inter alia*, the validity of Canada's first *Official Languages Act*. He argued essentially that s. 133 overstepped federal jurisdiction in language matters and that a constitutional amendment was necessary to support any legislation that, like the *Official Languages Act,* exceeded this provision. In expressing the unanimous opinion of the Court, Laskin C.J. explicitly rejected the argument. He held that there was no warrant for reading s. 133 as being "a final and legislatively unalterable determination of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public

[17] Section 133 reads as follows: "Either the English or the French Language may be used by any Persons in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages."

communications"[18]. Again according to the Chief Justice, s. 133, which grants minimal linguistic protection, may be supplemented by federal and provincial laws. He expressed this idea in the following terms:

> Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there is nothing in it or in any other parts of the *British North America Act* (reserving for later consideration s. 91(1)) that precludes the conferring of additional rights or privileges … respecting the use of English and French, if done in relation to matters within the competence of the enacting legislature[19].

This statement by the Chief Justice is the cornerstone of the principle of the legislative advancement of language rights now enshrined in s. 16(3) of the *Charter*. By affirming the inviolability of s. 133 and authorizing the adoption of additional legislative measures, the Supreme Court espoused a broad, evolving interpretation of s. 133.

Note that the Supreme Court categorically rejected the literal interpretation proposed by the appellants and, in particular, their use of the maxim *expressio unius est exclusio alterium* on which the latter based their comprehensive concept of s. 133. The Court considered this maxim "inapt"[20] as a measure of what s. 133 embraces. In fact, in the Court's opinion, this maxim "served no purpose to that end"[21].

(b) *Blaikie No. 1*

In 1979, in *A.G. of Quebec v. Blaikie*[22], the Supreme Court heard a new case relating to s. 133. The case arose as a result of the adoption by the Quebec Legislature of the *Charter of the French Language*[23] and related to the constitutional validity of ss. 7 through 13 of the *Charter*, gathered under the title "The Language of the Legislature and the Courts". These provisions proclaimed the official unilingualism of Quebec laws

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[18] *Jones, supra* note 11, at p. 193.
[19] *Ibid*. at pp. 192-193.
[20] *Ibid. a*t p. 196.
[21] *Ibid*.
[22] [1979] 2 S.C.R. 1016 [hereinafter *Blaikie No. 1*].
[23] R.S.Q. 1977, c. C-11.

and courts. Section 7 stated that French was the official language of the legislature and courts in Quebec. Sections 8 to 10 stipulated, *inter alia*, that legislative bills were to be written, printed, published, passed and assented to in French, and that only the French version of the Acts and Regulations was authoritative. Section 11 required corporate persons to use French before the courts and judicial and quasi-judicial bodies, while s. 12 required processes produced by courts and agencies exercising judicial or quasi-judicial functions, or forwarded by lawyers practising before them, to be written in French. In both cases, English was allowed if all the parties were in agreement. Finally, under s. 13, judgments rendered by courts and agencies exercising judicial or quasi-judicial functions were to be written in French and only the French version was official.

In a unanimous decision, the Supreme Court of Canada declared that the aforesaid provisions infringed s. 133 of the *Constitution Act, 1867* and that the Quebec Legislature could not unilaterally amend s. 133. Citing is own words in *Jones*, the Court thus confirmed the intangible nature of s. 133. As for the language of legislation, the Court dismissed the respondents' argument that s. 133 was concerned only with the printing and publication of the laws, and not their passage *per se*. Although s. 133 uses the words "printed and published in both those languages", the Court was of the opinion that "if full weight is given to every word of s. 133, it becomes apparent that this requirement is implicit"[24].

Similarly, the Supreme Court was of the opinion that, although the last sentence of s. 133 refers only to "the Acts of the Parliament of Canada and of the Legislature of Quebec", it also covers regulations. In the Court's view, "it would truncate the requirements of s. 133 if account were not taken of the growth of delegated legislation"[25].

Again in the perspective of an evolving interpretation, the Court extended the

[24] *Supra* note 22 at p. 1022.
[25] *Ibid*. at p. 1027.

meaning of the expression "Courts of …" used in s. 133 by holding that the expression relates not only to courts of justice but also to administrative tribunals exercising judicial or quasi-judicial powers. It explains its reasoning in the following terms:

> Dealing, as this Court is here, with a constitutional guarantee, *it would be overly-technical* to ignore the modern development of non-curial adjudicative agencies which play so important a role in our society, and to refuse to extend to proceedings before them the guarantee of the right to use either French or English by those subject to their jurisdiction[26].

In order to reach this conclusion, which was probably not anticipated by the framers in 1867, the Court relied essentially on two decisions of the Privy Council dealing with the interpretation of the *Constitution Act, 1867*: *Edwards v. Attorney General of Canada*[27] and *Attorney General of Ontario v. Attorney General of Canada*[28]. In the former, Lord Sankey stated that it was necessary to construe the Act broadly, in keeping with changing events. His dictum is familiar today in Canadian constitutional law circles:

> The British North America Act planted in Canada a living tree, capable of growth and expansion within its natural limits[29].

In the second, Viscount Jowitt stated that to such an organic statute "the flexible interpretation must be given which changing circumstances require"[30].

Thus, as it did in *Jones*, the Court rejected a literal interpretation of s. 133. By ruling that the requirement concerning the printing and publication of statutes in both official languages also extends to their adoption, and by extending the scope of s. 133 to include quasi-judicial agencies and legislation that, for the most part, did not exist at the time of Confederation, the Court interpreted the language rights guaranteed in s. 133 in an evolving manner, that is, on the basis of changes that have occurred since 1867.

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[26] *Ibid.*, at p. 1029 [emphasis added].
[27] [1930] A.C. 124.
[28] [1947] A.C. 127.
[29] *Supra* note 27 at p. 136.
[30] *Supra* note 28 at p. 154.

(c) *Blaikie No. 2*

Two years after *Blaikie No. 1*, the Attorney General of Quebec applied to the Supreme Court of Canada for a *de novo* hearing, in order for the latter to clarify the scope of s. 133 with respect to delegated legislation[31]. In a unanimous decision, the Court pursued its evolving analysis introduced in *Blaikie No. 1* and again refused to construe the scope of s. 133 according to its literal meaning. Once again, it noted "the phenomenal growth of delegated legislation since 1867"[32] and ruled that s. 133 of the *Constitution Act, 1867* encompasses not only regulations passed by the government, a minister or group of ministers but also regulations made by paragovernmental administrative agencies. Thus the Court, faithful to its previous evolving interpretation, further extended the meaning of the expression "Acts of the Parliament and of the Legislature of Quebec".

More importantly, the Court held that the expression also covers the rules of procedure for courts of justice and quasi-judicial tribunals. The court based this finding initially on the historical context in which s. 133 was drafted. After providing a brief background on the use of English and French before the courts since 1774, the Court concluded that the rules of practice had apparently always been published in both languages, with the exception of the 1978 Rules of the Court of Appeal, the English version of which was not yet available when the Court rendered its decision. According to the Court, this suggests that, although s. 133 does not refer to the rules of practice by name, they are "subject to the section by necessary intendment"[33].

The Court also based its finding on the "judicial character"[34] of the rules of practice, and the "fundamental right"[35] of litigants to use English or French before the courts. Given this fundamental right, it stood to reason, in the opinion of the Court, that

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[31] *A.G. of Quebec v. Blaikie,* [1981] 1 S.C.R. 312 {hereinafter *Blaikie No. 2*].
[32] *Ibid.* at p. 319.
[33] *Ibid.* at p. 332.
[34] *Ibid.*
[35] *Ibid.*

the rules of practice of the courts must be bilingual. The Court expressed itself as follows:

> The point is not so much that the rules of practice partake of the legislative nature of the Code of which they are the complement. *A more compelling reason is the judicial character of their subject-matter, for which s. 133 makes special provision*. Rules of practice may regulate not only the proper manner to address the Court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may, under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes […] *All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only*[36].

Thus, the Court once again refused to interpret s. 133 literally. Since s. 133 makes no reference to rules of practice, a literal interpretation would have dictated their exclusion. As the Court had done in *Jones*, however, it refused to apply the *expressio unius est exclusio alterius* dictum to interpret a constitutional provision. It interpreted s. 133 broadly and liberally, in an evolving manner. By briefly examining the language background of the rules of practice and concluding therefrom that the framers must have intended to include the rules, the Court appeared to acknowledge that the scope of the language rights referred to in s. 133 is defined not only by the wording of s. 133 but also by the intention of the framers and the historical context in which it was drafted by the latter.

(d) *A.G. of Quebec v. Quebec Association of Protestant School Boards*

In 1984, in *A.G. of Quebec v. Quebec Association of Protestant School Boards*[37], the Supreme Court, for the first time, was called upon to decide on the interpretation and application of s. 23 of the *Charter* guaranteeing the right to receive instruction in the language of the minority. In that particular case, the Court had to decide whether certain provisions of the *Charter of the French Language*[38] of Quebec relating to English-language instruction violated the language rights provided in s. 23 of the

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[36] *Ibid* [emphasis added].
[37] [1984] 2 S.C.R. 66 [hereinafter referred to as *Quebec Association of Protestant School Boards*].
[38] *Supra* note 23.

Charter. The challenged provisions restricted the right to English-language instruction at the primary- and secondary-school levels, subject to certain conditions, to children whose father or mother had received his or her primary instruction in English in Quebec. It could hardly be denied that, in this respect, the *Charter of the French Language* was inconsistent with s. 23(1)(b), which gives children whose parents have received their primary instruction in English anywhere in Canada the right to English schooling in Quebec. Thus, the Court did not hesitate to declare the sections in question of no force or effect, to dismiss the appellants' arguments based on s. 1 of the *Charter* and to acknowledge the inviolability of the rights set out in s. 23. The Court made it clear that no Act of the Parliament or of a legislature may unilaterally change the specific criteria provided under s. 23 in such a way as to restrict the extent of the right to receive instruction in the language of the minority.

As a result of this decision, the Court approached the issue of the constitutional right to receive instruction in the language of the minority in the same way as it had approached the constitutional guarantees concerning legislative bilingualism. In effect, the Court reiterated that language rights cannot be interpreted solely in terms of the wording of the provisions; they must also be interpreted with respect to what the framers had in mind, the context in which they were passed and, in the case of s. 23 in particular, the defects that they were intended to remedy.

> The special provisions of s. 23 of the *Charter* make it a unique set of constitutional provisions, quite peculiar to Canada. This set of constitutional provisions was not enacted by the framers in a vacuum. When it was adopted, the framers knew, *and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned*. They also had in mind *the history of these regimes*, both earlier ones such as Regulation 17, which for a time limited instruction in French in the separate schools of Ontario […] as well as more recent ones such as *Bill 101* and the legislation which preceded it in Quebec. Rightly or wrongly,--and it is not for the courts to decide,--*the framers of the Constitution manifestly regarded as inadequate some--and perhaps all--of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s. 23 of the Charter, which were at the same time given the status of a constitutional guarantee*[39].

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[39] *Supra* note 37 at p. 79 [emphasis added].

(e) *Reference re Manitoba Language Rights*

Just one year after the first decision on s. 23 of the *Charter*, the Supreme Court rendered a key decision on s. 23 of the *Manitoba Act, 1870*[40]. This was the *Reference re Manitoba Language Rights*[41]. The reference was further to a 1979 judgment by the Court in *A.G. of Manitoba v. Forest*[42], which ruled that s. 23 of the *Manitoba Act, 1870* was intangible and that the provisions of *An Act to provide that the English Language shall be the Official Language of the Province of Manitoba*[43] were *ultra vires* insofar as they violated the provisions of s. 23. The Act had been passed in 1890 and, since that date, Manitoba had, in fact, practised total unilingualism in its legislative proceedings. Although the Act was twice challenged and declared unconstitutional, once in 1892 and again in 1909, the province had nevertheless continued to enforce it. Only in 1979, therefore, as a result of a third challenge raised against the Act, did the issue finally come before the Supreme Court of Canada.

The first question posed to the Court in the *Manitoba Reference, 1985* was whether the requirements of s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* respecting the use of both French and English in the Acts of the Parliament of Canada and the Legislature of Manitoba were mandatory or simply directory. The second and third questions were whether the statutes and regulations that were not printed and published in both English and French were invalid and, if so, whether they had any legal force and effect and, if so, to what extent. Finally, the Court had to determine whether any of the provisions of the *Act Respecting the Operation of section 23 of the Manitoba Act in Regard to Statutes*[44], passed as a result of *Forest* in order to implement s. 23, were inconsistent with that section.

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[40] Section 23 of the *Manitoba Act, 1870* reads as follows: "Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the Constitution Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages".
[41] [1985] 1 S.C.R. 721 [hereinafter the *Manitoba Reference, 1985*].
[42] [1979] 2 S.C.R. 90 [hereinafter *Forest*].
[43] 1890, S.M. 553 Vict., c. 14.
[44] S.M. 1980, c. 3.

The Court had no problem in concluding that s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, were mandatory. It was clearly of the opinion that the choice of the words "shall" and "sera obligatoire" in drafting s. 133 was intentional and that, if these guarantees were not obligatory, they "would be meaningless and their entrenchment a futile exercise"[45]. But the Supreme Court goes much further. It described the fundamental purpose of the language rights contained in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867* as being "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike"[46].

Furthermore, after finding ss. 23 and 133 to be mandatory, the Court rejected the appellants' argument that these provisions, while mandatory in a grammatical sense, were only directory in a legal sense. The Court categorically refused to apply the doctrine of the mandatory/directory distinction to constitutional provisions. In the words of the Court, the utilization of such a vague principle would cause "harm…to the supremacy of Canada's Constitution"[47].

On the issue of the validity of statutes and regulations printed and published in English only, the Court concluded that such legislation should be ruled invalid. In its analysis of the issue, the Court stressed the need to make the requirement to adopt, print and publish all legislation of the Manitoba Legislature mandatory, in order to protect "the substantive rights of all Manitobans to equal access to the law in either the French or the English language"[48]. Going on to stress the essential role that language plays in human existence and development, the Court asserted the following:

> Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the

[45] *Supra* note 41 at p. 739.
[46] *Ibid*. at p. 739.
[47] *Ibid*. at p. 742.
[48] *Ibid*. at p. 744.

> world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.[49]

The Court also stated that the judiciary was responsible for "protecting the correlative language rights of all Manitobans including the Franco-Manitoban minority"[50].

Because it asserts that s. 23 should be viewed as "a specific manifestation of the general right of Franco-Manitobans to use their own language", reads into s. 23 the intention "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike", and stresses the significance of language as a tool for development and communication, the *Manitoba Reference, 1985* represents a crucial decision in terms of language rights. In fact, according to a number of authors, it represents the high-water mark of the judicial attitude that characterized this entire series of decisions by the Supreme Court on language rights[51].

B. Literal, Restrictive Interpretation: 1986-1988

In 1986, the Supreme Court rendered three significant decisions on language rights in the courts: *MacDonald, Société des Acadiens* and *Bilodeau v. A.G. Manitoba*[52]. In its 1988 decision *Mercure v. A.G. Saskatchewan*[53], it ruled on s. 110 of the *Northwest Territories Act*. These decisions represent a major break with earlier case law established by the Court on language rights. Far from following the broad, liberal approach developed in its earlier case law, the Court developed and applied a literal, restrictive approach.

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[49] *Ibid*.
[50] *Ibid*. at pp. 744-745.
[51] See P. Foucher, "L'interprétation des droits linguistiques constitutionnels par la Cour suprême du Canada" (1987) 19 R.D. Ottawa 381 at p. 385.
[52] [1986] 1 S.C.R. 449. In this case, the Court relied on its reasons in *MacDonald* to conclude, *inter alia*, that s. 23 of the *Manitoba Act, 1870* did not require that a summons issued by a Manitoba court to be bilingual or printed in the chosen language of the addressee.
[53] [1988] 1 S.C.R. 234 [hereinafter *Mercure*].

(a) *MacDonald*

In *MacDonald*, the Supreme Court of Canada held that, although s. 133 of the *Constitution Act, 1867* authorizes the use of English or French in any pleading or process in or issuing from any court of Canada or Quebec, it does not confer the right to receive processes in the language of one's choice. The appellant in this case, a unilingual Anglophone accused who challenged the validity of a summons issued in French only by the Municipal Court of Montreal, argued that s. 133 gives any person the right to be summoned before any court of Canada and any court of Quebec by a process issued in his own language, at least in criminal proceedings, to which the State is a party.

