S.C.C. File No.: 37642

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

**KASSEM MAZRAANI**

**APPELLANT**

- and -

**INDUSTRIAL ALLIANCE INSURANCE and FINANCIAL SERVICES INC. and MINISTER OF NATIONAL REVENUE**

**RESPONDENTS**

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# APPELLANT'S FACTUM
# (KASSEM MAZRAANI, APPELLANT)

(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada)*

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## PART I: OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The primary question presented on appeal is simply this: does a Federal Court Judge have a positive duty to adjourn a trial for the retention of translators the moment a witness or counsel expresses unease while testifying or presenting in their second official language?

2. Two subsidiary questions follow from this inquiry:

- First, can a Federal Court Judge take into account language agreements entered into by the parties?
- Second, does a Federal Court Judge have a duty to interfere with the solicitor-client relationship when a party or witness has willingly chosen to plead and/or proceed in its second official language?

3. Specifically, it is the Appellant's contention that, in this case, there is no language rights violation. The Respondent and its counsel expressly wished to proceed in English (with the use of some French on technical terms to be translated by Honourable Justice Pierre Archambault). The agreement, proposed by the Respondent's counsel, was to avoid an adjournment and to accommodate the unilingual self-represented Appellant.[1] It is only after losing the trial, and on the subsequent appeal of the decision below, that the Respondent raised the issue of language.

### B. Brief Factual Summary

4. The Appellant, Kassem Mazraani ("Mazraani"), was hired by the Respondent, Industrial Alliance ("Industrial Alliance"), under what was characterized as an Agency Contract in April 2012. Mazraani was terminated in November 2012.[2]

5. Industrial Alliance issued a T4A for the taxation year of 2012, indicating Mazraani earned $7,084.91. The Respondent characterized Mazraani's income as self-employed commissions.

6. In his 2012 income tax return, Mazraani declared:

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[1] Appellant's Record ("AR"), Volume III, Tab 12, Trial Transcript, pp. 7-9.

[2] Decision of the Tax Court of Canada ("Tax Court Decision"), AR, Volume I, Tab 1, at para 129; AR, Tab 36, Exhibit 20 Contract between Mr. Mazraani and IA Financial Services Inc., dated May 3rd, 2012.

- a gross commission income from self-employment in the amount of $7,084; and
- that he incurred $7,098 in expenses to earn that income.

7. Consequently, Mazraani declared a net loss of $14 for the 2012 taxation year.[3]

## C. Judicial Proceedings

***Tax Court***

8. The Ministry of National Revenue determined Mazraani had not held insurable employment. The Appellant appealed this decision to the Federal Tax Court in Montreal. The hearing was presided over by Archambault J.

9. Archambault J. allowed the appeal, and found Mazraani held insurable employment as *per* Article 2085 of the *Civil Code of Quebec*. The Court found that the parties' agreement to characterize Mazraani's employment contract as one of services and agency was not determinative of the contract's actual status.[4]

10. The Court held the "Agency Contract" was a contract of adhesion (i.e. a "boilerplate contract").[5] Archambault J. based this conclusion on the following factors:

- Mazraani did not have the opportunity to discuss or have any input as to whether he wanted to be an employee or an independent contractor;
- Mazraani was in a vulnerable position—given that he had been unemployed for quite some time prior to being hired;
- There was a degree of micromanaging of Mazraani that one would expect in an employer/employee relationship; and
- Mazraani's business cards did not indicate whether he was an independent contractor or an agent.[6]

11. The Court held that, objectively, all appearances suggested Mazraani was an employee of Industrial Alliance, and so held insurable employment.[7]

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[3] Tax Court Decision, *supra* note 2, at para 2.
[4] Tax Court Decision, *supra* note 2, at paras 138-139, 151, 190, 270, 289, 301.
[5] Tax Court Decision, *supra* note 2, at para 147.
[6] Tax Court Decision, *supra* note 2, at paras 147-151.
[7] Tax Court Decision, *supra* note 2, at paras 147-174.

***Language Facts***

12. With respect to the conduct of the trial itself, Archambault J. noted "…Additional hearing days were required, which allowed Mr. Mazraani to provide evidence to contradict the misleading evidence introduced by Industrial Alliance's key executives who testified, and enabled the Court to get a clear picture of the true facts."[8]

13. Industrial Alliance was ordered to pay costs on the basis it "…was not forthcoming in providing an accurate factual description of what took place."[9]

14. Quite apart from any difficulty in linguistic understanding between the parties, there was a deficit in clarity which resulted from certain tactical decisions made by the Respondent and counsel for Industrial Alliance, Mr. Turgeon.

15. Within this context, it is critical to note that, whereas Mazraani was unilingual, Anglophone, and self-represented both the lawyer and witnesses for Industrial Alliance ("key executives") were bilingual Francophones and sophisticated parties.

16. When the trial began, counsel for Industrial Alliance, Mr. Turgeon, indicated that Mr. Michaud, his first witness and an executive at Industrial Alliance, was to testify in French. Naturally, Mazraani indicated he would require a translator to proceed.

17. Archambault J. stated he was comfortable allowing Mr. Michaud to testify in French, provided some translation was available. Faced with the prospect of an adjournment, counsel for Industrial Alliance proposed that witnesses testify primarily in English, while expressing technical terms in French. Mazraani agreed to this proposal, referred to by Archambault J. as a "pragmatic compromise", and Mr. Michaud proceeded to testify in English.[10]

18. Later in the proceedings, Mr. Charbonneau, a separate witness for Industrial Alliance, indicated his preference was to testify in French. Notwithstanding, and consistent with the

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[8] Tax Court Decision, *supra* note 2, at para 304.
[9] *Ibid.*
[10] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10.

"pragmatic compromise", counsel for Industrial Alliance did not object to his testifying in English.[11]

19. A further language-related discussion arose when Ms. Lambert, another witness, began testifying in French. When the Judge indicated this was primarily an English hearing, neither Mr. Jilwan (counsel for the Ministry of National Revenue) nor Mr. Turgeon objected. As with the previous witnesses, Ms. Lambert proceeded to testify primarily in English.[12]

20. Throughout these proceedings, Mazraani only rarely objected to the use of French (when he could not follow witness testimony). Each time Mazraani objected, proceedings immediately returned to English.[13]

***Federal Court of Appeal***

21. After the Trial Judge ruled in favor of Mazraani, Industrial Alliance appealed – explicitly raising the language issue for the <u>first</u> time.[14]

22. The Federal Court of Appeal held that, by allowing and facilitating Mr. Turgeon's "pragmatic compromise", Archambault J. failed to ensure the Respondent's witnesses were heard in the official language of their choice, and failed to protect the language rights of both Mr. Turgeon and Mr. Mazraani:

> …the constitutional and quasi-constitutional official language rights of witnesses, counsel for Industrielle Alliance, as well as Mr. Mazraani's rights were <u>all</u> violated in the course of the hearing before the TCC.[15]

23. The Federal Court paid specific attention to Archambault J.'s remarks, to the effect, "…we are asking everyone speak to English as best they can." [16]

24. The Court held Archambault J. erred—that he was obliged to have immediately agreed to allow the witness to speak in French notwithstanding the prior agreement of the parties. This

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[11] AR, Volume IV, Tab 13, Trial Transcript, pp. 109-110.
[12] AR Volume IV, Tab 13, Trial Transcript, p. 56 (testimony of Lambert).
[13] AR, Volume VI, Trial Transcript, at pp. 96, 97 112, 117, 155, 212, 213, 221 (Leclerc).
[14] Notice of Appeal of Industrial Alliance, AR, Volume II, Tab 8, pp. 26-36.
[15] Decision of the Federal Court of Appeal ("FCA Decision"), AR, Volume I, Tab 2, at para. 7. [Emphasis Added].
[16] AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110.

completely ignores the fact Industrial Alliance witnesses agreed to testify in English as *per* Mr. Turgeon's proposal.[17]

25. The Federal Court of Appeal held any attempts to speak in French by witnesses or counsel were treated by Archambault J. as impermissible "accommodations" of language, resulting in a violation of their right to speak French.[18]

26. Finally, the Federal Court of Appeal held Archambault J. had exerted "subtle pressure" on counsel and witnesses to forego their right to speak in the official language of their choice.[19] At no point, however, did Mr. Turgeon ever definitively assert the right of witnesses or himself to speak *exclusively* in French.[20] Mr. Turgeon spoke in the language of his own choosing, which was English. His "pragmatic compromise" always remained in full force and effect.[21]

***The Appellant as a self-represented litigant***

27. Briefly, while the Appellant has retained counsel to draft this factum and argue the appeal, the Appellant's specific input in this factum remains integral and is addressed in this section.

28. The formerly self-represented Appellant wishes to point out that this process has been ongoing since 2013 and that he and his family have suffered greatly for which he believes that he is entitled to compensation. As the Appellant pointed out extensively in his motion for leave to appeal, the high turnover at Industrial Alliance had a negative impact on himself, other advisors, and their families. The Appellant further argued extensively in his motion for leave to appeal and in his reply that he was caught off guard by the Federal Court of Appeal, who incorrectly changed the issue of whether or not Mr. Mazraani held insurable employment to one of language rights.

29. The Appellant indicates that the key sections that are in the transcript that demonstrate that his rights were violated by Industrial Alliance (because they show that the Respondent did

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[17] AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110.
[18] FCA Decision, *supra* note 15, at para 22.
[19] FCA Decision, *supra* note 15 at paras 21-22.
[20] AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert), AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon).
[21] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

not care for Mr. Mazraani but rather wanted a decision from Archambault J. to save it money) are as follows:

> MR. TURGEON: Yeah, so it's—what I'm scared of is the Court would have to decide the status that would apply to all, that may have impact to all Industrielle Alliance representative—and it will be the same for London Life, others company and there's—we know from the evidence that there are many, not all but most of all company in that particular field work with that status.
>
> JUSTICE ARCHAMBAULT: M'hm.
>
> MR. TURGEON: And it is asked by the representative then, so it would be sad that the situation—that a ruling would have impact the entire company, an entire network of agents, on a so unique exceptional situation. And it is hard to conclude---
>
> …..
>
> JUSTICE ARCHAMBAULT: Okay. So you would like to have the same—at least the same results?
>
> MR. TURGEON: Yeah.
>
> JUSTICE ARCHAMBAULT: You don't care if I have the same reasons.
>
> (Laughter)
>
> JUSTICE ARCHAMBAULT: You---
>
> MR. TURGEON: Non.
>
> JUSTICE ARCHAMBAULT: You're result oriented, I assume.[22]

30. Further, the Appellant emphasizes that when Mr. Leclerc was testifying before Archambault J., he was asked how many agents Industrial Alliance terminated on an annual basis. Mr. Leclerc indicated that it was 13 to 14 people per year out of a possible 15 people. The AMF report, which was referred to at trial by the Appellant, demonstrated that at least 92 percent of the employees of Industrial Alliance were terminated or quit every year between the years of 2008 and 2012. This shows the difficulties faced by agents of Industrial Alliance. As such, and as aforementioned, the Appellant relies upon the submissions that he made as a *pro se* litigant on

[22] AR, Volume IV, Tab 13, Trial Transcript, pp. 101, 250.

both his leave to appeal and in the reply, and the Appellant repeats and relies upon them here to show that the evidence supports his position.[23]

## PART II: QUESTIONS IN ISSUE

31. This appeal raises the following issues:

> **Issue 1: Did the Federal Court of Appeal err in holding that the witnesses' and counsel's language rights had been violated in this case?**
>
> *To what extent should a trial court consider and assess whether or not "pragmatic compromises" are permissible in Federal Court, when the parties have agreed to proceed in one official language with some use of the other official language?*
>
> **Issue 2: Was the Tax Court obligated to adjourn the proceedings for translators under s. 15 of the *Official Languages Act* the moment that any witness or counsel for Industrial Alliance expressed some unease with the use of the English language?**
>
> *Did the Trial Judge balance the sometimes competing principles of economy, consistency, finality, fairness, and the integrity of the administration of justice? To what extent should a trial court scrutinize and assess whether or not consent and the failure to explicitly object to an English hearing with some French ought to be taken into account when determining whether or not language rights have been violated? Moreover, does the fact, that Industrial Alliance was represented by competent counsel who proposed the pragmatic compromise and consented to it, play a role in assessing a possible language rights violation?*

## PART III: STATEMENT OF ARGUMENT

### A. The Appellant's Basic Submission on the Federal Court of Appeal Ruling

32. The Federal Court of Appeal reversed the well-reasoned decision of Archambault J. (which held in favour of the self-represented Appellant) on the grounds that "subtle pressure" had been exerted on both counsel and witnesses for Industrial Alliance to speak and/or testify in English.