Speaking for the majority, Beetz J. dismissed this argument and upheld the validity of the unilingual summons. According to Beetz J., s. 133 is perfectly clear: it gives every person the option to use either language orally or in his written documents and pleadings. In his view, the language rights protected under s. 133 are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof [54]. Since s. 133 confers no such right on the recipients of a summons, he continues, it imposes no corresponding duty on the State. Beetz J. affirms that, although issuing the summons in both the English and French languages "would certainly be permissible and might well be desirable"[55], to impose it as a duty flowing from s. 133 would be "to make a mockery of the text of this section"[56]:

> No interpretation of a constitutional provision, however broad, liberal, purposive or remedial can have the effect of giving to a text a meaning which it cannot reasonably bear and which would even express the converse *of what it says*[57].

[54] *MacDonald, supra* note 7 at p. 483.
[55] *Ibid*., at p. 487.
[56] *Ibid.*
[57] *Ibid.* [emphasis added].

Continuing with his narrow, literal analysis of s. 133, Beetz J. affirmed that the only duty under s. 133 was that on the chambers of the Parliament of Canada and the Legislature of Quebec to use both languages in the respective records and journals of those houses and to print and publish the Acts in both those languages, by reason of the use of the terms "shall be used" and "shall". Next, relying on the dictionary definitions, he noted that the words "may be used" could not be construed as implying an obligation for, according to *Le Petit Robert*, "they mean the exact opposite"[58].

The arguments made by the interveners were also dismissed by the Court on the basis of the wording of s. 133. The compromise solution proposed by Alliance Québec, which would compel the official translation of a summons at the instance of the recipient "is clearly not imposed by the explicit provision of s. 133"[59], while the legislative precedents referred to by the Société franco-manitobaine, providing for summonses to be issued in the language of the accused, were of no use to the appellant since they were repealed and "s. 133 of the *Constitution Act, 1867*, expressly provides otherwise"[60] As for the suggestion by the Société that a distinction be made between civil proceedings on the one hand, and a penal or criminal proceeding in which the summons emanates from the State, "this distinction is in no way warranted by the language of s. 133"[61].

Dickson C.J., in his individual opinion, agreed with the finding of his brother that a unilingual summons does not violate s. 133, owing to the "clear" wording in s. 133. Wilson J., dissenting, categorically rejected the literal approach followed by her brothers. Essentially restating the position of the Court in *Re: Manitoba, 1985*, she affirmed that the purpose of s. 133 was to grant meaningful access to the judicial system by users of both official languages. A narrow, literal interpretation of s. 133, in her view, could totally defeat that purpose as it would, in fact, permit an English-speaking litigant to be dealt with in French, and vice versa. In short, according to Wilson J., s.

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[58] *Ibid.* [emphasis added].
[59] *Ibid*. at p. 489.
[60] *Ibid.* at p. 490.
[61] *Ibid*, at p. 491.

133 validates the use of both languages for a reason, and that reason is that the person before the Court should be dealt with in the language he or she understands. To say otherwise is to make a mockery of the individual's language right[62].

The narrow, literal interpretation by the majority in *MacDonald* is a striking departure from the previous approach of the Supreme Court to interpreting language laws. How can we explain this reversal? The Court rationalized its new approach in two ways. First, it stressed the fact that language rights, as protected in s. 133, were based on a political compromise that had in mind a very limited form of bilingualism. While this incomplete but precise scheme, according to the Court, could be complemented by federal or provincial legislation, it was not open to the courts "under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise"[63].

Second, the Court distinguished between language rights and the principles of natural justice. On this point, it should be noted that the appellant in *MacDonald* asked the Court to relate the requirements of natural justice and procedural fairness to s. 133. Beetz J. dismissed this argument: compliance with s. 133 "may very well fall short of the requirements of natural justice and procedural fairness". He continued: "These requirements protect not language rights but other rights, referred to as legal rights in the *Charter*, which s. 133 was never intended to safeguard in the first place and to which it is entirely unrelated"[64].

In short, the Court unequivocally affirmed that the two types of rights - language rights and the principles of natural justice - are entirely separate. While language rights are based on a historical and demographic reality peculiar to Canada, the principles of natural justice, such as the right to a fair trial and the right to make full answer and defence, are universal in the sense that they are found in most constitutional states and in many international laws. Since they are fundamentally different, the two types of

[62] *Ibid*. at pp. 537-538, 540.
[63] *Ibid*. at p. 496.
[64] *Ibid*. at p. 498.

rights must not be confused or the one invoked in support of the other. On this point, Beetz J. noted:

> It would constitute an error either to import the requirements of natural justice into the language rights, or vice versa, or to relate one type of right to the other under the pretext of re-enforcing both or either of them. Both types of rights are conceptually different. To link these two types of rights is to risk distorting both rather than re-enforcing either[65].

(b) *Société des Acadiens v. Association of Parents*

The majority of the Court followed this approach in *Société des Acadiens*, concluding that s. 19(2) of the *Charter*, which gives everyone the right to use English or French in every case before the courts of New Brunswick and in any other proceeding flowing therefrom, does not give an individual who comes before the Court and addresses it in his language the right to be understood directly by the judge in that language. As in *MacDonald*, Beetz J., speaking for the majority, based his decision on a textual analysis of s. 19(2). From his initial finding that the language rights protected by s. 19(2) "are of the same nature and scope"[66] as those guaranteed by s. 133, Beetz J. went on to state that nothing in either s. 19(2) or s. 133 guarantees that the speaker must be heard or understood, or that he has the right to be heard or understood, in the language of his choice. In support of this conclusion, the Court relied on the difference between the wording of s 19(2) and that of s. 20, which uses the verb "communicate". According to the Court, it is clear that the legislator meant to distinguish between the two provisions:

> I am reinforced in this view by the contrasting wording of s. 20 of the *Charter*. Here, the *Charter* has expressly provided for the right to communicate in either official language with some offices of an institution of the Parliament or Government of Canada and with any office of an institution of the Legislature or Government of New Brunswick. The right to communicate in either language postulates the right to be heard or understood in either language[67].

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[65] *Ibid*.
[66] *Société des Acadiens, supra* note 7 at p. 574.
[67] *Ibid*. at p. 575.

Beetz J. also relied on s. 13(1) of the *Official Languages of New Brunswick Act*[68], stating that, "had they been so inclined"[69], the drafters of the *Charter* could have followed the lead of s. 13(1), whereby any person appearing or giving evidence may be "heard" in the official language of his choice and such choice is not to place that person at any disadvantage. In short, according to Beetz J., the fact that s. 20 of the *Charter* and s. 13(1) of the *Official Languages of New Brunswick Act* expressly provided for the right to be understood necessarily implies that s. 19(2) implicitly excluded this right. Although the Supreme Court rejected the maxim *expressio unius est exclusio alterius* in *Jones,* it applied that principle to this case.

In *Société des Acadiens*, the Court reiterated the essential distinction between language rights and the principles of natural justice, the former being based on political compromise, and the latter being rooted in principle. According to the Court, this essential difference between the two types of rights demands that a distinct judicial approach be taken with respect to each[70]. As the principals of natural justice are by nature more seminal in nature than language rights, they may be interpreted liberally by the Courts. On the other hand, language rights, owing to their political nature, must be interpreted with greater restraint. The following passage from the judgment by Beetz J. is often cited in support of this proposition:

> Unlike language rights, which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the *Charter*, are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the *Charter*, remain nonetheless founded on political compromise.
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> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, *the courts should pause before they decide to act as instruments of change with respect to language rights*. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. *But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights*[71].

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[68] R.S.N.B. 1973, c. O-1.
[69] *Société des Acadiens, supra* note 7 at p. 575.
[70] *Ibid.* [emphasis added].
[71] *Ibid.* [emphasis added].

The Supreme Court thus established that it was not up to the courts to act as "instruments of change" in the area of language rights. This restraint, it explained, was compatible with s. 16(3) of the *Charter*, which contains a principle of advancement toward equality of status and use of the two official languages. In the Court's view, it was "significant" that this advancement of language rights was linked to the legislative process. The legislative process, unlike the judicial one, is a political process "and hence particularly suited to the advancement of rights founded on political compromise"[72].

Still on the subject of the distinction between language rights and the principles of natural justice, the Court reiterated that language rights are "unrelated to and not to be confused with the requirements of natural justice"[73]. While the purpose of language rights is to ensure advancement of the status and use of both official languages in Canada, the purpose of the principles of natural justice, like the right to an interpreter, is first and foremost comprehension. Language rights may thus be exercised independently of the understanding of the other official language that the person relying on those rights may have, while the principles of natural justice, like the right to an interpreter, may only be exercised in cases of incomprehension. Conceived in this way, the principles of natural justice are applicable to every accused, whether his language be French, English, Italian or Chinese:

> *The common law right of the parties to be heard and understood by a court and the right to understand what is going on in court is not a language right but an aspect of the right to a fair hearing*. It is a broader and more universal right than language rights. *It extends to everyone* including those who speak or understand neither official language. It belongs to the category of rights which in the *Charter* are designated as legal rights and indeed it is protected at least in part by provisions such as those of ss. 7 and 14 of the *Charter*[74].

Note that Dickson C.J. and Wilson J., both dissenting, took an approach reflecting in large measure the earlier judgments of the Court, in particular the *Manitoba Reference, 1985.* Stressing the fact that, by their very nature, language rights

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[72] *Ibid*. at p. 579.
[73] *Ibid*. at p. 475.
[74] *Ibid. at p. 577* [emphasis added].

are "intimately and profoundly social"[75], the Chief Justice was of the opinion that the corollary of the right to use French in every court case was the right to be understood by the court. To decide otherwise, in his view, would be to give a narrow reading to the constitutional and fundamental right to use the official language of one's choice in the courts. Such a result would frustrate the broad remedial purposes of the language protections provided in the *Charter* and be inconsistent with a liberal construction of language rights[76]. As for Wilson J., it seemed to her that, given the commitment to linguistic duality contained in s. 16 of the *Charter* and the principle of growth implied by that commitment, the Court's process could not be perceived as static[77]. Furthermore, she was of the opinion that, faced with an increasingly exacting public in this regard, the rights vested by s. 19(2) would be interpreted in an increasingly broad manner. She concluded that, at that time, in order for the right vested by s. 19(2) to have any meaning in the context of legal proceedings in the courts, the judge's level of comprehension had to go beyond a mere literal understanding of the language used by counsel. It had to be such that the full flavour of the argument could be appreciated[78].

(e) *Mercure*

In *Mercure*, rendered two years after *MacDonald* and *Société des Acadiens*, the Court upheld the narrow approach developed in the two decisions. The issue in *Mercure* was s. 110 of the *Northwest Territories Act*[79]. In a unanimous decision written by Laforest J., the Court ruled that, given the similarities between s. 110 of the *Northwest Territories Act*, s. 133 of the *Constitution Act, 1867*, and s. 23 of the *Manitoba Act, 1870*, the language rights accorded by s. 110 were the same as those accorded under the other provisions. Thus, in his opinion, they had to be interpreted in

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[75] *Ibid*. at p. 566.
[76] *Ibid*. at p. 567.
[77] *Ibid*. at p. 640.
[78] *Ibid*. at pp. 643-644.
[79] The Court acknowledged in *Mercure*, that s. 110, although still in effect I Saskatchewan, was not "enshrined" in the Canadian Constitution. Therefore it could be repealed or amended unilaterally by the province. Saskatchewan repealed s. 110 for the areas under its jurisdiction by passing the *Act respecting the Use of the English and French Languages in Saskatchewan* in 1988. Section 11(1) of the Act provides that every person has the right to use French or English before certain courts of the province (including all courts of criminal jurisdiction).

the same way. Laforest J. then reiterated the principles expressed in *MacDonald* and *Société des Acadiens*: an accused person is constitutionally entitled to speak French before the courts, but has no right to be understood in that language. The judge and all court officials can use English or French as they wish, both in oral and in written communication; the appellant has no right to a translator, except as required for a fair trial either at common law or under ss. 7 and 14 of the *Charter*; the right to be understood is not a language right but one arising out of the requirements of due process; the right to due process should not be linked with language rights because they are conceptually different, and the effect of doing so would involve the risk of distorting both rather than reinforcing either[80].

While reiterating the principles stated in *MacDonald* and *Société des Acadiens*, the Court partially qualified the words of Beetz J. in both cases. According to the majority in *Mercure*, language rights are a well-known species of human rights and should be approached accordingly. As in the case of other human rights, governmental measures for the protection of language rights must be tailored to respond to practical exigencies as well as to the nature and history of the country. But when Parliament or the legislature has provided such measures, it behooves the courts to respect them[81].

Note that *Mercure* raises another question which was not settled in the earlier decisions of the Court, i.e., whether a person who uses either official language has the right to have his remarks recorded in that language. The Court responded in the affirmative. In its view, the right of those before the Court to use French would be seriously truncated if recorded in another language"[82].

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[80] *Supra* note 53 at pp. 273-275.
[81] *Ibid*. at pp. 268-269.
[82] *Ibid*. at p. 276.

C. Partial Return to a Broad, Liberal Interpretation: 1990-1998

(a) *Mahé*

In 1990, in *Mahé v. Alberta*[83], the Supreme Court of Canada was again called upon to determine the scope of s. 23 of the *Charter*, which protects minority language educational rights. The issue was whether s. 23 includes a right to management and control over the minority language facilities and instruction. In a unanimous decision written by Dickson C.J., the Court did not hesitate to answer in the affirmative. The Court took the opportunity provided by *Mahé* to further explain the purpose of s. 23. For the Court, the general purpose of s. 23 "is to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population"[84]. The Court also reaffirmed the remedial character of s. 23 that it had recognized six years earlier in *Quebec Association of Protestant School Boards*. In the Court's view, the framers manifestly regarded the education regimes as inadequate, and s. 23 was designed to change the *status quo*. As the Court pointed out, "history reveals that s. 23 was designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the `equal partnership' of the two official language groups in the context of education"[85]. The Court also stressed the importance of language rights, in their broad meaning, for the survival of the minority culture:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them[86].

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[83] [1990] 1 S.C.R. 342 [hereinafter *Mahé*].
[84] *Ibid*. at p. 362.
[85] *Ibid*. at p. 364.
[86] *Ibid*. at p. 362 [emphasis added].

It is difficult to deny that, *prima facie*, the interpretation of s. 23 by the Court in *Mahé* seems incompatible with the narrow interpretation given to language rights in *MacDonald* and *Société des Acadiens*. A narrow interpretation of s. 23 could very well have led the Court to the finding that the section did not confer a right to management and control, since that section does not refer expressly to "management and control". Note in this regard that the respondent in *Mahé*, as well as a number of the interveners, argued that s. 23 should be interpreted narrowly. In support of this position, they relied in particular on the statements of Beetz J. to the effect that the courts should approach language rights with more restraint than they would in construing legal rights. In *Mahé*, the Court restated its agreement with the words of Beetz J.: in the Court's view, both the genesis and the form of s. 23 call for caution in its interpretation. By its very nature, s. 23 places positive obligations on government to alter or develop major institutional structures. However, the Court noted that while careful interpretation of the section is wise, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose"[87]. Thus, although s. 23 is the result of a "political compromise" and its wording does not explicitly refer to "management and control", this does not mean that the courts should completely ignore its remedial purpose[88]. Still, the Court appeared to be urging the courts to be careful in interpreting language rights because of the positive obligations that it imposes on governments.

(b) *Reference re the Public Schools Act (Man.)*

Three years after *Mahé*, the Supreme Court heard a reference to determine whether certain provisions of the *Public Schools Act* of Manitoba violated s. 23 of the *Charter*[89]. The Court also had to settle the issue of whether the right to have one's children receive primary- and secondary-school instruction "in minority language

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[87] *Ibid*. at p. 365.
[88] Note that the Court is of the opinion that the wording of s. 23, and particularly the French version, which uses the expression "établissements d'enseignement *de la minorité*", is entirely compatible with the finding that s. 23 gives, where numbers warrant, a certain measure of management and control, and it supports this finding.
[89] *Reference re the Public Schools Act* (Man.), [1993] 1 S.C.R. 839 [hereinafter *Reference, 1993*].

educational facilities" included a general right to physically separate facilities. Basing its decision on the judgment in *Mahé*, the Court found that the Manitoba law did not allow the province to meet its constitutional obligations to provide education in the language of the minority and ordered the Government of Manitoba to implement, immediately, an education system to allow the Francophone minority to exercise its s. 23 rights fully. Regarding the existence of a right to a distinct physical setting, the Court, after reiterating the importance of conducting a comprehensive assessment of the matter, found that it was reasonable to conclude that some distinctiveness in the physical setting was required for minority schools to fulfil out their role. Again in accordance with the principles stated in *Mahé*, the Court, while upholding the distinction between careful interpretation of language rights and broad interpretation of legal rights, reiterated that "it must still be open to the Court to breathe life into a compromise that is clearly expressed"[90].

C. Complete Return to a Broad, Liberal Interpretation: 1999-

(a) *Beaulac*

In its 1999 decision in *Beaulac*, the Supreme Court was called upon for the first time to interpret s. 530 of the *Criminal Code*. Specifically, the Court had to determine the meaning of the expressions "language of the accused" and "best interests of justice" used in the section. Before doing so, Bastarache J., speaking for the majority, deemed it appropriate to revisit the Court's earlier interpretation of constitutional language guarantees. The Court accordingly undertook a survey of the principal decisions rendered by the Supreme Court on language issues. It mentioned *Jones*, *Blaikie No. 1* and *Blaikie No. 2*, and the *Manitoba Reference, 1985*. In these decisions, according to Bastarache J., the Court adopted a purposive and liberal approach to the interpretation of language rights. They were followed by the 1986 trilogy which, as Bastarache J.

[90] *Ibid*. at p. 852. Note, however, that the Court again asks the courts to show caution when interpreting language rights that place positive obligations on governments.

conceded, appeared to reverse the tendency to adopt a liberal approach to the interpretation of constitutional language guarantees. Moving on to *Ford*[91], *Mahé*, the 1992 *Reference re Manitoba Language Rights*[92], as well as the *Reference, 1993*, the Court explained that all these decisions "re-affirm the importance of language rights as supporting official language communities and their culture"[93]. The interpretive framework is important, according to the Court, for a true understanding of language rights and the determination of the scope of s. 530 of the *Criminal Code*. It is also relevant, because "the conflicting messages of the 1986 trilogy and following cases have permeated the interpretation of language provisions that are incorporated in various statutes"[94]. Going on to refer specifically to the concept of "political compromise" and the restrictive approach recommended in *Société des Acadiens*, the Court stated:

> Though constitutional language rights result from a political compromise, this is not a characteristic that uniquely applies to such rights […] there is no basis in the constitutional history of Canada for holding that any such political compromises require a restrictive interpretation of constitutional guarantees. *I agree that the existence of a political compromise is without consequence with regard to the scope of language rights* [95].

The Court continued:

> Language rights must <u>in all cases</u> be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. <u>To the extent that *Société des Acadiens du Nouveau-Brunswick* stands for a restrictive interpretation of language rights, it is to be rejected</u>. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with <u>the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply</u>[96].

Thus, Bastarache J., speaking for the majority, completely rejected *Société des Acadiens* and the principle of a restrictive interpretation recommended in the decision, and clearly reaffirmed the essential role played by language rights in the preservation and development of official language communities. We can also read into these

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[91] *Ford v. A.G. of Quebec*, [1988] 2 S.C.R. 712. In this decision, the Supreme Court of Canada disposed of the distinction between freedom of expression in a private context and language rights.
[92] [1992] 1 S.C.R. 212. This decision clarified a number of other aspects of legislative bilingualism.
[93] *Supra* note 5 at pp. 786-787.
[94] *Ibid* at p. 788.
[95] *ibid*. at pp. 790-791 [emphasis added].
[96] *Ibid*, at pp. 791-792.

passages a desire to see the courts play a more active role in the process of advancement toward substantive equality of the official languages, a principle that, according to the Court, signifies two things in particular: "that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State" and, more significantly, "that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation"[97].

Finally, it should be noted that, although Lamer C.J. and Binnie J. agreed with the conclusion and with the analysis of s. 530 by their brothers, they did not consider the appeal an appropriate case in which to revisit the constitutional interpretation of language rights. In support of this opinion, they cited the "well-established rule of prudence" that courts ought not to pronounce on constitutional issues unless they are squarely raised for decision. Furthermore, Lamer C.J. and Binnie J. were of the opinion that the principle of statutory construction set forth in s. 12 of the *Interpretation Act*[98], whereby any text is deemed to be remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects, was sufficient to dispose of the appeal.

(b) *Arsenault-Cameron*

On January 13, 2000, the Supreme Court upheld the new policy of the Court on the interpretation of language rights in *Arsenault-Cameron v. Prince Edward Island*[99], yet another case relating directly to the interpretation of the right to minority-language education guaranteed by s. 23 of the *Charter*. The appellants in this case, Francophone parents in Prince Edward Island, and right holders under s. 23 of the *Charter*, argued that the refusal of Prince Edward Island's Minister of Education to approve the establishment of a French school in Summerside and his offer to provide bus transportation to an existing French-language school violated their rights under the

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[97] *Ibid*. at p. 791.
[98] R.S.C. 1985, c. I-21.
[99] 2000 S.C.C. 1.

Charter. Before the Trial Division of the Supreme Court of Prince Edward Island, the parents obtained a declaration that the government had an obligation under s. 23 to offer instruction in French in a facility located in the Summerside region[100]. The Appeal Division set aside the judgment, however, ruling that instruction could be offered at an existing French school located in another community and that bus transportation was an acceptable way of fulfilling the constitutional obligations of the province[101]. In a unanimous judgment by Major and Bastarache JJ., the Supreme Court of Canada overturned the decision of the Court of Appeal and restored the decision of the Trial Division. Referring first to *Beaulac*, the Court once again asserted that language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities, and that the fact that constitutional language rights resulted from a political compromise does not affect their scope. A purposive interpretation of s. 23 rights was based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development would be enhanced[102].

Relying mainly on the basic principles established in *Mahé* and the *Reference re the Public Schools Act*, the Court specified that determining the demands of s. 23 required determination of the appropriate services, in pedagogical terms, for the number of students involved and an examination of the costs of the contemplated service. It added that educational services provided to the minority need not be identical to that provided to the majority, since "substantive equality under s. 23 requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide a standard of education equivalent to that of the official language majority"[103]. The Court also ruled that where a French-language school board is established to comply with s. 23, the school board alone is empowered to decide how it will deliver those services to the minority. Empowerment

[100] (1997), 147 Nfld. & P.E.I.R. 308.
[101] (1998), 162 Nfld. & P.E.I.R. 329.
[102] *Supra* note 99 at par. 27.
[103] *Ibid*. at par 31.

was essential, stated the Court, to correct past injustices and to guarantee that the specific needs of the minority language community would be the first consideration in any given decision affecting language and cultural concerns[104]. Although the Court agreed that the government should have the greatest possible discretion in its choice of institutional framework within which to fulfil its obligations under s. 23, the Minister's discretion was limited by the remedial aspect of s. 23, the specific needs of the minority language community, and the exclusive right of representatives of the minority to the management of minority language instruction and facilities[105].

Summary

In my opinion, it is clear from this analysis of case law on language rights that the Supreme Court of Canada has long vacillated in its approach to interpreting these rights. From 1975 to 1986, it invariably opted for a broad, liberal, generous interpretation. Indisputably distancing itself from the wording of s. 133, it decided, *inter alia*, that the requirement relating to the printing and publication of statutes in both official languages also implied that they had to be passed in both official languages, and that the expression "Acts of the Legislature" should also include regulations. Furthermore, it interpreted the word "Courts" used in s. 133 as including administrative tribunals. In the *Manitoba Reference, 1985,* it asserted that the purpose of s. 23, the equivalent of s. 133, was to "ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike". The decisions from this period were thus characterized by an evolving concept of the Canadian Constitution, as expressed by Lord Sankey in *Edwards*. Many saw in this decision "the direction that

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[104] *Ibid*. at par. 45.

[105] *Ibid*. at par. 44. The analysis in Section I is not meant to be exhaustive. The Supreme Court of Canada has in fact rendered other decisions on language rights. They include *A.G. (Quebec) v. Brunet, Collier et al*., [1990] 1 S.C.R. 260, *Sinclair v. A.G. of Quebec*, [1992] 1 S.C.R. 579 and the *Reference re Manitoba Language Rights*, *supra* note 92, which all clarified a number of aspects of legislative bilingualism. *Ford, supra* note 91, and *R. v. Paquette*, [1990 2 S.C.R. 1003 should also be mentioned; in the latter, the Court asserted that s. 110 of the *Northwest Territories Act* was still in force in Alberta and Saskatchewan in the context of criminal proceedings. We, however, are of the opinion that the decisions under study illustrate particularly well the shilly-shallying of the Court in interpreting language rights.

the Court would henceforth take in the matter"[106] [TR]. Yet in 1986, the Court did a complete about-face. After strongly insisting, one year earlier, on the social aspect of language rights, the Court completely rejected this view and ruled, in *Société des Acadiens, MacDonald* and *Bilodeau*, that the right to use French or English before the courts did not include the right to be understood in that language, or the right to receive a trial issuing from those courts in one's own language. In *Société des Acadiens*, for example, while acknowledging that language rights are fundamental rights, the Court expressed the opinion that they are the result of a political compromise and must therefore receive a narrow interpretation from the courts. Then, in the 1990's, in a number of cases over school rights, the Court appears to have reverted to an expansive view of language rights. It stated that, although s. 23 is the result of a political compromise, the courts must be able to "breathe life" into a political compromise that is clearly expressed. Relying on the remedial nature of s. 23, the Supreme Court then made it clear that that particular provision gives official language minorities a right of management and control over their children's education and over minority educational facilities. In the *Reference, 1993*, the Court interpreted this right of management and control as including a right to separate physical facilities. *Mahé* and the *Reference, 1993* clearly illustrate the Court's ambivalence with respect to the interpretive approach to be taken on language rights. In both cases, in fact, the Court appeared to have trouble reconciling the two approaches developed earlier since, while recognizing the remedial nature of s. 23 and stressing the close relationship between language, culture and education, it urged the courts to be "careful" in interpreting language rights, because of the positive obligations that language rights create for governments. With *Beaulac* and *Arsenault-Cameron*, the Supreme Court of Canada apparently put an end to the vacillation that characterized its interpretation of language rights, by completely rejecting *Société des Acadiens* and the narrow approach that it recommended and stating, clearly and plainly, that language rights must "<u>in all cases</u> be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada". Both decisions complete a fundamental shift by the

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[106] *Supra* note 51 at p. 386. See also M. Bastarache, "Commentaire sur la décision de la Cour suprême du Canada dans le renvoi au sujet des droits linguistiques au Manitoba" (1985), 31 R.D. McGill 93.

Court, as they demonstrate a clear desire by the Supreme Court of Canada to establish that, taken as a whole, language laws must, at all times, be interpreted broadly and liberally. In my view, there is no question but that *Beaulac* and *Arsenault-Cameron* mark the dawn of a new age in the construction of language rights and that they will have a decisive influence on any future interpretation of language provisions, whether constitutional or legislative[107].

PART III

ADVANCEMENT OF LANGUAGE RIGHTS BEFORE THE COURTS: ss. 530 AND 530.1 OF THE *CRIMINAL CODE*

In accordance with the principle of legislative advancement of language rights expressed in *Jones* and now entrenched in s. 16(3) of the *Charter*, the Parliament of Canada, in exercising its jurisdiction over criminal law and criminal procedure, has passed a number of legislative provisions to extend the language rights of the accused before the courts, including ss. 530 and 530.1 of the *Criminal Code*. These provisions have been in effect throughout Canada since January 1, 1990[108].

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[107] To give only one example, consider *Gisèle Lalonde et al. v. Health Services Restructuring Commission* rendered by the Ontario Divisional Court on November 29, 1999. The applicants in this case sought to overturn the directives issued by the Commission concerning Montfort Hospital, on the grounds that they infringed s. 15 of the *Charter*, the fundamental guiding principle of the protection of minorities, identified by the Supreme Court of Canada in *Reference re the Secession of Quebec*, [1998] 2 S.C.R. 217, and certain general principles of administrative law. The Divisional Court found for the applicants and, in its analysis of the *French Language Services Act*, cited passages from *Beaulac*. However, the decision of the Divisional Court was appealed by the Health Services Restructuring Commission and the Ontario Court of Appeal agreed on March 3, 2000 to hear the appeal. The Court of Appeal also agreed to hear the cross-appeal on s. 15.

[108] Note that, prior to this date, the *Criminal Code* provided for these provisions to enter into force gradually, province by province. This proclamation system was, however, deemed discriminatory and an infringement of s. 15 of the *Charter* in *R. v. Tremblay* (1985), 41 Sask. R. 49 (Q.B.); *Reference re the Use of French in Criminal Proceedings in Saskatchewan* (1987), 44 D.L.R. (4th) 16 (Sask. C.A.) and *Paquette v. R.*, [1986] 3 W.W.R. 232. The latter decision was overturned by the Alberta Court of Appeal 91987), 56 Alta. L.R. 92d) 195, on the grounds that the process was in accordance with the principle of the advancement of language rights enshrined in s. 16(3) of the *Charter*. The Supreme Court of British Columbia and the Court of Appeal for Newfoundland concurred in *R. v. Paré* (1986), 31 C.C.C. (3d) 260 and *Re Ringuette and the Queen* (19897), 33 C.C.C. (3d) 509 respectively.

(a) Contents of ss. 530 and 530.1

Section 530(1) stipulates that, on application by an accused whose language is one of the official languages of Canada, the 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 Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada. The time periods within which the accused may make such an application are set out in s. 530(1)(a), (b) and (c) and vary depending on the nature of the proceeding used in prosecuting the offence. Section 530(2) deals with the situation where the language of the accused is not one of the official languages of Canada. In this case, the judge, on application by the accused, may grant an order directing that the accused be tried before a judge or judge and jury who, in the opinion of the judge, speak the official language of Canada in which the accused can best give testimony or, if the circumstances warrant, speak both official languages of Canada. Under s. 530(3), the justice of the peace or provincial court judge before whom an accused first appears shall advise the accused of his right to apply for an order under subsection (1) or (2). As the law now stands, the judge only has this obligation if the accused is not represented by counsel[109]. Section 530(4) allows the Court before which the accused is to be tried to make the order provided under ss. 530(1) and (2) where the accused fails to apply within the prescribed time. Finally, s. 530(5) stipulates that an order that an accused by tried before a court that speaks one of the official languages may be varied to require that the accused be tried before a court that speaks both official languages.

Section 530.1 lists the specific rights that may be exercised where an order is granted under s. 530. It stipulates that: (1) the accused and his counsel have the right to use either official language during the preliminary inquiry and trial (530.1(a) and (c));

[109] In his study entitled *The Use of English and French Before the Courts in Canada* (Commissioner of Official Languages, November 1995, Supply and Services Canada 1995, cat. No.: SF31/1995f, ISBN: 0-772-23039-5), the Commissioner of Official Languages writes that this obligation is apparently not always respected and the presumption that an accused who is represented by counsel does not need to be informed of his language rights is often groundless. He therefore recommends

(2) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused (530.1(b); (3) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the same official language and he does and, except where the prosecutor is a private prosecutor, to have a prosecutor who speaks the same official language as he does (530.1(d) and (e)); (4) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial (530.1(f); (6) the record of proceedings during the preliminary inquiry or trial shall include a transcript of everything that was said during those proceedings in the official language in which it was said, as well as a transcript of any interpretation into the other language of what was said, and any documentary evidence that was tendered during those proceedings in the official language in which it was tendered (530.1(g)) and finally (7) any trial judgement, including any reasons given therefor, shall be made available by the court in the official language of the accused (530.1(h))[110].

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that a new mandatory form be added to the criminal process, that would advise the accused of their language rights under the *Code* and enable them to specify the official language that they prefer.

[110] Note that the *Code* also includes a provision dealing with the language of certain forms. This is s. 841(3), which entered into effect on February 1, 1989. Section 841(3) stipulates that any pre-printed portions of a form set out in Part XXVIII of the *Code*, such as warrants, summonses and other documents of this type, shall be printed in both official languages. Note also that the majority of the case law stipulates that the two official languages must be used *simultaneously* on the forms. See in particular *R. v. Goodine* (1992), 71 C.C.C.(3d) 146 (N.S.C.A.); *R. v. Alcan* (February 10, 1994), Chicoutimi 150-27-001626-908 (C.Q. Cr. Div); *R. v. Cotton* (March 13, 1991), Hull 550-37-000038-909, (S.C. Que Cr. Div.). Section 841(3) was also challenged by the Attorney General of Quebec in *Belval v. Noiseux*, [1999] R.J.Q. 704 (application for leave to appeal to the Supreme Court of Canada denied on October 21, 1999) on the grounds that the requirement that both official languages be used simultaneously on the forms was incompatible with s. 133 of the *Constitution Act, 1867*, which allows the use of either language. The Court of Appeal dismissed this argument and ruled that there was no contradiction between s. 841(3) of the *Criminal Code* and s. 133 of the *Constitution Act, 1867*.