33. With respect, there was no language rights violation in this case and holding otherwise, as the Federal Court of Appeal did, ignores vital context. Archambault J. never ruled proceedings *had to* go forward in English.[24] Counsel for Industrial Alliance, Mr. Turgeon, both agreed to and,

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[23] AR, Volume V, Tab 15, Trial Transcript, pp. 121-122.
[24] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

indeed, made the suggestion to proceed primarily in English. It was further agreed that witnesses for Industrial Alliance would be permitted to testify French when *necessary* (and with translation provided by Archambault J.).[25]

34. Counsel has a duty to assert the rights of their clients and bring them to the attention of a court. If counsel for Industrial Alliance believed proceeding in English would prejudice the Respondent or its witnesses, there should have been a clear objection on the record – regardless of whether proceeding in English was an attempt to accommodate Mazraani as a self-represented litigant or avoid an adjournment of proceedings. In other words, it fell to Mr. Turgeon to seek an adjournment and to assert his clients' and his own language rights in circumstances where the choice to conduct the trial primarily in English was his.

35. There will be instances in which unilingual self-represented litigants contest matters against represented parties whose native tongue is the other official language.[26] The Federal Court of Appeal decision below potentially threatens the integrity of many otherwise solid judicial outcomes on the basis of language rights violations – including where there has been no prior objection. In this case, Mr. Turgeon did not object, and in failing to do so, the Appellant submits, waived any suggestion that his own, or his clients' language rights were violated. The Respondent willingly chose to speak and conduct proceedings primarily in English.[27]

36. Once the matter proceeded to the Federal Court of Appeal, counsel for Industrial Alliance resiled from the "pragmatic compromise" he had suggested.[28] In light of this tactical decision, and on the record before this Honourable Court, it is not clear why counsel for Industrial Alliance proposed the pragmatic compromise when he could have simply agreed to an adjournment.[29]

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[25] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[26] The Honourable Justice Allan R. Hilton "The Practice of Law in Quebec: The Perspective of an Anglophone Quebecker" ("*The Practice of Law in Québec*")
[27] AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert); AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon); AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[28] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10; Notice of Appeal of Industrial Alliance, AR Volume II, Tab 8 pages 26-36.
[29] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

***The Practice of Accommodating Self-Represented Parties is Widespread and Not Onerous***

37. At the Superior Court of Justice in Montreal, it is common practice to plead in the language of a unilingual self-represented party. As a matter of courtesy and respect for judicial economy, many lawyers and witnesses will agree (especially where they are functionally bilingual) to proceed in the self-represented litigant's language. Those who do not feel comfortable simply proceed in their language of choice, and interpreters are obtained accordingly.[30]

38. *Chiasson c. Chiasson*, a decision cited by the Federal Court of Appeal, is clearly distinguishable. In that case, the Trial Judge's conduct was considerably egregious in that the party was mocked for wanting to speak in one of Canada's official languages. The Trial Judge's actions constituted *overt* pressure—as opposed to "subtle pressure" found in the case at bar.[31]

39. It should be noted the right to receive a trial in the language of one's choice is not absolute. In *Émond c. R*, a francophone litigant who sought a trial in English was denied that right on the basis that his request was merely tactical.[32] The obvious distinction in this case is that the Appellant is a unilingual Anglophone, and the manner in which his matter proceeded was about need and reasonable accommodation.

40. The case of *R v. Beaulac* can also be distinguished. *Beaulac* dealt with the right of an accused, in a criminal case, to a trial in the French language. Mr. Beaulac could speak English, but he requested his trial be heard in French. In response, the Trial Judge exerted *overt* pressure and denied the request. By way of contrast, the case at bar is a civil case and Archambault J. did not definitively rule that the trial *must* proceed in English. Rather, in a case involving a unilingual self-represented litigant, the Trial Judge responded to and subtly enforced the compromise proposed by Mr. Turgeon, a bilingual Francophone lawyer.[33]

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[30] *The Practice of Law in Québec*, *supra* note 26.
[31] *Chiasson c. Chiasson*, 1999 CarswellNB 599, at paras 1, 4, 5, 6, Book of Authorities ("BA"), Tab 1.
[32] *Émond c. R.*, 2012 QCCS 7223 (CanLII), at paras 26-30.
[33] *R. v. Beaulac*, 1999 CarswellBC 1025, at paras 11, 45 ("*Beaulac"*); AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert); AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon); AR,

***The Appellant's Language Rights & Unnecessary Interference***

41. The Federal Court of Appeal's declaration that Mazraani's language rights were violated is unwarranted.[34] Mazraani never asserted a language rights violation and his position with respect to the primary use of English (consistent with Mr. Turgeon's "pragmatic compromise") has not changed.[35]

42. Archambault J. repeatedly indicated his willingness to adjourn the proceedings for the purpose of coordinating translation services.[36] Mr. Turgeon insisted that he was at ease in both official languages – at no point does Mr. Turgeon seek to waive the "pragmatic compromise".[37] At most, Mr. Turgeon appears to express regret at having proposed and entered into the "pragmatic compromise", but there is no attempt to rescind it.[38]

43. The Respondent cannot have it both ways: no request for an adjournment, but upon losing at trial, they can then choose to assert a language rights violation. There is no question that any party, lawyer, or witness before the Federal Court or any Court affected by s. 133 of the *Constitution Act 1867* and the *Official Languages Act, 1988* is entitled to speak and appear in either French or English.[39] At the same time, if parties wish to enter into an agreed compromise, wherein both languages are spoken and a Judge assumes the responsibility of translating as required, then they are entitled to proceed on that basis. Such compromises are common place and, indeed, acceptable within the scope of applicable language rights legislation.[40]

44. Effectively, Archambault J.'s decision was overturned on the basis of a compromise both parties accepted as being reasonable. While the record appears to be incomplete in terms of the Respondent's motivation to propose this compromise, absent a proper objection from counsel it

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Volume III, Tab 12, Trial Transcript, at pp. 7-10; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

[34] FCA Decision, *supra* note 15, at para 7.

[35] AR, Volume VI, Tab 15, Trial Transcript, at pp. 138, 209.

[36] AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 146; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8.

[37] AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 146.

[38] AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 146, 225-226.

[39] *Official Languages Act*, R.S.C. 1985, c. 31 (4th Suppl.), s. 2, 14, 15, 18 ("*OLA*"); *Constitution Act, 1867* ("*Constitution Act*"), 30 & 31 Victoria, c. 3 (U.K.), R.S.C. 1985, App. II, No. 11, s. 133.

[40] *The Practice of Law in Québec*, *supra* note 26 at pp 5b-12.

is submitted Archambault J. was correct to uphold the agreed upon pragmatic compromise.[41] His judgment was totally sound.

## B. The Standard of Review is Correctness

45. This Honourable Court's role is not to re-hear cases, but to review for error according to the appropriate standard of review established in *Housen*. It is only appropriate for an appellate court to interfere with the findings of a lower court where,

- they are unsupported by the evidence;
- unreasonable; and
- deemed to have affected the result.[42]

46. Whether or not the Trial Judge *ought* to have adjourned proceedings for translators is a highly discretionary decision entitled to considerable deference under the circumstances. The decision reflected a "pragmatic compromise" proposed by the Respondent who has appealed as against the Trial Judge's acceptance of their own proposal only after losing the trial.