PART IV

INTERPRETATION OF ss. 530 AND 530.1 OF THE *CRIMINAL CODE* BY THE COURTS PRIOR TO *BEAULAC*

Like the other legislative provisions relating to court proceedings, ss. 530 and 530.1 have given rise to an abundance of case law in which the courts have had to spell out the implications of the various rights contained in these sections. From a reading of the case law, it appears that the courts are not always in agreement on the full implications of the various rights guaranteed by the sections; the conflict between the two interpretative approaches developed by the Supreme Court of Canada prior to *Beaulac* is evident. It is also clear that the distinction made by the Supreme Court between language rights and the principles of natural justice has sown considerable confusion. Specifically, the principle, so often repeated by the Supreme Court, that the two types of rights must remain separate and not be invoked in support of each other for interpretation purposes is misunderstood by a number of judges. This is the framework within which we will examine in this Part the judicial interpretation by Canada's courts of ss. 530 and 530.1, prior to *Beaulac*.

A. Scope of ss. 530 and 530.1

1. Under s. 530.1, must indictments and informations be translated?

As we noted *supra*, s. 841(3) of the *Code* requires that the forms referred to in Part XXVIII be printed in both official languages. Indictments and informations are subject to this requirement. However, the obligation under s. 841(3) relates only to the preprinted sections of the forms. The handwritten sections, i.e., those completed by hand by the informant or prosecutor, may be completed in English or French depending on his preference. The accused may therefore receive an information or indictment in which the handwritten sections have been completed in the other official language. Although Parliament enumerated in s. 530.1 a number of consequences arising from an order that an accused be tried before a court that speaks his official language, it did not

address the subject of the handwritten sections of indictments and informations. Despite Parliament's silence on the subject, however, a number of courts have held that the handwritten sections of such documents must be translated in writing into the official language of the accused, if the latter elects to be tried by judge alone, or by judge and jury, who speak his official language.

(a) Yes, under s. 530.1, indictments and informations must be translated: *Belleus* and *Boutin*

In *Belleus v. R.*[111], the accused, who spoke French, made a s. 530 application to be tried by a judge and jury who spoke French. On the date scheduled for the trial to begin, it was discovered that the indictment was written in English only and no interpreter was available. Observing that such cases arose frequently, Soublière J. concluded that the accused, who had applied to be tried in French under s. 530, was entitled to obtain an indictment written in French under s. 530.1(b) of the *Code*. Since one had not been provided, the accused was summarily acquitted.

In a similar case heard in the Ontario Court, *R. c. Boutin*[112], the Court ruled that, under s. 530.1, the information must be made available without delay in the official language of the accused where the latter elects to be tried by a judge who speaks his official language. From his first appearance, the accused in the case had applied to be tried in French. On the day of the trial, his lawyer demanded that the information containing the charged be declared of no force or effect because it was written in English only. His application was based on a number of legislative provisions, including ss. 530 and 530.1 of the *Code*, s. 20(1)(b) and ss. 7 and 11 of the *Charter*. The court dismissed the argument based on s. 20(1)(b) of the *Charter* but found that it was reasonable to construe ss. 530 and 530.1 as including the requirement to provide the accused with an information in his own language. In fact, after expressing his surprise at the failure to explicitly mention the language of the information, Khawly J.

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[111] (May 13, 1991), in Télé-Clef 3 p. 43 (Gen. Div. Ont.) [hereinafter *Belleus*].
[112] [1992] O.J. No. 3733 (Ontario Court, Provincial Division), on-line: QL (OJ) [hereinafter *Boutin*].

stated that the right of the accused to be judged in his official language should probably include the right to know the charges against him in his official language. He noted:

> Section 530.1 requires that testimonial evidence at the trial be translated and that the Crown and the judge speak the language of the accused. In this context, to say that the fact that the information does not come from the accused does not give him the right to an information in the language of the trial signifies that Parliament did not want the accused to have the right to understand what he is being charged with, which I find hard to imagine[113]. [TR]

Note that Khawly J. also based his decision on the legal rights entrenched in ss. 7 and 11 of the *Charter*, which, in his view, require the accused to be informed of the charges against him in his language.

In light of the comments of Khawly J. in *Boutin*, we can conclude that the aforesaid case law attempts to correct an omission that is difficult to hay, given the many other rights enjoyed by the accused under s. 530.1 when they elect to be tried by a court that speaks their official language. In fact, when an order is issued under s. 530 directing that the accused be tried before a judge, or judge and jury, who speak his official language, and when the accused then enjoy the various rights listed in is. 530.1, including, in particular, the right to have a prosecutor and judge who speak his language, it is difficult to imagine that he would not also have the right to obtain the document containing the charges against him in his own language, all the more so if we consider that, in criminal matters, indictments and informations are very important documents. Not only do they inform the accused of the charges against him, but also they are the document that set in motion the entire judicial proceeding and authorize the judge to hear the case. Without them, there could be no trial[114].

I feel compelled, however, to comment on *Belleus* and *Boutin*. First, with all due respect for the contrary opinion of Soublière, his interpretation of s. 530.1(b)

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[113] *Ibid*, at p. 13.

[114] In this regard, note that the Commissioner of Official Language, in his study entitled *The Equitable Use of English and French Before the Courts in Canada* (1995), recommended that s. 530.1 be amended to stipulate that, when a person elects to be tried by a court that speaks his official language, the handwritten section of the indictment or information must be provided to him without delay in his official language.

concerning written pleadings appears arguable to us. Section 530.1(b) clearly refers to the right of the accused and his lawyer to use French or English in the written pleadings and other documents. Therefore, it does not have the effect of requiring the Crown to provide the accused with an indictment or information written entirely in his language. In fact, ss. 530.1(a) and (b) of the *Criminal Code* reproduce, as it were, the principle of s. 133 of the *Constitution Act, 1867*. Thus, they must be interpreted in the same way as s. 133 as far as written pleadings are concerned, i.e., as acknowledging the right of an accused and his lawyer to use the official language of their choice, without imposing any corollary obligations on the State. If we extend this analysis further, the argument could be made that, if Parliament had in fact intended to use s. 530.1(b) to impose an obligation on the Crown concerning its own written pleadings, it would have expressly made such a provision, as it did in s. 530.1(h), which requires the court to make judgments available in the official language of the accused, and in s. 841(3), which requires the various forms set out in the section to be printed in both official languages.

Second, insofar as Khawly J. in *Boutin* relied secondarily on the legal guarantees of the *Charter* to grant the accused the right to obtain a translation of the documents containing his charge, the decision appears to us to go against the principles set out by the Supreme Court of Canada in *MacDonald* and *Société des Acadiens*. In both decisions, the Court held that the two types of rights, i.e., those relating to language and those relating to natural justice, must not be confused or invoked in support of each other when they are interpreted. This having been said, it is clear that the accused Boutin would have had the right to the assistance of an interpreter if he had not understood the nature of the offence with which he was charged. This right is based on the principles of natural justice enshrined in ss. 11(a) and 14 of the *Charter,* which are available to any accused, regardless of his language. The evidence showed, however, that Boutin understood English.

(b) No, under s. 530.1, indictments and informations need not be translated, but in the context of a s. 530 order, ss. 11(a) and 14 of the *Charter* give the accused the right to obtain a written translation of the aforesaid documents: *Simard*

The debate over the translation of indictments and informations was laid to rest in Ontario by *Simard v. R.*[115], a decision of the Ontario Court of Appeal. Simard, a Francophone from Matane, was charged with sexual assault. At his arraignment, he obtained an order to be tried in French and to have an interpreter to orally translate the information, the handwritten part of which was in English only. At the beginning of his trial, counsel for the accused presented a motion before the Ontario Court (Provincial Division) to set aside the information because, while the form itself was bilingual, the details of the charge were written in English only and the accused had applied to be tried by a judge who spoke French. Khawly J. allowed the motion. Basing his reasons on the decision in *Boutin*, cited *supra*, rendered that same day, and on the decision by Soublière J. in *Belleus*, he concluded that s. 530 required that an information be in the language of the accused. If he was wrong in his interpretation of s. 530.1, Khawly relied secondarily on the legal protections entrenched in the *Charter*, in particular ss. 7 and 11.

The Ontario Court (General Division) allowed the appeal by the Crown. It held that the language rights of the accused had note been infringed, since s. 530.1 did not stipulate that the handwritten section of the information had to be translated into the official language of the accused. Also, s. 530.1(g) never stated that the information was part of the record of proceedings. Given Parliament's silence in the matter, Morin J. stated that he could not conclude that s. 530.1 required the translation of indictments or informations. Again according to the judge, the right of the accused to a fair hearing had not been infringed in the case because an oral interpretation of the information had been provided.

This decision was appealed to the Ontario Court of Appeal, in which the accused presented a number of arguments, including one to the effect that ss. 530 and 530.1 must be interpreted from the perspective of the *Charter*, which guarantees the equality of both official languages of Canada and the right of the accused to understand the

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[115] (1995), 27 O.R. (3d) 97 (C.A.), application for leave to appeal dismissed by the Supreme Court of Canada on September 12, 1996 [hereinafter *Simard*].

charges against him and to be understood by the Court. The accused also relied on s. 20(1) of the *Charter* under which any member of the public in Canada has the right to communicate with an institution of the Parliament or government of Canada in English or French. He argued that this provision, read together with ss. 530 and 530.1, requires the Attorney General's agents to prepare an information in the official language elected by the accused for the trial. The "Association des juristes d'expression française de l'Ontario", an intervener in the case, suggested that the Court view ss. 16 to 20 of the *Charter* as recognition of the privileged status of both official languages, with the result that language rights should not be interpreted narrowly. Relying on *Mahé*, the AJEFO argued that the courts must "breath life" into language rights.

The Ontario Court of Appeal, composed of Lacourcière, Arbour and Labrosse JJ., dismissed the argument based on s. 20(1) of the *Charter* outright, as the police and Attorneys General of the provinces were not acting on behalf of a federal institution and therefore s. 20(1) was inapplicable to the case. Furthermore, after noting that the preprinted section of the information had been printed in both official languages, in accordance with s. 84(3) of the *Code*, the Court refused to read into s. 520.1 an obligation to provided the accused with a translation of the handwritten part of the information in his language. Relying specifically on the principle set out by the Supreme Court in *MacDonald* and *Société des Acadiens* to the effect that the courts should pause before deciding to act as instruments of change with respect to language rights, the Court refused to "import the word information into the wording of s. 530.1 when it is not included"[116].

However, the Court was of the opinion that ss. 11(a) and s. 14 of the *Charter* gave the accused, where he so requested, the right to demand a written translation of the information and, in support of its opinion, referred to the decision of the Supreme Court of Canada in *R. v. Tran*[117], which related to the right to interpreter assistance. In *Tran*,, the Supreme Court ruled that, as part of their control over their own proceedings, courts

[116] *Ibid*. at p. 106.
[117] [1994] 2 S.C.R. 951 [hereinafter *Tran*].

have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood[118]. By the same token, the Crown counsel has a responsibility to provide a written translation of the information in order to protect the accused's right to understand the nature of the charge and to allow him to make full answer and defence. The Court stated that it was up to the accused and his counsel to make the request as they alone were capable of deciding whether it was necessary to have an information translated into the official language of the trial in order to properly inform them of the specific offence charged. In this respect, note that the Court did not dismiss the possibility that an order for the written translation of an information naming an accused who speaks neither English nor French may be necessary to protect his right to a fair hearing and the right to make full answer and defence.

Thus, the Ontario Court of Appeal ended the debate concerning indictments and informations; henceforth those documents were to be translated in writing in the official language of the accused, upon request. The decision of the Court is interesting in that it reflects the two opposing currents regarding the interpretation of language rights. Appealing initially to the principle of restraint developed by the Supreme Court, the Court of Appeal refused to see a translation requirement in s. 530.1, given Parliament's failure to address the issue. However, the Court went on to extend the scope of the accused's language rights by ruling that ss. 11(a) and s. 14 of the *Charter* require indictments to be translated in a trial that is the subject of a s. 530 order. In doing so, the Supreme Court appeared to ignore the distinction, repeated time and again by the Supreme Court, between language rights and the principles of natural justice. Indeed, although the rules of natural justice require that indictments and informations be translated into the language of the accused, the same reasoning could be applied to other legal documents, such as written pleadings, written arguments and documentary evidence disclosed prior to trial or introduced during trial.

[118] *Ibid*. at p. 979.

A second interesting aspect of this decision is the affirmation by the Court, further to a brief review of the legal language rights of the language minorities outside Quebec, that ss. 530 and 30.1 should be interpreted in light of s. 12 of the *Interpretation Act*[119], which states that every enactment shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects, in accordance with their meaning, intention and true spirit. As the Court put it:

> The general rules of construction in the case at bar demand that the court apply a *purposive* analysis, and that the right conferred by s. 530.1 be construed in terms of its *remedial function*. Such an interpretation must consider the *historical absence of the right to be tried in the language of Francophone accused outside Quebec*[120]. [TR]

To my knowledge, this is the only reference to s. 12 of the *Interpretation Act* found in case law relating to ss. 530 and 530.1. In my view, and with respect, it would have been more appropriate for the Ontario Court of Appeal to restrict itself to those rules of construction in order to find that the handwritten sections of indictments and information must, in fact, be translated in writing, rather than to invoke the principles of natural justice.

2. Under s. 530.1, must evidence be disclosed in the official language of the accused, or must documentary evidence tendered during the trial be in the official language of the accused?

According to s. 530.1(g) of the *Code*, the record of proceedings during the preliminary inquiry or trial must include a transcript of everything that was said in the official language in which it was said, 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 question arises as to whether, where a court orders that a trial be held before a judge who speaks the same official language as that of the accused, the Crown is required to disclose evidence in that language.

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[119] *Supra* note 23.
[120] *Supra* note 115 at p. 110 [emphasis added].

For the purposes of this discussion, it is important to bear in mind the distinction between pre-trial disclosure and the translation of documentary evidence tendered during the trial.

(a) No, under s. 530.1, pre-trial evidence need not be disclosed in the official language of the accused: *Rodrigue* and *Breton*

The issue of pre-trial disclosure in a trial before a judge, or judge and jury, who speak the official language of the accused within the meaning of ss. 530 and 530.1 was recently examined at length by the Yukon Supreme Court in *R. v. Rodrigue*[121].

Having been charged with a number of offenses relating to trafficking in narcotics, Rodrigue, the accused, applied to be tried by a judge who spoke his official language, i.e., French. At the preliminary inquiry, he submitted an application to obtain disclosure of the Crown's evidence in French. The evidence consisted mainly of statements and notes taken by members of the Royal Canadian Mounted Police, transcripts of evidence provided by an informer at the preliminary inquiry, and notes from an interview. The accused argued essentially that his right to be tried before a court that spoke French within the meaning of ss. 530 and 530.1 necessarily included the right to obtain disclosure the evidence in that language. He argued that the right was also conferred under s. 5 of the Yukon's *Languages Act*[122], which states that "either English or French may be used by any person" before the courts of the Yukon.

The Yukon Supreme Court dismissed his application. On the matter of s. 5 of the Yukon's *Languages Act*, MacDonald J. stated that the provision was equivalent to s. 133 of the *Constitution Act, 1867,* to s. 23 of the *Manitoba Act, 1870,* s. 19 of the *Charter* and s. 110 of the *Northwest Territories Act*, and therefore had to be interpreted in the same way as the aforesaid other sections, i.e., as recognizing the right of all

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[121] (1994), 91 C.C.C. (3d) 455 (Y.S.C.) [hereinafter *Rodrigue*]. Appeal dismissed by the Yukon Court of Appeal on the grounds that this was an interlocutory judgment, which cannot be appealed (1995), 95 C.C.C.(3d) 129 (Y.C.A.). The Supreme Court of Canada denied the accused leave to appeal on September 7, 1995.
[122] S.Y. 1988, c. 13.

participants in the judicial process, including lawyers and judges, to use the language of their choice without, however, imposing any corollary obligations on the State. Referring to the statement of Beetz J. in *MacDonald* to the effect that such provisions, which represented a minimum standard, could very well be supplemented by legislation but which "it is not open to the courts under the guise of interpretation" to amend, he refused to read into s. 5 anything other than the right of the applicant to use the official language of his choice in his own written pleadings and other documents.

Turning to ss. 530 and 530.1 of the *Code*, MacDonald J. began by noting that those sections illustrated the application of the principle of the advancement of language rights through legislation, to which Beetz referred in *Société des Acadiens* and which was enshrined in s. 16(3) of the *Charter*. He also noted that the provisions go considerably beyond the constitutional language requirements and s. 5 of the Yukon's *Languages Act*, as they grant an accused the right to a judge, jury and prosecutor who speak his official language. They also require the courts to render their judgments in both official languages and to arrange for the presence of an interpreter to assist the accused whenever the oral or written evidence is not in his official language. MacDonald J. noted that the exercise of those rights before the criminal courts of the Yukon was in no way challenged.

Section 530.1, he continued, stipulates that the record of the preliminary inquiry and trial must include everything that was said "in the official language in which it was said", a transcript of any interpretation, as well as any documentary evidence "in the official language in which it was tendered". In his view, therefore, s. 530.1 creates no translation requirement with respect to disclosure of the evidence, since it only requires the documentary evidence to be included in the record "in the official language in which it was tendered". In the opinion of the Macdonald J., if Parliament had intended to impose a positive obligation on the Crown with respect to the disclosure of evidence, it would have done so explicitly, as it did in s. 841(3) of the *Code*, and in ss. 530.1(d) and (e), which require the judge presiding at the preliminary inquiry and the prosecutor to

use the official language chosen by the accused. MacDonald summarized his reasoning as follows:

> To summarize, my opinion is that: (I) s. 5 of the *Yukon Languages Act* recognizes the right to choose the official language of one's choice in written arguments and pleadings; (ii) it is for Parliament and the Legislative Assemblies, not for the courts by way of interpretation, to ensure legislative progress in the equality of the English and French languages; (iii) this is precisely what Parliament has done by adopting ss. 530 and 530.1 of the *Criminal Code*, and (iv) these provisions do not require that disclosure of evidence be made in the official language of the accused[123].

The decision by MacDonald J. thus followed the lead of the Supreme Court of Canada with respect to the interpretation of language rights. In this respect, it should be noted that MacDonald J. dismissed the applicant's argument to the effect that the fact that no version of the documentary evidence was available prevented him from making a full answer and defence. Still in accordance with the principles developed by the Supreme Court to the effect that language rights and the principles of natural justice, such as the right to give full answer and defence, are completely separate and should not be confused with each other, he stated:

> Moreover, if the accused maintains that in the case of a trial held in the official language of his choice, his right to a fair trial means that all the evidence must be disclosed in that official language, but that such a requirement would not exist in the case of an accused who did not understand either of the official languages, this approach would apply in an arbitrary fashion the requirements inherent to the right to a fair trial, and furthermore, would be irreconcilable with the fundamental distinction established by the Supreme Court of Canada between linguistic rights and the right to a fair trial[124].

MacDonald J. also dismissed the claim by the applicant that the decision of the Supreme Court of Canada in *R. v. Stinchcombe*[125] granted him the right to disclosure of evidence in his language. In the opinion of MacDonald J., the right to disclosure of evidence referred to in *Stinchcombe* was the right to disclosure of the evidence as it exists. However, after noting the importance of the right of the accused to give full answer and defence and to receive a fair trial, he stated that those principles could, under certain circumstances, make it necessary to disclose evidence in a language

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[123] *Supra* note 121 at pp. 464-465.
[124] *Ibid*. at p. 476.

understood by the accused. In that particular case, however, he concluded that the situation was different, especially since the accused and his counsel both stated that they spoke and understood English.

In 1995, in *R. v. Breton*[126], the Yukon Territorial Court in turn found that s. 530.1 created no requirement to translate documentary evidence disclosed prior to trial. The accused in that case elected to be tried by a judge who spoke French, and claimed that the Crown was required to disclose the evidence to him in French. In support of his argument, he invoked, *inter alia*, ss. 530 and 530.1 and s. 5 of the Yukon's *Languages Act*. Like the decision of the Yukon Supreme Court in *Rodrigue*, the judge concluded that none of the provisions required the Crown to disclose information in its possession in any language other than that in which it was prepared. Furthermore, he was of the opinion that the accused, who was represented by a lawyer who was well acquainted with the official language in which the documents were written, had not been deprived of a fair trial. As in *Rodrigue*, however, the Court noted that, under other circumstances, the Crown could be required to translate documentary evidence into the official language of the accused, in order to ensure that he could defend himself properly and receive a fair trial. In the case in question, ruled the judge, it had not been demonstrated that the accused's rights had been infringed.

Finally, it should be noted that in *Simard*, cited *supra*, the Ontario Court of Appeal cited with approval a passage from the judgment of MacDonald J. of the Yukon Supreme Court in *Rodrigue*, to the effect that s. 530.1 creates no requirement to translate documentary evidence disclosed at the pre-trial stage.

Thus, the state of the law on the issue of pre-trial disclosure appears to be firmly established: s. 530.1(g) imposes no obligation, on the basis of language rights, to disclose evidence in the official language of the accused. Relying essentially on the wording of s. 530.1(g) and drawing on the principle whereby the courts must show

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[125] [1991] 3 S.C.R. 326 [hereinafter *Stinchcombe*].
[126] (July 9, 1995) Whitehorse, TC-04-10538;10005; 10005A; 100013 (Y.T.C.) [hereinafter *Breton*].

restraint when dealing with language rights, in order to avoid extending such rights beyond what is clearly stipulated in the legislation, the courts have refused to read a requirement to disclose evidence in the language of the accused into s. 530.1(g), which stipulates only that the record must include evidence "in the official language in which it was tendered". These judgments also refer to relevant passages in *MacDonald* and *Société des Acadiens* to justify their findings. However, the courts have left an opening by stating that, under certain circumstances, the principles of natural justice could impose an obligation to provide some translation. In such a case, however, it is definitely a right that may be invoked by any accused who does not understand the language in which the evidence exists, regardless of the language group to which he belongs.

(b) Yes, under s. 530.1, documentary evidence tendered during the trial must be translated into the official language of the accused: *Boudreau*

In *R. v. Boudreau*[127], the New Brunswick Court of Appeal had an opportunity to examine the issue of the translation of documentary evidence tendered during the trial. Mr. Boudreau, charged with impaired driving, elected under s. 530 to be tried before a judge who spoke French. He was acquitted by the Provincial Court, which held that the certificate of the qualified analyst or technician containing the results of the chemical analysis of breath samples from the accused was inadmissible, as it was prepared only in English. This decision was overturned by the Court of Queen's Bench (Trial Division), but the Court of Appeal reinstated the decision on the grounds that the certificate in question was inadmissible. The relevant passage from the judgment of the Court of Appeal is cited at length:

> In New Brunswick, there are two official languages. As a result, an accused has the right to be tried in the official language of his choice. He also has the right, as does every accused in the land, to a fair trial. It is incumbent on the court to ensure a fair trial, by using every reasonable and necessary means to enable the accused to understand the proceedings, the evidence and the pleadings.
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> […]

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[127] (1991), 107 R.N.-B. (2e) 298 (C.A.) [hereinafter *Boudreau*].

> Our various language laws also recognize that every citizen has the right to express himself in either of Canada's official languages when called as a witness or submitting a written report. Here I confine myself to the trial procedure and will not comment on the pre-trial process.
>
> […]
>
> *To my mind, it would go against the principle of a fair hearing, if evidence were received, without the consent of the accused, in a language other than that chosen for the trial without translating it into the language of the trial.* In implementing the principle of a fair hearing, the common law has for centuries offered many examples in which, for the benefit and understanding of an accused who speaks a foreign language, an interpreter has been used. *I do not believe that we can require less in the case of an official language*[128] [TR].

To my mind, this excerpt illustrates the extent to which the distinction between language rights and the principles of natural justice established by the Supreme Court in *MacDonald* and *Société des Acadiens* continues to sow confusion among the judiciary. It seems clear to us that Angers J. relates the requirements of natural justice to the language rights enjoyed by the accused under ss. 530 and 530.1, thus confusing the two kinds of rights which, according to the Supreme Court, must remain separate. Furthermore, the excerpt implies that, "in the case of an official language", i.e., in the context of a trial before a court that speaks the official language of the accused, the right of the accused to a fair hearing gives them the right to have the evidence translated into their language. With respect for the contrary opinion of Angers J., this reasoning would have the effect of applying the principles of natural justice differently, depending on the language group of the accused, when those universal principles are deemed to apply uniformly for all accused, regardless of their language.

(c) No, under s. 530.1, documentary evidence tendered during the trial need not be translated into the official language of the accused, although the principles of natural justice may require that it be translated: *Mills*

In *R. v. Mills*[129], 18 persons were charged jointly with conspiracy to traffic in narcotics; some were Anglophones and others Francophone. An order was issued for the co-accused to be tried before a judge and jury who spoke both official languages. During the trial, the defence moved to have a transcript of a telephone communication

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[128] *Ibid*. at pp. 107-108 [emphasis added].
[129] (1994), 124 N.S.R. (2d) 317 (S.C.N.S.) [hereinafter *Mills*].

in English translated into French. After examining the wording of s. 530.1(g), Boudreau J. of the Supreme Court of Nova Scotia held that the admission of the intercepted communication in the original language, i.e., English, was in complete agreement with s. 530.1(g), which requires that the trial record include documentary evidence "in the official language in which it was tendered during the proceedings". Having said this, the Supreme Court of Nova Scotia, like the Yukon Supreme Court in *Rodrigue* and the Yukon Territorial Court in *Breton*, went on to express the opinion that the principles of natural justice might, in certain circumstances, require that some evidence be translated into the official language of an accused to ensure that he received a fair trial. Boudreau J. expressed himself on this point as follows:

> With regard specifically to the transcripts of intercepted communications, these are being tendered in the official language in which the conversations occurred, which is English. In my opinion, this is consistent with s. 530.1(g)(iii) of the *Criminal Code; however, the circumstances may require that a different procedure be followed to ensure that the accused have a fair trial and an opportunity to make full answer and defence*[130].

Although, in that particular case, the judge appeared to hold the opinion that the right of the accused to a fair trial and to make full answer and defence was not infringed, he nevertheless ordered that the transcript of the communication be translated into French and made available in writing, owing to a number of technical difficulties raised by the interpreters.

3. Does s. 530.1 apply to bilingual trials?

According to the wording of ss. 530(1), (2) and (4), the court may, "if the circumstances warrant" order the trial to be held before a judge, or a judge and jury, who speak both official languages, commonly referred to as a "bilingual trial". Furthermore, under s. 530(5), an order that the accused be tried before a court that speaks one of the official languages may be varied by the court to require that the accused be tried before a court that speaks both official languages.

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[130] *Ibid.* at p. 320 [emphasis added].

From the case law, a number of circumstances have been established in which an order that the trial be held before a judge or a judge and jury who speak both official languages is warranted. In *Edwards v. The Honourable Yves Lagacé*[131], Béliveau J. identified four such circumstances: (1) where counsel for the accused does not speak the same language as his client; (2) where the Crown counsel does not speak the same language as the accused; (3) where the language of the accused is different from that of the majority of the witnesses or the documentary evidence; and (4) where the co-accused do not speak the same official language. Although this list is incomplete, it appears that the circumstances under which a "bilingual" trial is warranted are easily established, in particular in provinces with an English-speaking majority, where there will almost inevitably be English-speaking witnesses or evidence prepared in English.

Before turning to the problem of interpretation raised by s. 530.1 regarding bilingual trials, we should clarify the term "bilingual trial", since it may lead to confusion. As Deschênes J. noted in *R. v. Gauvin*[132], this expression does not refer to a trial in which all the oral and documentary evidence will necessarily be interpreted and translated into the two official languages. On the contrary, stated Deschênes J., one of the reasons for granting an order providing for a judge, or judge and jury, who speak both official languages, "is precisely to avoid, as much as possible, this type of situation"[133]. Thus, when a bilingual trial is ordered, the Court will alternate between English and French, depending on the particular circumstances of each case. For example, if there is a Francophone accused and Anglophone witnesses, the judge will address the accused in French and switch to English when addressing the witnesses. If the trial involves co-accused who do not speak the same official language, presumably the judge will strike a balance between his alternating use of English and French, depending on the circumstances and the person whom he is addressing. The obvious advantage of a bilingual trial is that the judge, the members of the jury and the Crown counsel are all able to understand directly, without the assistance of an interpreter, the testimony of the accused and the other witnesses, as well as all the oral and written

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[131] (March 24, 1998), Montreal 505-37-00327-983, (C.S. Qué.) [hereinafter *Edwards*].
[132] (1995), 169 R.N.-B. (2e) 161, (N.B.Q.B.) [hereinafter *Gauvin*].
[133] *Ibid*, at p. 173.

arguments. Furthermore, the documentary evidence may be tendered in one official language, without resorting to translation, and still be understood by the Court and the Crown. Of course, the accused, his counsel or the witnesses may follow the arguments in their official language, if they so desire, or if it proves necessary, since the court is required to offer interpretation services under s. 530.1(f). In short, as was noted by Béliveau J. in *Edwards*, although the expression "bilingual trial" suggests "integral bilingualism", what we have here instead is what some refer to as "passive bilingualism", in which each person speaks his language and is understood by the other who, if he so desires, may have resort to interpretation if necessary[134].

This having been said, the question arises as to whether s. 530.1, which lists the specific rights and duties flowing from a s. 530 order, is applicable when the s. 530 order requires that the trial be held before a judge, or judge and jury, who speak *both* official languages. This question arises from the fact that the introduction to s. 530.1 does not refer in any way, shape or form, to an order that the accused be tried before a judge, or judge and jury, who speak both official languages. In fact, the introduction refers only to the other two kinds of orders contemplated by s. 530, i.e., the order that the judge speak the official language that is the language of the accused, and the order that the judge speak the official language that is the one in which the accused can best give testimony[135]. As may be expected, this question has produced conflicting judgments.

(a) No, s. 530.1 does not apply when a bilingual trial is ordered: *Cross, Beaulieu, Robin and Edwards*

R. v. Cross[136] is the first decision in which it was held that s. 530.1 is not applicable when a bilingual trial is ordered. The three accused in this case were arrested as a result of the events at Oka, Quebec, in the summer of 1990. As they were natives

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[134] *Supra* note 131 at p. 29.
[135] The introduction of s. 530.1 reads 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 that is the language of the accused or in which the accused can best give testimony […]".
[136] [1991] R.J.Q. 1430 (S.C.) [hereinafter *Cross*].

and did not speak French, they elected to be tried before a judge and jury who spoke English. The Crown counsel, who wanted to use French occasionally, then decided to challenge the constitutionality of s. 530.1(e) against s. 133 of the *Constitution Act, 1867*. Before ruling that s. 530.1(e) was unconstitutional, Greenberg J. of the Superior Court of Quebec considered the possibility, under s. 530(5), of varying the initial order and ordering a bilingual trial. After examining the advantages and disadvantages of such an order, he noted the following:

> Also, such an order for a bilingual trial would result in the non-applicability of Section 530.1. *According to its own terms*, it is triggered only where an order is granted under section 530 directing that an accused be tried before a judge and jury who speak English or before a judge and jury who speak French, but not when an order is granted for a trial before a bilingual judge and jury[137].

Lacourcière, Arbour and Labrosse, of the Ontario Court of Appeal, concurred in *R. v. Beaulieu*[138]. For reasons that do not appear in the judgment, the Court of Appeal ordered that the accused, a Francophone who had elected to be tried before a judge and jury who spoke French, instead be tried before a judge and jury who spoke both official languages. In the Court's opinion, in the absence of a s. 530 order that the accused be tried before a judge and jury who spoke the official language that was the language of the accused, or the official language in which the accused could best give testimony, s. 530.1 was not applicable.

Note also the decision of Rounthwaite J. of the British Columbia Provincial Court in *R. v. Robin*[139]. The accused in this case applied for an order to be tried before a judge and jury who spoke his official language, French. The Court, however, was of the opinion that the trial should be held before a judge and jury who spoke both official languages, so that the evidence could be assessed in the official language in which it was tendered, while the accused would have the benefit of simultaneous interpretation. In the opinion of Rounthwaite J., s. 530.1 was therefore inapplicable. This having been said, it should be noted that, although the Court was of the opinion that s. 530.1 is

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[137] *Ibid*. at p. 1449 [emphasis added].
[138] (October 5, 1995), Toronto C9210, C8948 (Ont. C.A.) [hereinafter *Beaulieu*].
[139] (November 28, 1995), New Westminster, B.C. No. 36499C (B.C.P.C.) hereinafter *Robin*.

inapplicable when an order for a bilingual trial is made, it noted that the provisions of s. 530.1 may provide guidance in such a trial.