### *Standard of Review: Can and Should the "Pragmatic Compromise" be Treated Like a Contract?*

47. By way of analogy, the "pragmatic compromise" functions as a contractual agreement between both Parties and the Court. The appropriate standard of review for contractual interpretation is mixed fact and law,[43] but since there is an extricable question of pure law in this matter, the correctness standard applies.

48. The extricable question is as follows: whether or not Archambault J. is permitted to accept the "pragmatic compromise" in light of his positive duty to ensure protections for the Parties', witnesses' and lawyers' official language rights under the *Official Languages Act*.

49. This extricable question is of significance to the legal profession as a whole. The Federal Court of Appeal's decision creates a dangerous precedent requiring judges to become language

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[41] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10; AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert); AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon).

[42] *H.L. v. Canada (Attorney General),* [2005] 1 S.C.R. 401, at para 69, citing *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235, at para 5.

[43] *Creston Moly Corp v. Sattva Capital Corp.,* 2014 SCC 53, at para 50.

rights advocates where counsel fails to object to the primary use of one language and proposes a compromise which potentially violates language rights.

## C. French and English are the Official Languages of Canada

50. The *Official Languages Act ("OLA")*[44] falls under the privileged category of "quasi-constitutional legislation",[45] and provides as follows at s. 14 and 15:

> **14** English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.
>
> **15(1)** Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.
>
> **(2)** Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

51. Subsections 15(1) of the *Official Languages Act* establishes, *inter alia*, a positive duty on Federal Courts to ensure any person giving evidence before them may be heard, without disadvantage, in the official language of his or her choice.[46]

52. Subsection 15(2) of the *OLA* further establishes a similar duty on Federal Courts to ensure that simultaneous interpretation from one official language into the other is made available for any proceeding before it wherein a party *requests* such services.[47] Critically, the *Act* does not define the content of a reasonable request or limit the ability of the Parties to arrive at a fair compromise about the use of language.

53. It is clear, however, that both French and English are the official languages of Canada. In *R. v. Beaulac*, the Supreme Court of Canada firmly established "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development

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[44] *OLA*, *supra* note 39, ss.14-15.
[45] *Thibodeau v. Air Canada*, [2014] 3 S.C.R. 340, at para. 12.
[46] *OLA*, *supra* note 39, s. 15 (1).
[47] *OLA*, *supra* note 39, s. 15 (2).

of official language communities in Canada".[48]

54. Accordingly, s. 133 of the *Constitution Act* and s. 15 of the *Official Languages Act* must be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. Other pieces of legislation, including the *Official Languages Act*, s. 2,[49] and the *Canadian Charter of Rights and Freedoms*, s. 16(1),[50] express a similar purpose.

55. In *Beaulac*, Bastarache J. explained the role government must play in establishing and enforcing language rights:

> the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. **As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language**. The governing principle is that of the equality of both official languages.[51]

56. To be clear, that is not a description which applies to this matter. At the direction of the Respondent's counsel, and despite the option to adjourn proceedings so that translation services

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[48] *Beaulac*, *supra* note 33, at para. 25.

[49] From the *OLA, supra* note 39 at s. 2: "The purpose of this Act is to (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions; (b) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and (c) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada." *Official Languages Act, supra.*

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

[51] *Beaulac*, *supra* note 33, at para 39.

could be organized, the matter proceeded in English. Pursuant to the "pragmatic compromise", Archambault J. provided translation services to assist the Appellant's understanding of witness testimony (which was partially in French as needed). The language of the *OLA* is permissive and it is possible to reconcile Archambault J.'s reasons with these provisions. In the circumstances of this case, Archambault J. facilitated the Respondent's witnesses speaking in French. He also ensured that both the Respondent's witnesses and Mr. Mazraani could enjoy the benefits of ss. 14 and 15 by undertaking to provide French to English translation himself.

57. The English and French languages have equal status and equal rights and privileges in Courts established by Parliament, including the Tax Court of Canada. Hence, any party appearing before or submitting written pleadings to Federal Court has the constitutional right to do so in the official language of his or her choice *per* s. 133 of the *Constitution Act, 1867*.[52] This constitutional right is also reflected and confirmed in ss. 16 and 19 of the *Canadian Charter of Rights and Freedoms.*[53]

58. In *MacDonald v. City of Montreal,*[54] the Supreme Court of Canada found the constitutional right to use the official language of one's choice in courts, covered by s. 133 of the *Constitution Act, 1867*, applies broadly to "…litigants, counsel, witnesses, judges and other judicial officers."

59. Significantly, an individual's ability to express themselves in both official languages does not impact that person's constitutional right as to which language he or she chooses when participating in court proceedings. One's ability to speak both official languages is "irrelevant" to one's choice. In the words of the Supreme Court of Canada in *R. v. Beaulac*:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity…[55]

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[52] *Constitution Act, supra* note 40 at s. 133.
[53] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 s. 16, 19.
[54] *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at para 61.
[55] *Beaulac*, *supra note 33*, at para 45.

## D. Self-represented litigants and the Tax Court of Canada

60. The issue of *pro se* litigation is becoming increasingly common. More and more Canadians are unable to bear the financial burden of retaining a lawyer. As a result, Courts are increasingly confronted with the unique challenges that self-represented litigants pose – language rights are no exception.

61. In *Pintea v. Johns,*[56] the Supreme Court of Canada fully endorsed the *Statement of Principles on Self-Represented Litigants and Accused Persons* established by the Canadian Judicial Council. Some of the key highlights of this Statement include:

- that judges and court administrators should do whatever possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons;
- depending on the circumstances and nature of the case, the presiding judge may explain the process provide information about the law and evidentiary requirements, modify the traditional order of taking evidence, and question witnesses (typically to assist the self-represented party);
- that judges, court administrators and others facilitate, to the extent possible, access to justice for self-represented persons; and
- providing the required services for self-represented persons is also necessary to enhance the Courts' ability to function in a timely and efficient manner.[57]

62. The Barreau de Montréal has also released an English version on how to respond to and accommodate self-represented litigants in Court, which cites the *Statement of Principles of Self-Represented Litigants and Accused Persons*. Trial Judges are directed to provide some assistance to self-represented litigants.[58]

63. Had Mazraani been represented by counsel, outstanding language issues would likely have been resolved *prior* to the trial itself. When Mr. Turgeon, counsel for Industrial Alliance, proposed a "pragmatic compromise" in lieu of an adjournment, Archambault J. agreed, with the understanding that he would assist the self-represented litigant by translating from French to

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[56] *Pintea v. Johns*, [2017] 1 S.C.R. 470, at para. 4.
[57] Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006), pp. 1-2.
[58] George R. Hendy, "The *per se* litigant / Self-representation" (2015) Barreau de Montréal pg. 3; Standing Committee, "Access to Justice in English in the District of Montreal. February" (2007).