We turn finally to *Edwards,* cited *supra*, a case tried in Quebec Superior Court, in which 36 accused, some Anglophone and other Francophone, were charged with tobacco and alcohol smuggling. After an extensive review of the case law on bilingual trials, Béliveau J. found, as had the Ontario Court of Appeal in *Beaulieu*, that s. 530.1 is only applicable when an order is made for a trial to be held before a court that speaks both official languages, by reason of the wording of s. 530.1:

> *In the light of the introduction to s. 530.1*, it is clear that the provision is only applicable when the accused must be tried before a court that speaks the language that is the language of the accused. Furthermore, this was conceded by the Ontario Court of Appeal in *R. v. Beaulieu*, as well as by Greenberg and Boudreau JJ. […][140] [TR]

Note that the Attorney General of Canada, the mis en cause in the case, argued that s. 530 makes no provision for three types of trials, i.e., one before a judge who speaks the official language of the accused, one before a judge who speaks the official language in which the accused can best give testimony, and one before a judge who speaks both official languages. According to the Attorney General of Canada, the fact that the judge, or judge and jury, can speak both official languages would only be an "additional form" of the two types of orders referred to in s. 530. In other words, an order for a trial before a judge, or judge and jury, who spoke both official languages, would not in itself constitute a third type of order. In fact, there would only be two types of orders, i.e., one for a trial before a judge, or judge and jury, who spoke the official language that was the official language of the accused, covered by s. 530(1), and one for a trial before a judge, or judge and jury, who spoke the official language in which the accused, in the opinion of the judge, could best give testimony, covered by s. 530(2). Both types of orders could include the additional form of a judge, or judge and jury, speaking both official languages. In that case, the absence of an explicit reference to this form in the introduction to s. 530.1 was of no consequence, and s. 530.1 would apply in the case of a bilingual trial.

Although the Court found this argument "seductive" [TR], it refused to endorse it since it was of the opinion, first, that "it could not reject the decision of the Ontario Court of Appeal in *Beaulieu* except for compelling reasons" [TR] and, second, that s. 520.1 could not, in any case, be construed in this light. According to the Court, if one accepted that an order that the accused be tried before a judge who spoke both official languages was, for the purposes of the latter provision, an order that he be tried before a judge who speaks the official language that is his official language, that would "induce the courts to rewrite ss. 530.1(d) and (e) of the *Code*" [TR]. "Clearly, it is not the duty of the courts to enact laws" [TR], stated Béliveau J. Furthermore, he continued, "that would go against the rules of interpretation to the effect that, in matters of language rights […], the courts should take care and pause before they decide to act as instruments of change"[141] [TR].

Thus, a number of courts clearly embraced the principles laid down by the Supreme Court of Canada in *MacDonald* and *Société des Acadiens*, to wit, that the courts should pause before they decide to act as instruments of change in language rights, and that they should instead interpret language rights with restraint. They concluded that s. 530.1 was inapplicable where an order for a bilingual trial was made, since its introduction did not specify that the aforesaid rights and obligations were applicable when such an order was issued. This interpretation of s. 530.1 seems highly debatable to us. It is dominated by a concern for following the grammatical and literal meaning of the introduction, regardless of Parliament's purpose and intention. Thus, by restricting themselves to the wording of the introduction, the courts have rejected long-established rules of statutory interpretation to the effect that the terms of a statute must be construed in their overall context, bearing in mind the purpose of the statute and the intention of Parliament, and that a construction that considers only the wording must always be rejected[142].

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[140] *Supra* note 131 at p. 34 [emphasis added].
[141] *Ibid.* at pp. 35-36.
[142] See on this subject P.A. Côté, *Interprétation des lois*, 2e éd., Cowansville, Éditions Yvon Blais, 1990, at pp. 279 and 365.

Furthermore, the courts appear to be completely disregarding the practical effects of their interpretation. The interpretation proposed by these courts in fact lead to absurd, inconsistent results. Note that s. 530.1 enumerates the various rights that may be exercised by the accused and his lawyer, both in the preliminary inquiry and at trial, as well as the obligations incumbent on the Court and the Crown when a s. 530 order is issued. Finding that s. 530.1 is inapplicable when an order is issued to hold a bilingual trial therefore means that, when an order is issued for such a trial, the accused is deprived of all the rights listed in the section, i.e., the right to use either official language during the trial and preliminary inquiry (s. 530.1(a); the right to have the preliminary inquiry judge and the Crown speak same official language that is the official language of the accused (ss. 530.1(d) and (e)); their right to have the record of the proceedings include everything that was said during those proceedings in the official language in which it was said (530.1(d)) and their right to have the judgment, including any reasons therefor, made available in the official language that is the language of the accused (s. 530.1(h)). This interpretation would also mean that counsel for the accused (530.1(a) and (b)) as well as the witnesses (530.1(c)) would no longer have the right to use either English or French. The argument may, of course, be made that the right of the accused and of counsel, as well as of the witnesses, to use the language of their choice would not be compromised in a bilingual trial since, "by necessary implication", the fact that the accused is tried by a judge and jury who speak both official language may be read as allowing the use of either official language[143]. Furthermore, in the provinces of Manitoba, Quebec, New Brunswick, Ontario, Saskatchewan, Alberta and the Yukon Territory, the right of any person to use the language of his choice before courts of criminal jurisdiction, i.e., the same right granted the accused, their counsel and witnesses under ss. 530.1(a), (b) and (c), is protected under either s. 133 or equivalent constitutional or legislative provisions. On the other hand, Newfoundland, Nova Scotia, Prince Edward Island and British Columbia offer no language guarantees with respect to French before courts of criminal jurisdiction. Finding that s. 530.1 is inapplicable

[143] See the working document of the Department of Justice Canada entitled *Vers une consolidation des droits linguistiques dans l'administration de la justice au Canada* (1996), at p. 13.

once a bilingual trial has been ordered therefore means that, in those four provinces, the accused, counsel and witnesses could, in principle, be denied the use of French during the trial, since they have no legal right to use it, even in a bilingual trial. Furthermore, the accused in those four provinces would have no language rights in the preliminary inquiry, as s. 530.1 alone governs the use of French, including the language of the judge, at that stage of the proceedings.

Furthermore, although the right of the accused and their counsel to use the language of their choice in their written and oral arguments is protected independently of ss. 530 and 530.1 in certain jurisdictions, this is not the case with respect to the other rights listed in s. 530.1. These rights include, *inter alia*, the right to have a judge in the preliminary inquiry and a prosecutor who speak the language that is the language of the accused, the right to have the record include a transcript of any interpretation and the right to have the judgment available in his official language. It is hardly imaginable that Parliament would have intended to deprive the accused of those rights, merely because an order was issued for a bilingual trial, especially when we know that in the provinces with English-speaking majorities, ss. 530 and 530.1 are regularly invoked to allow bilingual trials, since the circumstances warranting such trials are very often satisfied.

In my opinion, for all the reasons mentioned *supra*, it is wrong to conclude that s. 530.1 is inapplicable when an order is issued for a bilingual trial. Such a finding leads to absurd results that cannot be imputed to Parliament and which the latter could not have intended. In my opinion, therefore, the strict, literal construction of the introduction to s. 530.1 adopted in *Cross, Beaulieu, Robin* and *Edwards* should be revisited. The words of Martin J. in *R. v. Forsey*[144] appear quite informative in this matter. In *Forsey*, 16 persons were indicted, including 3 Anglophones and 2 Italian speakers, who elected to be tried in English, and 11 Francophones, who elected to be tried in French. The Crown asked for a bilingual trial. After referring to the statement by his brother Greenberg J. in *Cross* to the effect that s. 530.1 was not applicable in the

[144] (1995), C.C.C. (3d) 354 (Que. S.C.) [hereinafter *Forsey*].

context of a bilingual trial, Martin J. indicated that he could not associate himself with this interpretation, for the following reasons:

> In the case of *R. v. Cross*, *supra*, my colleague Greenberg J., albeit in an *obiter dictum*, chose to consider briefly the scope of the foregoing sections. He suggested that s. 530, among its other possibilities, contemplated the ordering of a "bilingual" trial and further that in the event of such an order being made, s. 530.1 would be inapplicable. *I concede that the wording of s. 530.1, strictly construed, may admit of that interpretation but, with the greatest of respect, I do not think that that was the intent of the legislator at all.* Indeed, after considerable reflection I am unable to come to the same conclusion as my brother[145].

(b) Although s. 530.1 makes no mention of an order for a bilingual trial, the rules of natural justice require that the principles of s. 530.1 be applied when such an order is issued: *Mills* and *Edwards*

While conceding that a literal construction of s. 530.1 does indeed suggest that the section is inapplicable when an order is issued for a "bilingual" trial, a number of courts have attempted to bridge the gap left by the inapplicability of s. 530.1, by applying the principles of natural justice. *Mills*, cited *supra*, in which 18 co-accused were tried before a judge and jury who spoke both official languages, is one example of this. One of the co-accused involved in the case had requested, pursuant to s. 530.1(g), that the transcript of a telephone communication be translated into French. Also, the requirement that the Crown counsel in the trial speak both languages had been discussed. Boudreau J. readily agreed that the provisions of the Code did not stipulate that s. 530.1 was applicable in the context of a bilingual trial. However, given the "underlying purpose" [TR] of ss. 530 and 530.1, the Court had to apply s. 530.1 in such a trial. Boudreau J. put it this way:

> It is apparent s. 530.1 refers only to the first two manners of proceedings previous mentioned; one, being where the accused is to be tried before a judge and jury who speak the official language of Canada that is the language of the accused; the other, being in the official language in which the accused can best give testimony. The section does not go on to refer to the third manner of proceeding, that is before a judge and jury who speak both official languages of Canada.

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[145] *Ibid*. at p. 364 [emphasis added]. 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 109, recommends that the introduction be amended so that s. 530.1 explicitly states that s. 530.1 applies to bilingual trials, thereby avoiding any ambiguity.

> *Nevertheless, it seems clear that the purpose of ss. 530 and 530.1 are to ensure that accused of all languages have a fair trial and an opportunity to make full answer and defence.* Therefore, in the third situation where the trial proceeds in both official languages, as in all trials, the purposes just mentioned must be achieved. *The court should then apply s. 530.1, with such modifications as may be required, in a trial before a judge and jury who speak both official languages of Canada, to ensure that these objectives are met*[146].

Edwards, cited *supra*, is in agreement with this opinion. We noted earlier that, like the Ontario Court of Appeal in *Beaulieu*, the judge hearing this case found that 530.1 was inapplicable when an order was made to hold a trial before a judge who spoke both official languages. He went on to adopt the reasoning of Boudreau J. in *Mills*, to the effect that the purpose of ss. 530 and 530.1 was, first and foremost, to guarantee the accused a fair trial and an opportunity to make full answer and defence, and concluded that the principles of natural justice required that the judge and Crown speak both languages alternately when a bilingual trial was held. As he said:

> Although s. 530.1 is inapplicable where the court has ordered a "bilingual trial", this should not mean that the judge and Crown may then disregard the language status of an accused. In this respect, the Court subscribes to the opinion of Boudreau J. […] and concludes that, under the rules of natural justice, the judge and Crown bear an obligation to ensure that the accused receive a fair trial[147]. [TR]

In both cases, the courts decided to bridge the gap left in cases where s. 530.1 was inapplicable by relying on the principles of natural justice. Here again, there appears to be some confusion between language rights and the principles of natural justice which, incidentally, is abundantly clear from the excerpts cited. In both judgments, the Court concluded that the purpose of ss. 530 and 530.1 is to ensure that the principles of natural justice, in particular, the right to a fair hearing and the right to make full answer and defence, are respected. As we noted *supra*, and as the Supreme Court of Canada has on many occasions held, the purpose of language rights is not to ensure that the principles natural justice are applied, but rather to ensure equal status of English and French. The two kinds of rights must not, in the Court's opinion, be invoked in support of each other. Insofar as the principles of natural justice invoked in

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[146] *Supra* note 131 at pp. 319-320 [emphasis added].
[147] *Supra* note 129 at p.37.

both decisions must apply to all the accused, regardless of their language, and exist at all times independently of the application of ss. 530 and 530.1, it appears erroneous to us to invoke them to make up for the fact that s. 530.1 is inapplicable. In my opinion, it would have been much simpler to concur with Martin J. in *Forsey* that Parliament could not have intended to render s. 530.1 inapplicable in the case of a bilingual trial and, on this basis, render s. 530.1 applicable *pleno jure*[148].

4. Does s. 530 has the effect of overriding the principle of joint trials?

The second thorny question with respect to bilingual trials is whether co-accused who do not speak the same official language and who each exercise their right to be tried before a judge who speaks their official language must be tried separately or jointly in accordance with the principle that the parties to a common enterprise must be tried jointly. In other words, does the presence of co-accused who speak English and French constitute a "circumstance" that warrants holding a trial before a judge, or judge and jury, who speak both official languages? Although most of the case law on this issue is to the effect that such a situation is in fact a circumstance that warrants holding a bilingual trial, thereby respecting the principle of joint trials, two recent decisions of the Superior Court of Quebec took a different approach on this question.

(a) No, s. 530 does not have the effect of overriding the principle of joint trials: *Lapointe and Sicotte, Garcia,* and *Gauvin*

The argument that the principle of joint trials applies in the case of co-accused who speak a different official language is based on *R. v. Lapointe and Sicotte*[149]. Lapointe and Sicotte were jointly charged with robbery and using a firearm during the commission of an indictable offence. In the preliminary inquiry, Lapointe applied to be

[148] A claim could be made that the debate has now been resolved, since Bastarache J. stated in an *obiter* at p. 803 of *Beaulac*: "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*." [emphasis added].
[149] (1981) 64 C.C.C. (2d) 562 (Ont. C. Ct.) [hereinafter *Lapointe and Sicotte*].

tried before a judge who spoke French, while the Crown applied for an order that the accused be tried before a judge and jury who spoke both official languages. Sicotte's counsel, who spoke only English, opposed holding a bilingual trial, on the grounds that there would be problems with interpretation, and that he would be unable to defend his client properly. Following a brief survey of the common law on the issue of joint trials, and after examining the particular circumstances of the case, Graburn J. granted the Crown's application. He was of the opinion that, apart from cases in which the cost would be prohibitive, or where the proceeding would become so complicated that the rights of the accused would be infringed, the principle that the parties to a common enterprise must be tried jointly should not be discarded. Furthermore, according to Graburn J., it is clear from a reading of s. 530 (then, s. 462.1) that Parliament intended for joint trials to be held before a judge and jury who speak both official languages in the case of co-accused who speak different official languages. As he put it:

> In my judgment, parliament has recognized the possibility of joint trial wherein one accused speaks French and the other English, or any other language for that matter. This is clear from the language of s. 462.1(1), (2), (4) and (5) [now 530(1), (2), (4) and (5)], namely, that in the circumstances delineated in each subsection the Court may, if the circumstances warrant, order that the accused be tried by a Justice of the Peace, magistrate, Judge or Judge and jury who speak both official languages - French and English. *It seems to me that Parliament clearly contemplated that in circumstances such as exist in the present case the trial should be bilingual in the interests of the accused themselves, and in the interest of the administration of justice*[150].

Similarly, in *Garcia v. R.*[151], Barrette-Joncas J., citing with approval the passages from Graburn J. *supra*, ordered a joint trial for co-accused involved in a conspiracy to traffic in narcotics. The language of one of the accused was French, while the language of the others, who were originally Spanish, was English. The judge pointed out that a joint trial would allow the accused to be heard directly by a bilingual jury without having to go through an interpreter. As well, a bilingual jury would be better able to assess the evidence.

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[150] *Ibid*. at pp. 574-575 [emphasis added].

[151] (1990), 58 C.C.C. (3d) 43 (S. C. Que).

Finally, we should mention *Gauvin*, cited *supra,* another case involving a conspiracy to traffic in narcotics. In the preliminary inquiry, three of the accused indicated that they wanted to be tried before a French-speaking judge and jury, while the fourth requested a trial before an English-speaking judge and jury. However, the Provincial Court made no order concerning the language question. The issue before the Court of Queen's Bench was whether it was in the best interests of justice to order that the accused be tried before a judge and jury who spoke both official languages. Although the situation in the case was apparently not contemplated by s. 530 (s. 530(4) had no application since the accused had in fact made an application for an order, nor was s. 530(5), brought into play, since there was no s. 530 order), Deschênes J., after conceding the "purpose" and "practical need" for bilingual trials ordered that a bilingual trial be held. He based his decision on the fact that the Crown was represented by two counsel, one bilingual and the other a unilingual Anglophone, that the accused were represented by three bilingual counsel and one unilingual Anglophone, that the majority of the witnesses were Anglophones, that a large part of the documentary evidence was written in English and, finally, that simultaneous interpretation or consecutive translation services would be available during the trial.

As a result, ever since *Lapointe and Sicotte*, the courts have been nearly unanimous in following and applying the principle whereby persons who are accused of a common enterprise but do not speak the same official language should generally be tried jointly, finding that this is a circumstance in which a bilingual trial is warranted. However, this tendency has been reversed, at least in two decisions of the Quebec Superior Court, thus giving rise to conflicting case law.

(b) Section 530 may have the effect of overriding the principle of joint trials: *Forsey* and *Bouchard*

In *R. v. Forsey*, cited *supra*, 17 persons were charged with conspiracy to import narcotics. Of the 17, 12 spoke French, 3 were unilingual English speakers and the other 2, originally Italian, spoke English as their second language. The accused, Forsey, applied to be tried before an English-speaking judge. The French-speaking accused

applied to be tried by a French-speaking judge. The Crown, relying on the principle whereby persons charged with having taken part in a common enterprise must, as a general rule, be tried jointly, and on the judicial discretion granted in s. 530(4), argued that a bilingual trial was called for.

After noting that most of the arguments would be made in French, given the number of Francophone accused, Martin J. ruled that if he did not order separate trials, i.e., one for the Francophone accused and the other for the Anglophone accused, those who spoke only one language would inevitably be at a disadvantage, since they would not be able to directly understand the part of the proceedings conducted in the other language. They would therefore need to use interpreters. According to the judge, the use of interpreters, regardless of their competence, was always a compromise. It was a necessary compromise, he continued, when the accused did not speak either official language, or where the witnesses testified in language other than the language of the trial. On the other hand, the use of interpretation became more difficult where the interpretation extended to the pleadings, rulings on the admissibility of evidence and instructions to the jury. In order to avoid such problems, stated the Court, it is necessary, first and foremost, to ensure that the accused is tried before a court that speaks his official language and only to consider using interpreters only as a last resort. As for the principle to the effect that persons charged with a common enterprise must generally be tried jointly, the judge was of the opinion that a rigid application of this principle would not compromise the language rights of the accused set out in ss. 530 and 530.1 of the *Code*. He explained his reasoning as follows:

> Given however, the inherent difficulties which accompany the use of interpretation, *can it be said that an accused whose language is either French or English is nevertheless obliged to forfeit his right to a trial in his language because he happens to be jointly indicted with others who speak the other official language of Canada?* I hardly think so. It may be that the words "if the circumstances warrant" in s. 530(4) of the *Criminal Code* are arguably sufficiently wide to encompass a situation involving jointly indicted accused, some speaking French and others English. *However, I am of the view that these words were never intended to sanction the watering-down or dilution of the accused's rights in order to sanctify the principle that persons engaged in a common enterprise should invariably be jointly tried.* It is in the end a question of balance and discretion[152].

[152] *Supra* note 144 at p. 364 [emphasis added].

Furthermore, the Court stated that it was satisfied that the right of the English-speaking accused to a fair trial would be jeopardized if it ordered a bilingual trial. The Court therefore ordered separate trials, one for the English-speaking and the other for the French-speaking accused.

In September 1995, one year after *Forsey*, Pinard J. of the Quebec Superior Court followed the same approach in *R. v. Bouchard*[153], another case of narcotics trafficking involving both Anglophone and Francophone accused. Invoking the right to make full answer and defence, Pinard J. order the trial to be severed into two trials, one for the French-speaking accused and the other for those of Italian origin, who customarily spoke English. Although the accused of Italian origin understood French, Pinard J. was of the opinion that it was French learned in the street. They were more comfortable, he said, conducting business and, obviously, expressing their viewpoint and giving full answer and defence, in English[154].

In both cases, the Superior Court of Quebec found that the right to a fair trial and the right to make full answer and defence for each of the accused individually should prevail over the rule of joint trial in a common enterprise. It was clear from *Forsey* and *Bouchard* that the Court saw a risk that the rules of natural justice would be infringed if it ordered a joint trial for the French- and English-speaking accused. With due respect, this decision again illustrates the measure of confusion by the courts between the language rights set out in ss. 530 and 530.1 and the principles of natural justice, i.e., the right to a fair trial and the right to make full answer and defence. Martin J. also stated that, in his view, the purpose of ss. 530 and 530.1 was, first and foremost, to implement the principles of natural justice[155]. As we mentioned *supra*, as the Supreme Court stated on more than one occasion, and as the Court recently confirmed in *Beaulac*, the purpose of language rights, such as those protected by ss. 530 and 530.1, is rather to ensure the advancement of the status of English and French, not to implement the principles of

[153] (September 13, 1995), Montreal 500-01-001861-951, (S.C. Que.) [hereinafter *Bouchard*].
[154] *Ibid* at p. 7.

natural justice, which have a broader, more universal scope that that of language rights, since they apply to every person who does not understand what is happening in court. English- or French-speaking accused thus have the right to the same legal guarantees as any other accused, in particular, the right to an interpreter, guaranteed under s. 14 of the *Charter*, if they do not understand the proceedings. In this context, we fail to see how an order for a bilingual trial could compromise the right to natural justice enjoyed by all accused. Furthermore, insofar as the Supreme Court is of the opinion that it would be wrong to link the principles of natural justice with language rights, *Forsey* and *Bouchard* appear to go against the case law of the Supreme Court on this issue.

The decision of Martin J. in *Forsey* also establishes that a joint trial for English- and French-speaking accused would have compromised the language rights of the accused to be tried in "their" language and, consequently, their right to understand the entire trial procedure directly. On this point, note that, contrary to the implication by Martin J., the right of the accused to be tried before a court that speaks their language does not mean that they are entitled to a trial every aspect of which is conducted in their language. In fact, such a right does not exist. Sections 530 and 530.1 grant the accused certain language rights, specifically, the right to a judge and a prosecutor who speak their official language. They also impose certain corollary obligations on the State, such as that of ensuring that the judgment is available in the official language of the accused. By no means, however, do they protect a general, absolute right to be tried entirely and exclusively in the accused's language, as attested by s. 530, which offers the possibility of a trial being held before a judge, or judge and jury, who speak *both* official languages[156].

Furthermore, although it could be argued that, in a bilingual trial, the language rights of some accused could be infringed if the entire trial were conducted almost exclusively in the other official language of Canada, it must be remembered that this is a bilingual trial. As in all other cases in which the circumstances warrant the holding of

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[155] *Supra* note 144 at p. 358.
[156] See in this regard, the discussion paper of the Department of Justice Canada entitled *Vers une consolidation des droits linguistiques au Canada* (1995), at pp. 16 and 17.

a bilingual trial, the use of both languages should generally be balanced according to the special circumstances of each case. In principle, therefore, the judge will be required to use both languages equitably[157]. We should also note that s. 530.1(f) stipulates that the court must offer interpretation services, and s. 530.1(g) that the record must contain a transcript of any interpretation[158].

B. Constitutional Validity of s. 530.1(e)

1. Is s. 530.1(e) incompatible with s. 133 of the *Constitution Act, 1867?*

Despite numerous clarifications by the various provincial courts concerning ss. 530 and 530.1 of the *Code*, a number of questions remain unanswered, the most important of which is, without a doubt, the constitutional validity of s. 530.1(e), which grants the accused the right to have a prosecutor who speaks the same official language as he does. In fact, this provision has on two separate occasions been the subject of a legal challenge before the Superior Court of Quebec. In both cases, the proceedings were initiated as a result of events at Oka, Quebec during the summer of 1990. The accused, who were natives, elected to be tried by an English-speaking judge and jury. In the pre-trial proceedings, the Crown counsel, who were Francophones, indicated that they wished to use French occasionally. Counsel for the accused objected on the grounds that this would infringe the right of the accused to be tried before a court that spoke English within the meaning of ss. 530 and 530.1. The trial judge ruled that s. 530.1(e) apparently required the prosecution to use English at all times. As a result of this decision, the four counsel for the Quebec Crown decided to challenge the constitutional validity of s. 530.1(e) in view of the right of every person to use the language of his choice, protected by s. 133 of the *Constitution Act, 1867*.

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[157] See in this regard, *Edwards, supra* note 128 at p. 38, in which Béliveau J. states that, during a bilingual trial, the judge and prosecutor "must alternate between the two languages, in an equitable manner depending on the circumstances" [TR].

[158] It could also be claimed that the debate was resolved by an *obiter* of Bastarache J. in *Beaulac*. In his analysis of the meaning of the expression "the bests interests of Justice" and of the discretion provided in s. 530(4), at p. 798, Bastarache, included in his enumeration of the factors that the trial judge must assess, the following element: "the fact that there may be co-accuseds". He goes on to add, in parentheses, "which would indicate the need for separate trials".

In 1991, the Superior Court handed down two contradictory judgments. In *Cross*, cited *supra*, Greenberg J. found that s. 530.1(e) was, in fact, at odds with s. 133 of the *Constitution Act, 1867*, as it denied counsel his right to use either of the two official languages before the courts. Greenberg J. accordingly declared that s. 530.1(e) was of no force or effect in Quebec. Note that, before ruling that s. 530.1(e) was unconstitutional, Greenberg J. reviewed the relevant case law developed by the Supreme Court of Canada and then stated that, in his opinion, ss. 530 and 530.1 related essentially to language rights and not to the right of the accused to a fair trial. In this respect, we may say that Greenberg J., in accordance with the teachings of the Supreme Court, was very careful not to confuse language rights with the principles of natural justice, and not to link the two types of rights[159].

In contrast, in *The Queen v. Montour*[160], heard less than one month after *Cross*, Tannenbaum J. respectfully stated that he did not agree with the decision of his brother. He ruled that s. 133 of the *Constitution Act, 1867* protected the language rights of individuals and not those of persons representing the State, in this case, the Crown counsel. Furthermore, Tannenbaum J. stated that he saw no conflict between s. 133 and s. 530.1(e), since s. 530.1(e) did not require the prosecutor to choose between the two official languages; rather, it gave the accused the right to have a prosecutor who agreed to use his language. After all, said Tannenbaum J., it is the rights of the accused, not those of the prosecutor, that are at issue. However, insofar as Tannenbaum expressed the opinion that ss. 530 and 530.1 related not only to language rights but also to guaranteeing the accused a fair trial, his decision provides one more illustration of the confusion existing in the matter.

Cross and *Montour* were appealed to the Court of Appeal of Quebec and, after a seven-year delay, were heard on June 4, 1998. In a concise decision rendered on

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[159] See also *R. v. Rottiers* (1995), 126 Sask. R. 81 (Sask. C.A.) in which the Court, in accordance with the teachings of the Supreme Court, made a clear distinction between language rights and the principles of natural justice.
[160] [1991] R.J.Q. 1470 (S.C. Que.) [hereinafter *Montour*].

September 2, 1998[161], the Court of Appeal, composed of Biron, Fish and Forget JJ., ruled that s. 530.1(e) of the *Criminal Code* was not incompatible with s. 133 of the *Constitution Act,* 1867. The Court concurred that s. 530.1(e) imposed an institutional obligation on the Crown to appoint a prosecutor who was willing to use the official language of the accused, thereby confirming the position of the Attorney General of Canada, who was an intervener in the two cases in order to support the constitutionality of the provisions of the *Code.*

In my opinion, the interpretation proposed by the Court of Appeal follows naturally from a reading of ss. 530 and 530.1. There is, in fact, no doubt that the effective implementation of s. 530.1(e), and of all the other language rights, is dependent on measures that the State must inevitably take in order to give effect to these rights. Furthermore, it is well established that language rights are, as a matter of fact, distinguishable from many other types of rights precisely because the government must provide services in order for those rights to be exercised[162]. A reading of ss. 530 and 530.1 as a whole makes it clear that they impose certain obligations on the government. For example, the right of the accused to be tried by a judge who speaks the same official language as he requires that the chief justice of the court assign a judge who, in fact, speaks the same official language as that of the accused. This is therefore an obligation on the court administration. Similarly, the right of the accused to receive the judgment in his official language requires institutional measures to be taken to ensure that the judgment is available in the official language requested. If the judge writes his judgment and reasons in the official language that is not the language of the accused, the court or the Department of Justice will have to obtain translation services. Furthermore, under s. 530.1(f), the State is required to provide interpretation services to the accused, his counsel and any witnesses. Note also that s. 841(3) of the *Code* requires any forms referred to in Part XXVIII to be printed in both official languages. This obviously means that institutional measures must be take to create, print and make available the forms in a bilingual format. The same reasoning must therefore be applied

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[161] [1998] R.J.Q. 2587. Note that an application for leave to appeal was filed by the Attorney General of Quebec but that, as a result of *Beaulac*, the latter withdrew the appeal.
[162] See in this respect *Ford v. Quebec (A.G.), supra* note 91 at p. 751.

in the case of the right of the accused to have a prosecutor who speaks the same official language as he; this provision means that the Crown, i.e., the Attorney General's offices responsible for the prosecution, must assign a prosecutor who is able and willing to speak that language. If he does not wish to do so, another prosecutor must be assigned to the case (i.e., one whose choice of language matches that of the accused).

In short, given the "institutional" nature of language rights, it would have been quite illogical to abandon this approach when dealing with the right of the accused to have a prosecutor who speaks his language.

PART V:

INTERPRETATION OF s. 530 BY THE SUPREME COURT OF CANADA IN *R. v. BEAULAC*

In May 1999, the Supreme Court of Canada handed down its judgment in *R. v. Beaulac*. Mr. Beaulac was charged with first-degree murder. His first trial ended in a mistrial and his conviction in the second trial was overturned by the Court of Appeal, which ordered a new trial. Although his application had been denied previously, Mr. Beaulac again applied, in a hearing prior to his third trial, to be tried before a judge and jury who spoke both official languages of Canada, pursuant to s. 530(4)[163]. The judge, who was not Mr. Beaulac's judge at trial, dismissed the application. As a result, the trial proceeded in English. Mr. Beaulac was convicted and he appealed the conviction. The Court of Appeal dismissed the appeal from the conviction, upholding the decision rendered by the judge in the preliminary hearing on the issue of language. Mr. Beaulac then appealed to the Supreme Court of Canada, solely on the issue of the violation of his

[163] Note that s. 530(4) is only applicable where an accused fails to apply for a trial in the official language of his choice within the time periods prescribed in s. 530(1), and that where the application by the accused is submitted within the prescribed time, s. 530(1) gives the judge no discretion: he must order that the accused be tried before a judge, or an judge and jury, who speaks the official language of the accused. On the other hand, where an application is made under s. 530(4), i.e., beyond the prescribed time, it is not automatically granted. In fact, s. 530(4) allows the Court before

language rights. This was the first time that Supreme Court had been called upon to interpret the language rights afforded by s. 530 of the *Criminal Code*. Specifically, the Court had to examine the meaning of the expressions "language of the accused" and "best interests of justice" found in s. 530. As I noted in Part I of this paper, the Court decided that it should first examine the constitutional background of language rights before considering the scope of s. 530. After reviewing the case law established by the Court in the matter of language rights, the Court, in an unusual move, completely rejected its 1986 decision in *Société des Acadiens* and ruled that language rights must "in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"[164]. This, therefore, was the context that the Court had in mind when it turned to the analysis of s. 530 of the *Criminal Code*.

Section 530: An Absolute Right

The first significant element to be noted with respect to the interpretation of s. 530 is the statement by the Court that s. 530(1) of the *Code* creates an "absolute right"[165] of the accused to equal access to designated courts in the official language that he considers to be his own. On this point, the Court noted that the courts called upon to deal with criminal matters were therefore required to be "institutionally bilingual"[166] in order to provide for the equal use of the two official languages of Canada. The Court added that this was "a substantive right and not a procedural one that can be interfered with"[167]. Although it may be said that ss. 530 and 530.1 of the *Criminal Code*, by their very wording, imposed language obligations on provincial prosecutors and provincial court judges, ever since they entered into force, *Beaulac* confirmed these obligations, while adding that the principle of substantive equality must be applied. As the Court explained:

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which the accused is to be tried to issue a s. 530(1) order only if it is satisfied that it is in the "best interests of justice" to do so.

[164] *Supra* note 9. Emphasis by the Court.

[165] *Supra* note 5 at p. 793.

[166] *Ibid.*

[167] *Supra* note 5 at p. 793.

> With regard to existing rights, equality must be given true meaning. This Court has recognized that *substantive equality* is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to *equal access* to services of *equal quality* for members of both official language communities in Canada[168].