English, as the need arose.[59] The Federal Court of Appeal erred in rejecting the informed choice of Mr. Turgeon on behalf of his clients and witnesses.

***Informality of the proceeding in the Tax Court context***

64. Tax Court proceedings are supposed to be informal. Thus, the "pragmatic compromise", which suggests a certain level and degree of informality, is in keeping with the more relaxed and informal spirit of such hearings. The informal nature of the proceedings is described at s. 18.15(3) of the *Tax Court Act*, which reads:

> Notwithstanding the provisions of the Act under which the appeal arises, the Court is not bound by any legal or technical rules of evidence in conducting a hearing and the appeal shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit.[60]

## E. The Practice of Law in the Unique Jurisdiction of the City of Montreal

65. This case was heard in the City of Montreal, a city in which English and French are routinely used interchangeably (not only in daily life but in the court system as well).[61]

66. Section 133 of the *Constitution Act* ensures that both English and French can be plead in any Federal Court in Canada and any court in the Province of Quebec. Montreal, with its large Anglophone minority population, presents a unique challenge in both the Quebec court system as well as the Federal Court system. It is not possible to untangle the linguistic and practical reality of the legal system in Montreal from the facts of this case.

67. In "Perspectives of an Anglophone Quebecker", the Honourable Justice Allan R. Hilton, a puisne justice on the Quebec Court of Appeal, addressed the interchangeable use of the English and French languages—and the resultant hybrid terminology—in Court proceedings. He notes that bilingual lawyers will often use both languages in Court:

> Because of the great extent to which they plead cases in French, Anglophone lawyers tend, at least on occasion, to talk in somewhat of a hybrid language when they address a judge in English. An Anglophone judge sitting in a motions court, for example, might hear an Anglophone lawyer say something like this: "My Lord, we have been referred to you by the Greffière spéciale because we cannot

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[59] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[60] *Tax Court of Canada Act*, RSC 1985, c T-2, s. 18.15(3) ("*TCC Act*").
[61] *The Practice of Law in Québec*, *supra* note 26, at pp. 5b-5.

> agree on an échéancier for this case and we want you to fix one. In addition, I wish to present an application for an ordonnance de sauvegarde to remain in effect until the hearing on the injonction interlocutoire." Translated into proper English, this statement would be as follows: "My Lord, the Special Clerk has referred us to you because we cannot agree on a timetable for this case and we want you to establish one. In addition, I wish to present an application for a safeguard order to remain in force until the hearing on the interlocutory injunction".[62]

68. Justice Hilton goes on to provide a first-hand account of how the judicial system in Montreal deals with the challenges that self-represented litigants pose in an environment where English and French are often used interchangeably. For example, Justice Hilton notes that transcripts will often have both English and French.[63]

69. Further, Justice Hilton states that it is not at all uncommon for Judges to act as translators in Superior Court—particularly when a party cannot afford to hire a translator.[64] While Federal Courts are required to provide translator services when a party requests them, Quebec courts are not required to pay for the expense of a translator if a party cannot afford one. Thus, in the case of two unilingual self-represented litigants of the opposite language, the Judge will often have no choice but to act as a translator.[65] Moreover, when counsel is involved and one party is a self-represented litigant, it is a common practice for a Judge to politely ask opposing counsel if he or she would be willing to plead in the language of the self-represented litigant. Most lawyers will agree to do so.[66]

70. Justice Archambault's assumption of the role of translator in this case was *entirely consistent* with common practice in Montreal courtrooms. When it became apparent the Appellant was unable to understand French submissions, Justice Archambault was willing to adjourn for translators.[67] The resultant "pragmatic compromise" was in keeping with the ways in

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[62] *Ibid* at pp. 5b-7.
[63] *Ibid* at pg. 5b, 11-12.
[64] *Ibid* at pg. 5b-12.
[65] *Ibid.*
[66] *Ibid.*
[67] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

which Judges in Montreal respond to such circumstances when the parties do not wish to adjourn.[68]

71. Justice Hilton provides further guidance on the issue of how Montreal Judges deal with unilingual opposing parties of the opposite language as follows:

> We all know that the proper management of trials and appeals involving self-represented litigants is already a challenge for counsel and judges alike. It is even more so when language considerations are factored in. When lawyers are involved on the other side of the case, they will generally gracefully acquiesce to a request from the judge to speak in the language of the self-represented litigant, even if that language is their second one...Matters become more complicated, however, when a unilingual self-represented litigant has to listen to the testimony and then cross-examine a witness who speaks only the other language. Unless the self-represented litigant has the means to hire an interpreter for the purpose, the trial judge has to more or less muddle through and convey the essence of the questions to the witness...[69]

## F. Circumstance Led to the Pragmatic Compromise

72. Proceedings before Archambault J. were conducted pursuant to ss. 18.15(3) of the *Tax Court of Canada Act*, which directs the Tax Court of Canada to conduct hearings "as informally and expeditiously as the circumstances and considerations of fairness permit".[70]

73. Language issues arose on the second day of the hearing when Mr. Turgeon for Industrial Alliance indicated that his first witness, Mr. Michaud, would be testifying in French. In response, Mazraani indicated that he would need an interpreter if Mr. Michaud was to testify in French[71]. The key passages as identified by the Federal Court of Appeal are as follows:

> JUSTICE ARCHAMBAULT: Fine. So let's start with Mr. Michaud. It's Michaud. It's not Comeau. It's Michaud.
>
> MR. TURGEON: Bruno Michaud. Monsieur Bruno Michaud.
>
> JUSTICE ARCHAMBAULT: O.K. So ---
>
> MR. TURGEON: That will testify in French if you have no ---

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[68] *The Practice of Law in Québec*, *supra* note 26, at pg. 5b-12.
[69] *Ibid.*
[70] *TCC ACT*, *supra* note 60, s. 18.15(3).
[71] AR, Volume III, Tab 12, Transcript, at pp. 7-10.

JUSTICE ARCHAMBAULT: I don't have any problem except that the party – you don't understand French very well?

MR. MAZRAANI: No.

JUSTICE ARCHAMBAULT: So ---

MR. TURGEON: And I hesitate to impose the witness ---

JUSTICE ARCHAMBAULT: Okay. Because ---

MR. TURGEON: Well, yeah, my colleague is referring to the Exhibit E-4 – A-4 that is – that he's speaking French.

MR. JILWAN: His job application.