The recent decision in *Brochu*[169] provides a concrete example of the scope of this principle. In *Brochu*, the Provincial Court of Saskatchewan ordered a stay of proceedings against Mr. Brochu as a result of the unacceptable delay, in large part the result of his application to be tried in French. After 33 months of waiting, it was still not possible to give Mr. Brochu a trial in French. By ordering the stay of proceedings, the Court took judicial notice that, since 1985, it had been possible for accused in Saskatchewan to be tried entirely in French, and that the province had bilingual clerks, prosecutors, defence lawyers and judges to hear trials in French.

2. When a new trial is ordered, must the accused's application be based on s. 530(1) or 530(4)?

Before determining the meaning of the expressions "language of the accused" and "best interests of justice", one of the main questions facing the Court was the interpretation of s. 530 when it interacts with the requirement of a new trial, a particular situation that the drafters of the section apparently did not consider. In other words, when a new trial is ordered, as in *Beaulac*, should s. 530(1) or 530(4) be applicable? On this point, the Court noted that, *prima facie*, an accused who is ordered to face a new trial is in a position quite similar to that of one who is ordered to stand trial for the first time, as contemplated by s. 530(1). There are, however, a number of differences. The Court offered the example of an accused who made no s. 530 application at a first trial on a particular charge, and then requested a second trial in the other official language. In such an eventuality, stated the Court, the Crown prosecutor might have to be replaced

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[168] *Ibid*. at p. 789 [emphasis added].
[169] *Her Majesty the Queen v. Réal Brochu* (November 9, 1999), (Provincial Court of Saskatchewan) [unreported].

for the retrial. In short, the Court concluded that s. 530(4) should be applied where a new trial is ordered, as some special circumstances might have to be considered[170].

3. Meaning of "Language of the Accused"

Section 530 of the *Criminal Code* grants every accused the right to apply to be tried before a judge, or judge and jury, who speaks "the official language that is the language of the accused". What does this expression mean? Is it the habitual language of the accused, his maternal language, the first language learned and still spoken? According to the Court, the solution to the problem was to look at the purpose of s. 530. As the Court pointed out, it was "to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity"[171]. The Court went on to state that the language of the accused "is very personal in nature", and that "it is an important part of his or her cultural identity". The accused must therefore, in the Court's view, be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself[172]. The Court continued by stating that the "principles upon which the language right is founded", "the requirement of equality with regard to the provision of services in both official languages of Canada" and "the substantive nature of the right" all pointed to the freedom of Canadians to assert which official language is their own language. An accused's own language, for the purposes of s. 530(1) and (4), is thus "either official language to which that person has a sufficient connection"[173]. The Court conceded that it does not have to be the dominant language. Instead, the Court applied the following criterion: if the accused has sufficient knowledge of an official language to instruct counsel, he or she will be able to assert that that language is his or her language, regardless of his or her ability to speak the other official language[174]. The Court added that the Crown could challenge the assertion, but would have the onus of showing that the assertion was unfounded. In

[170] *Supra* note 5 at pp. 793-795.
[171] *Ibid.* at p. 797.
[172] *Ibid.*
[173] *Ibid*. at pp. 796-797.

such a case, the court would not inquire into specific criteria to determine a dominant cultural identity, or into the personal language preferences of the accused. It would only satisfy itself that the accused was able to instruct counsel and follow the proceedings in the chosen language without the assistance of an interpreter[175].

The Supreme Court thus gave a very broad meaning to the expression "language of the accused". The criterion established by the Court appears to us, however, to be fully compatible with the purpose of equality of status of both official languages, and with the purpose of supporting the development of Anglophone and Francophone minorities. The accused may therefore choose the official language in which they prefer to be tried, regardless of their "maternal language"[176].

4. Meaning of "Best Interests of Justice"

The second expression to be clarified, more difficult than the first, and the one that caused trouble in *Beaulac*, is found in s. 530(4): "best interests of justice". As we noted *supra,* s. 530(4), which applies when the application by the accused is not submitted within the prescribed time, allows the judge to make the s. 530(1) order only if he is satisfied that it would be in the "best interests of justice". This expression caused problems in *Beaulac*, since it was clear from the record that the Court of Appeal decision had been based exclusively on Mr. Beaulac's ability to speak English.

First, since the rule is the automatic access to a trial in one's official language when an application is made in a timely manner, and a discretionary access when such an application is not timely, the trial judge should therefore consider, first and foremost, the reasons for the delay. The trial judge might, for example, consider whether and when the accused was made aware of his right. Did he waive the right and later change

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[174] *Ibid.* at p. 797.
[175] *Ibid*. at p. 797.
[176] Note that the Attorney General of Canada, an intervener in this case, recommended a more restrictive criterion in this respect, one based essentially on the case law of the last 100 years: he argued that the "official language" of the accused was either his "maternal language" or his "habitual language".

his mind? Why did he change his mind[177]? Next, the trial judge should consider a number of factors that relate to the conduct of the trial. Among these factors are whether the accused is represented by counsel, the language in which the evidence is available, the language of the witnesses, whether a jury has been empanelled, whether witnesses have already testified, whether they are still available, whether proceedings can continue in a different language without the need to start the trial afresh, the fact that there may be co-accused (which would indicate the need for separate trials), changes of counsel by the accused, the need for the Crown to change counsel and the language ability of the presiding judge[178]. Among the factors that must *not* be considered are "administrative inconvenience" and "fairness of the trial". On the question of administrative inconvenience, the Court expressed the following opinion:

> *I wish to emphasize that mere administrative inconvenience is not a relevant factor*. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. […] *in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages*[179].

In the case of an accused who receives a new trial, the Court noted that the retried accused does not have to justify why he or she is requesting a second trial in his or her official language when he or she failed to do so in the first. The granting of such a request, explained the Court, "is not an exceptional favour given to the accused by the

[177] *Ibid*. at pp. 797 and 798. Note that the Supreme Court stated that the right of the accused to be informed of his or her right under s. 530(3) was of questionable value because it applied only when the accused was unrepresented. The assumption that counsel is aware of the right and will in fact advise his or her client of that right in all circumstances, absent a duty to do so, is unrealistic. Note also that two contradictory judgments have been handed down on this issue since *Beaulac*: *Gérard Deveaux v. Her Majesty the Queen* (December 22, 1999), Port Hood, N.S., No. 0579 (P.C.) and *Chi Mong Le v. Her Majesty the Queen* (January 31, 2000), London, Ontario, No. 5024F (C.S.J.). In the first case, the Court, citing *Beaulac*, was of the opinion that failure to advise the accused of his right was a substantial wrong and not a simple procedural error, and ordered a new trial. In the latter, the Superior Court of Justice refused to issue an order of *certiorari* quashing the preliminary inquiry simply because of the failure of the justice of the peace to advise the accused of his s. 530(3) right.
[178] *Ibid*. at p. 798.
[179] *Ibid*. at pp. 798-799 [emphasis added].

State; rather, it is the norm". Thus, the only relevant factors to consider under s. 530(4) are the *additional* difficulties caused by an untimely application[180].

As for the fairness of the trial, it is clear from the judgment that the Court took the opportunity provided by this case to reiterate the fundamental distinction between language rights, on the one hand, and the right to a fair trial, on the other, and to attempt to dispel the confusion existing on this point. In its analysis of the meaning to be given to the expression "the best interests of justice", the Court noted the following:

> Another important consideration with regard to the interpretation of the "best interests of justice" is the complete distinctiveness of language rights and trial fairness. Unfortunately, *the distinctions are not always recognized* […]The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. *The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English*. This Court has already tried to dissipate this confusion on several occasions[181].

In *Beaulac*, the decision of the Court of Appeal to uphold the dismissal of the application by Mr. Beaulac to be tried in French was based exclusively on his ability to speak English. As Bastarache J. noted, however, the ability of the accused to express himself in English was irrelevant, because the choice of language was meant not to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that was responsive to his linguistic and cultural identity.

Before making a decision on this point, the Court cited the passage from *MacDonald* to the effect that it would constitute an error either to import the requirements of natural justice into language rights or vice versa, or to relate one type of right to the other, and that both types of rights were conceptually different. It added: "I

[180] *Ibid*. at p. 799.
[181] *Ibid*. at pp. 799-800 [emphasis added].

re-affirm this conclusion here *in the hope that these rights will no longer be confused*"[182].

After explaining which factors the courts should not consider, i.e., administrative inconvenience and fairness of the trial, in determining whether it was in the best interests of justice to allow a s. 530(4) application, the Court noted that no set infallible method could be provided that would be applicable to every case. The basic principle, however, is that, in general, owing to the importance of language rights and the stated intention of Parliament to ensure the equality of French and English in Canada, the best interests of justice will be served by accepting the application of the accused to be tried in the official language of his choice[183]. Therefore, it is the denial of the application that is exceptional and must be justified. The burden of this demonstration, asserted the Court, should fall on the Crown[184].

The Court conceded, however, that the later the application is made in the trial process, the better must be the reason for the delay in order for the application to be accepted. If the accused makes his or her application in the middle of the trial and can provide no reason for his or her lateness, it may not be accepted, depending on the circumstances. When a new trial is ordered, however, the presumption in favour of the accused is much stronger because of the similarity between this situation and the one contemplated in s. 530(1)[185]. The Court added that, although the need to replace the Crown prosecutor was a relevant factor to be considered in such a case, that alone would not be enough to justify turning down the application, even in the absence of any reason provided by the accused for not making a similar application before the first trial[186]. The Court noted that the accused was under no obligation to justify his actions in that regard, as he was under no obligation to make an application in the first trial. Therefore, "even if the retried accused must make an application pursuant to s. 530(4), the granting of his or her application will be assured unless, in exceptional

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[182] *Ibid*. at p. 800 [emphasis added].
[183] *Ibid*. at p. 801.
[184] *Ibid*. at pp. 800-801.
[185] *Ibid*. at p. 801.

circumstances, the Crown is able to show that the application should be denied, based on relevant s. 530(4) considerations"[187].

5. Remedy on Appeal

The final issue examined by the Court in *Beaulac* relates to the appropriate remedy when s. 530 is violated. *Prima facie*, it should be noted that Mr. Beaulac invoked the error committed by the Court in rejecting his application for a trial in French in the context of an appeal from his murder conviction. The respondent in *Beaulac*, basing its argument on ss. 686(1)a(b)(iii) and 686(1)(b)(iv) of the *Criminal Code*, therefore tried to argue that no substantial wrong or miscarriage or justice or harm had occurred in Mr. Beaulac's trial, that the trial was fair, and that Mr. Beaulac's appeal should therefore be dismissed. Responding to this argument, the Supreme Court began by noting that s. 530 was not concerned with assuring a fairer trial. It saw an analogy to be made in this case with *Tran,* in which Lamer CJ. ruled that s. 686(1)(b)(iii) was designed to avoid the necessity of setting aside a conviction for minor or harmless errors of law, where the Crown could establish that no substantial wrong or miscarriage of justice had occurred. Section 686(1)(b)(iv) was also designed to allow a court to dismiss an appeal from a conviction, but only in cases of procedural irregularity where the Crown could show that the accused suffered no prejudice. Still according to the Chief Justice in *Tran*, violation of s. 14 of the *Charter* constituted a serious error of law, and certainly not one which, for *Criminal Code* purposes, could be characterized as minor or harmless, or as a procedural irregularity. Similarly, in *Beaulac*, the Court refused to apply the remedial provisions of s. 686 to a violation of language rights. According to the Court, given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, and the objective of s. 686 of the *Criminal Code*, the violation of s. 530 constituted a substantial wrong and not a procedural irregularity. As a result, s. 686(1)(b) had no application in the case and a new trial had to be ordered. Thus, the Court made it clear that there had to be an effective remedy

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[186] *Ibid*. Emphasis by Court.
[187] *Ibid*.

available for breach of s. 530 rights. The application of s. 686 of the *Criminal Code* would make it illusory[188].

It is clear that by referring to the breach of s. 530 as a "substantial wrong" and not a simple administrative error, and *ipso facto* overriding the applicability of s. 686 of the *Criminal Code*, the Supreme Court has granted every person whose language rights have been breached a powerful remedy[189].

CONCLUSION

Language provisions, be they constitutional or ordinary legislative provisions, may be interpreted either narrowly and literally, in order to restrict their scope, or broadly and generously, in order to expand their scope. my survey of cases dealing with ss. 530 and 530.1 and rendered prior to *Beaulac* clearly show that the courts have constantly vacillated between the two approaches, just as the Supreme Court itself did between 1975 and 1993. Thus, certain courts have favoured a literal, restrictive approach in their interpretation of ss. 530 and 530.1, relying on *MacDonald* and *Société des Acadiens*, in which the Court, being of the opinion that, unlike legal rights, language rights are based on a "political compromise" and not on "principles", ruled that language rights must be handled with restraint. A survey of the cases dealing with ss. 530 and 530.1 clearly shows that this distinction between language rights and the principles of natural justice, as well as the different rules of interpretation which, according to the Court, must follow therefrom, continue to sow considerable confusion in its application. Luckily, *Beaulac*, while reiterating the distinction between the two types of rights, completely dismissed the principle of restrictive interpretation which, in accordance with *Société des Acadiens*, would have followed therefrom. As the Court noted, the

[188] See on this point *Brochu*, *supra* note 162, in which the Court ordered a stay of the proceedings instituted against Mr. Brochu on the grounds of an unacceptable delay of 33 months and 3 days that he suffered after applying to be tried in French.

[189] It is interesting to note that on the question of remedies, the Supreme Court also staked out a very different position than the one advanced by the Attorney General of Canada. According to the latter, a breach of s. 530 can never, in itself, constitute a prejudice or a substantial wrong and can never result in an order for a new trial, unless a jurisdictional error has been committed, by reason of the

existence of a political compromise has no bearing on the interpretation of language rights. And as the Court pointed out in its judgment, though language rights result from Canada's constitutional background, political compromise is not a characteristic that applies uniquely to language rights[190]. In fact, if this had been the real reason why the Court believed that language rights should be interpreted differently, the Court would then have interpreted all the other *Charter* rights narrowly.

From a review of the case law prior to *Beaulac*, it is equally clear that a number of courts had no hesitation in using the distinction established by Beetz J. between a restrictive interpretation of language rights and a liberal interpretation of the principles of natural justice, in order to narrow the scope of ss. 530 and 530.1 of the *Criminal Code*. Since ss. 530 and 530.1 were intended as a response to the literal, restrictive approach adopted by the Supreme Court in *MacDonald* and *Société des Acadiens*, it seems quite incongruous to us that these sections should be interpreted following the same approach. The courts could very well have applied the evolving approach developed by the Supreme Court of Canada in *Blaikie No. 1, Blaikie No. 2*, *the Manitoba Reference, 1985* and *Mahé*, or reconsidered the dissenting opinions of Dickson C.J. and Wilson J. in *MacDonald* and *Société des Acadiens*. In all of the aforesaid decisions, the Court showed considerable openness to the idea of language rights, and to the need to take into consideration their purpose and role. With very few exceptions, the lower courts never refer to the purpose of ss. 530 and 530.1 or to Parliament's intention when they interpret the provisions. The judicial interpretation of ss. 530 and 530.1 prior to *Beaulac* appears all too often to be dominated by a concern for following the grammatical and literal meaning of the provisions, irrespective of the purpose of their drafters and the context in which they were drafted.

In *Beaulac*, the Supreme Court of Canada not only rejected the narrow construction recommended in *Société des Acadiens* but also, more importantly, stated

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fact that the purpose of s. 530 is to ensure the equality of both official languages and not to ensure a fairer trial leading to a more justifiable verdict.

that language rights must "in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada"[191]. It therefore seems clear to us that such a construction by the lower courts will no longer be possible and they will have to adjust their fire. According to the Court, the principal purpose of s. 530 of the *Criminal Code* is to assist members of both official language communities in obtaining equal access to specific services, before designated courts, in their own language. As a result, when applying s. 530, the Canadian courts must take into consideration its remedial character, its substantive nature and the aforesaid purpose. These pronouncements by the highest court of the land represent explicit recognition of both the profoundly social nature of language rights and the relation existing between language rights and the development and vitality of the official language communities. This is why *Beaulac* is so important, and the official languages communities can only rejoice in the decision.

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[190] See on this point, *supra* note 51 at pp. 395-396. See also W. Newman, "Les droits linguistiques, la *Charte* et la nouvelle *Loi sur les langues officielles*", a paper presented at the Second Annual Conference on Human Rights and the *Charter*, Ottawa, February 1990.
[191] *Supra* note 9. Emphasis added by Court.