--- (SHORT PAUSE)

MR. TURGEON: And my client knows as a matter of fact that he's speaking French.

JUSTICE ARCHAMBAULT: He picked up the lowest ---

MR. TURGEON: Yeah.

JUSTICE ARCHAMBAULT: --- the lowest level of French. Are you uncomfortable with having this witness testify in French?

MR. MAZRAANI: Of course.

JUSTICE ARCHAMBAULT: Would you need -- would you need an interpreter?

MR. MAZRAANI: Of course.

JUSTICE ARCHAMBAULT: Of course what?

MR. MAZRAANI: I need an interpreter. I can't ---

JUSTICE ARCHAMBAULT: You need an interpreter.

MR. MAZRAANI: --- because this case is ---

MR. TURGEON: Okay. Let me ---

> JUSTICE ARCHAMBAULT: Because I have to -- you know, I have to be fair to both parties. You know, I'm prepared to let him speak in French but then I would have to arrange for an interpreter for him.[72]

74. As the transcript goes on to indicate after the above exchange, it was Mr. Turgeon who proposed the notion of the witness testifying in English, not the Trial Judge. The Trial Judge was initially prepared to let the witness testify in French.[73] The "pragmatic compromise" arose after Mr. Turgeon sought an adjournment to confer with his client.[74]

75. After the adjournment, Mr. Turgeon proposed that Mr. Michaud testify in English but that he be permitted to express himself in French on technical issues, which could then be translated into English - the pragmatic compromise.[75]

76. Both the Judge and Mazraani accepted Mr. Turgeon's proposal.[76] The Federal Court of Appeal erred by characterizing the compromise as resulting from Archambault J.'s granting an adjournment (for the purpose of allowing Mr. Turgeon to devise a compromise).[77] In fact, it was Mr. Turgeon who proposed the brief adjournment and then proposed the compromise. In its decision, the Federal Court of Appeal omitted the following portion of the transcript in which it is clear that Mr. Turgeon and Industrial Alliance chose to proceed in English:

> JUSTICE ARCHAMBAULT: If he doesn't want a—if he tells me he cannot follow what's going—is going to be going on in French, then---
>
> MR. TURGEON: Let me see if he—
>
> JUSTICE ARCHAMBAULT: Yeah. Would you like a break or—
>
> MR. TURGEON: Yeah, okay.
>
> JUSTICE ARCHAMBAULT: Yeah,
>
> MR. TURGEON: Well, 30 seconds, please,
>
> JUSTICE ARCHAMBAULT: Or I don't mind to wait, you know.

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[72] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10 [emphasis added by the Federal Court of Appeal].
[73] AR, Volume III, Tab 12, Trial Transcript, at pp. 8-10.
[74] AR, Volume III, Tab 12, Trial Transcript, at pp. 8-10.
[75] AR, Volume III, Tab 12, Trial Transcript, at pp. 8-10.
[76] AR, Volume III, Tab 12, Trial Transcript, at p. 10.
[77] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

(SHORT PAUSE)

MR. TURGEON: Well, what we propose that we have the testimony in English and the witness will do the best he can.

JUSTICE ARCHAMBAULT: Yeah.

MR. TURGEON: But at some point, he may, if it—

JUSTICE ARCHAMBAULT: Use the French words.

MR. TURGEON: comes to very technical issues, he ask to testify in French and we may briefly translate it to the other parties.

JUSTICE ARCHAMBAULT: Would you like to try that?

MR. MAZRAANI: Well I have---

JUSTICE ARCHAMBAULT: Okay We could try—

MR. MAZRAANI: Yeah.

JUSTICE ARCHAMBAULT:--and if we run into problems we can suspend it. Okay?

MR. TURGEON: Let's see to which extent we can go on.

JUSTICE ARCHAMBAULT: yeah, yeah Let's start it this way let's be pragmatic and we will see. I will I will make a suggestion once he on the witness stand that may help.

MR. TURGEON: Okay, yeah. Yeah, I'm sure.

JUSTICE ARCHAMBAULT: So let's start with your first witness.

MR. TURGEON: Okay. Monsieur Michaud, if you want to go in the box.[78]

77. Mr. Turgeon and Industrial Alliance's willingness to proceed with the trial in English, with small portions of French, was a result of their desire to move the matter forward and ultimately to conclusion rather than suffer an adjournment.[79] While the record does not contain any explicit reference to this fact, the conclusion follows logically from the facts of the case. The Appellant, in his personal capacity, has instructed counsel to state at this point in the factum that Mr. Turgeon used the word "we" to show his own willingness to enter into the pragmatic

[78] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[79] AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-111.

compromise. The use of the word "we" also demonstrates Mr. Turgeon's desire and capacity to use the English language.

## G. Motivations for Pleading/Testifying in One's Second Official Language

78. It is important to question Industrial Alliance's decision to proceed in English. What motivated Mr. Turgeon to propose the compromise? It is clear no one had contemplated a possible issue with respect to what language the matter would proceed in until the hearing began. Had they done so, arrangements for translation services would have been made.[80]

79. There are many circumstances in which a party or lawyer will voluntarily provide evidence or submissions in their second language. We must be careful not to assume that all Anglophone lawyers will solely plead in English in Federal or Quebec Courts and that all Francophone lawyers will solely plead in French in Federal or Quebec Courts.

80. Further, not all Anglophone witnesses will testify in English, nor will all Francophone witnesses testify in French. There may be many factors informing the choice of language.

81. Very few people are perfectly bilingual. Many people characterized as "bilingual" may well face issues, however minor, when attempting to communicate in their second language.[81] This does not suggest that a lawyer or witness would have to restrict his or her presentation solely to one's maternal official language at all times.

82. An Anglophone litigator may well wish to plead an entire case in French on behalf of a Francophone client in Montreal (despite the inevitability of fumbling over a few words in their second language). It is a matter of common human experience that people stumble over words no matter the language. Justice Hilton of the Quebec Court of Appeal discusses some examples wherein even Judges have struggled with a few words during trials in Montreal. A few errors certainly do not suggest an inability to carry on or a desire to switch the proceedings to another language.[82]

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[80] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10; AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-111.
[81] *The Practice of Law in Québec*, *supra* note 26, at pp. 5b-6.
[82] *The Practice of Law in Québec*, *supra* note 26, at pp. 5b, 6-7, 10.

## H. Examining Party to Provide Interpreter

83. According to the *Federal Court Rules*, the examining party is to provide an interpreter if the witness will testify in another official language. The fees and disbursements of the interpreter will be borne by the administrator of the Federal Court as *per* s. 93(2).[83]

84. In the proceedings at issue, Mazraani would have been required to provide a translator to examine any witnesses wishing to proceed in French and Industrial Alliance would have been required to provide translators if examining witnesses in English (had they wished to proceed entirely in French). The costs would have been paid for by the Federal Court. However, the Parties would have had to have sought such interpretation services a *minimum* of six days before the hearing.[84] In this case, neither party notified the Court of the linguistic reality at play and many of the difficulties arose because the parties had failed to work out the language issue amongst themselves as is required by the *Federal Court Rules* produced below:

> **Interpreter**
> 31 A request by a party under the Official Languages Act for an interpreter at a hearing shall be made in writing and be sent to the Administrator as soon as is practicable before the hearing begins.
> S. 93
> **Administrator to provide interpreter**
> (2) Where an interpreter is required because the examining party wishes to conduct an oral examination in one official language and the person to be examined wishes to be examined in the other official language, on the request of the examining party made at least six days before the examination, the Administrator shall arrange for the attendance and pay the fees and disbursements of an independent and competent interpreter.
> **Interpreter**
> 283 Rule 93 applies, with such modifications as are necessary, to the use of an interpreter at trial.[85]

85. Given that Mazraani was self-represented, he likely did not know he needed to apply for translators. The record is silent on this question, but translators were not ready to intervene. Consequently, an adjournment would have been a necessity—but for the "pragmatic

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[83] Federal Courts Rules (SOR/98-106), s. 93 (2).
[84] *Ibid.*
[85] *Ibid*, ss. 93 (1) (2), 283.

compromise."[86]

## I. Undertakings are Sometimes Given to Testify in the Second Official Language

86. The issue of linguistic compromises came up in the case of *Finney v. Gauthier*.[87] In *Finney v. Gauthier*, a case before the Court of Appeal for Quebec, Hilton J.A. dealt with the complex issue as to whether or not leave to appeal should be granted to examine whether the government should pay for the cost of translators. Hilton J.A. ultimately denied leave to appeal, but he did note some of the witnesses had undertaken to testify in English, despite being Francophone, and had, in fact, undertaken to *accommodate* the unilingual English-speaking Ms. Finney. Hilton J.A. noted as follows:

> I have been informed that the trial judge and all counsel for the respondents have undertaken to use the English language during the course of the trial, and that several witnesses who would otherwise testify in the French language have undertaken to testify in English. I have also been informed that as the trial has continued, these undertakings have been respected. I have every reason to believe that they will continue to be respected.
>
> While certainly not complaining about the undertakings to which I have referred, Mrs. Finney believes that such counsel and witnesses should not have to renounce their right to speak French during the trial if they so choose and therefore to speak English in order to accommodate her, but rather, that they too should be free to speak French if they wish, which would be facilitated if she was to have the interpretation services for which she contends.[88]

87. Unlike Federal Court, Quebec courts do not provide translation services. While the issue of whether or not Quebec courts *ought* to provide free translators in civil disputes is not before this Court, the case is simply used to illustrate that there are cases wherein witnesses agree to testify in their second language in order to accommodate another party.

88. Critically, they freely do so (it is their "choice" within the confines of applicable legislation) as in the case of *Najdowski v. Universite de Montreal* (where Francophone witnesses chose to testify in English to accommodate a partially unilingual party).[89] This is in line with the case at bar. Industrial Alliance's counsel proposed an English proceeding with some French

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[86] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[87] *Finney v. Gauthier*, 2006 QCCA 54, 2006 CarswellQue 58, at paras 5-6.
[88] *Ibid.*
[89] *Najdowski v. Universite de Montreal*, [2002] Q.J. No. 4139, at para 6.

rather than to have the matter adjourned. Had Industrial Alliance wanted to go forward in French then its counsel should have intervened and demanded the right of the witnesses to testify in French or demanded counsel's own right to plead in French.[90]

## J. Failure to Object

89. In *Abdallah v. Snopek*, the Ontario Divisional Court noted that the failure of opposing counsel to object to an improper jury address is often cited as a reason for refusing a remedy on appeal, particularly in civil cases. The Divisional Court held:

> …there are sound policy reasons underlying that general rule. If counsel makes an objection at trial, the trial judge still has an opportunity to deal with the issue, either by a correcting instruction to the jury or by taking the case away from the jury altogether. This is certainly by far the preferable course of action and counsel must be encouraged to take it. Most times, a timely objection will avoid a mistrial, with all of its attendant problems of cost and delay for the parties as well as for the justice system. If there is no penalty for a failure to object, counsel might be tempted to "hide in the weeds" upon hearing an objectionable address, hoping that the jury will find in favour of his or her client anyway, but nevertheless thinking that if the verdict is not a good one, it can be reversed upon appeal. There is therefore an onus on trial counsel to speak up if opposing counsel crosses the line, so that the trial judge can deal with the issue right then and there.[91]

90. The case of *Dale v. Toronto Railway* is also of assistance. In that decision, the Court of Appeal for Ontario found there is a duty for opposing counsel to "object openly and at once" to an offensive jury charge and held that if counsel does not object, "…he should *prima facie* be considered as waiving all objection and taking his chances of a favourable verdict – so that it will be too late to raise the objection as a ground of a motion for a new trial."[92]

91. While *Dale* deals with an objection to a jury charge, the principle still applies here. In failing to make an on the record *Official Languages Act* objection, counsel acquiesced to, and the Appellant reasonably relied on the assumption proceedings would be conducted primarily in English. Presumably, if Industrial Alliance had won the trial, it would not have raised the issue

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[90] AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert), AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon); AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[91] *Abdallah v. Snopek*, 2008 CarswellOnt 997, at para 37-38.
[92] *Dale v. Toronto R. Co.*, [1915] CanLII 535 (ON CA), at para 16.

of language rights on appeal. The fact the Respondent *waited* to properly object to a proceeding it had proposed is akin to a party who fails to object—in the hopes of obtaining a favorable verdict.[93] This principle has also carried forward to the present day, as is stated in *Marshall v. Watson Wyatt & Co*, wherein Laskin J.A. summarized the same point at para. 15 of that decision.[94]

92. The only exception to the failure to object doctrine appears to be where there has been a miscarriage of justice. The Court of Appeal for Ontario in *Montepeque v. State Farm Mutual Automobile Insurance Company* recently ruled a matter can only be raised for the first time on appeal if not giving effect to the ground of appeal would cause a miscarriage of justice:

> In a civil case, the failure to object at trial is usually fatal on appeal because "it is an indication that trial counsel did not regard as important or necessary the additional direction now asserted": *Marshall v. Watson Wyatt & Co.* (2002), 2002 CanLII 13354 (ON CA), 57 O.R. (3d) 813 (C.A.), at para. 15. An appellate court can still give effect to an objection to an aspect of a trial judge's jury charge raised for the first time on appeal, but only if not giving effect to the objection would cause a miscarriage of justice: see *Kerr v. Loblaws Inc.*, 2007 ONCA 371 (CanLII), 224 O.A.C. 56, at para. 32; and *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(6).[95]

93. In this case, the fact counsel did not properly object at any point during the trial to the witnesses giving evidence in their second language is fatal to the suggestion of a violation of linguistic rights. Declining to allow the Respondent to advance this argument would not create a miscarriage of justice.

94. The holding by the Federal Court of Appeal that Mr. Turgeon's own linguistic rights were violated is baffling.[96] Accepting this contention suggests that, if, at any time, a Montreal Anglophone lawyer stumbled over a few words in a French proceeding, or a Montreal Francophone lawyer stumbled over a few words in an English proceeding, the proceedings should *immediately* switch to counsel's first language.

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[93] AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert); AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon); AR, Volume. III, Tab 12, Trial Transcript, at pp. 7-8; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.

[94] *Marshall v. Watson Wyatt &* Co, 2002 Carswell Ont 65, at para. 15.

[95] *Montepeque v. State Farm Mutual Automobile Insurance Company,* 2017 ONCA 959, at para 34.

[96] AR, Volume VI, Tab 15, Trial Transcript, at p 145.

95. If counsel had wanted a French proceeding, he could have and should have clearly stated, on the record, that he was revoking the "pragmatic compromise," that the *Official Languages Act* gave him the right to plead in French, and that the witnesses should be permitted to testify exclusively in French.

96. The failure to object, in the language rights context, also came up in the case of *Leduc v. Canada*.[97] Mr. Leduc was a francophone government employee who was terminated during a bilingual meeting. Under s. 36 (1) of the *Official Languages Act*, Mr. Leduc was entitled to a meeting in the official language of his choice. Mr. Leduc did not protest that the meeting was held in both English and French. On the contrary, Mr. Leduc freely accepted the use of the English language. The Court held Mr. Leduc was given the opportunity to pursue his rights and chose to forego them.[98] This is very similar to the case at bar wherein counsel from Industrial Alliance proposed the "pragmatic compromise" and proceeded in the English language only to complain, for the first time, on appeal.[99]

## K. Federal Court of Appeal Decision in This Case Constitutes the First Occasion in Which *"Subtle Pressure"* or *"Pression Subtile"* Has Led to a Reversal of a Trial Result Involving Counsel

97. The Federal Court of Appeal described Archambault J. as having exerted "subtle pressure" during the trial to have the witnesses testify in English. There has never been a case in which a reversal has resulted due to pressure that is deemed "subtle." A Trial Judge "…should confine himself as much as possible to his own responsibilities and leave to counsel [his or her] function."[100]

98. The closest case that can be found to the concept of "subtle pressure" is from the Ontario Court of Appeal in *R v. Stucky*. In that case, the Court of Appeal excused counsel for failing to object at certain points during the trial as a result of the Trial Judge's hostile attitude towards both previous defence counsel and towards current defence counsel. The Trial Judge also vigorously cross-examined the accused at his trial on various offences related to

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[97] *Leduc v. Canada,* 2000 CanLII 15454 (FC).
[98] *Ibid* at para. 16, 18.
[99] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8.
[100] *R. v. Torbiak and Campbell* (1974), 18 C.C.C. (2d) 229 (Ont. C.A.), at para. 5, BA Tab 2.

telemarketing.[101]

99. The *Stucky* situation is far from the "subtle pressure" that the Federal Court of Appeal suggests Archambault J. exercised in the case at bar. There is nothing in the record suggesting the Judge was hostile or threatening towards counsel or towards any witnesses. The Judge merely indicated witnesses had been asked to testify in English as *per* Mr. Turgeon's request.[102] Accordingly the Federal Court of Appeal has misattributed the source of the "subtle pressure" – it stemmed from Mr. Turgeon's desire to avoid an adjournment of proceedings in light of the linguistic challenges presented by the Parties.

## L. The Right to Use One's First Official Language Has Limits

100. The right of a litigant to understand "what is going on" in court and to be understood is one aspect of the right to a fair hearing.[103] In *MacDonald*, a criminal defendant's right to understand Court proceedings and to be understood was described as a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. Indeed, certain aspects of this right are entrenched in general and specific provisions of the *Charter*.[104]

101. However, there are limits to this right and, fundamentally, they are about choice. The right to be tried, to be heard and to be understood in one's own language or the language of one's choosing is more "may" than "shall." For example, in Quebec, the fundamental right to a fair trial requires that interpreters be available (that they *may* be used), but not that they necessarily be provided at public expense (that they *shall* be used).

102. In *McCullock Finney c. Canada (Attorney General),*[105] the Quebec Superior Court held that, while specific provisions of the *Criminal Code* settle the question as to the use of one's preferred official language in the field of criminal law, the same does not apply to civil proceedings in Quebec. In *McCullock*, the Court did not think the provision of an interpreter at public expense was required, and went on to question whether it even had the power to impose

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[101] *R v. Stucky*, 2009 ONCA 151, at para. 78-90.
[102] AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110.
[103] *MacDonald v. Montreal (City)*, 1986 CarswellQue 110, at para. 114.
[104] *Ibid* at para 17.
[105] *McCullock Finney v. Canada (Attorney General)*, 2009 QCCS 4646.

(upon either level of government) the obligation to assume the costs of translation or interpretation services as a general principle.[106]

103. In *Marshall v. Gorge Vale Golf Club*,[107] the British Columbia Supreme Court held it did not have the power to order the Provincial government to provide free transcription services to a deaf litigant in a civil matter, and that the right to an interpreter, under s. 14 of the *Charter*, did not create an obligation on the respondent to pay for the services of an interpreter.

104. In *R. v. Butler*, the New Brunswick Court of Queen's Bench, Trial Division, considered whether a unilingual Anglophone, who had made a formal request for disclosure in English in a criminal matter, had the unqualified right to receive that disclosure in English. The Court was of the opinion that it was essential for the accused to establish the refusal to provide translated disclosure resulted in *actual* prejudice to his ability to make full answer and defence.[108]

105. In *Brenneur c. R.*, the Tax Court refused to force a unilingual self-represented party to hire a bilingual lawyer at a proceeding that the other parties wished to conduct on a bilingual basis.[109] Similarly in *R v. Rose*, the Quebec Superior Court held that the Crown does not have the obligation to translate all disclosure from French to English to accommodate unilingual anglophone counsel.[110]

106. In *Ewonde v. Canada*, a decision citing the decision at bar, the Court dealt with the issue of whether or not a Francophone could have a French proceeding after having commenced the proceeding in English (since he had initially been incarcerated in a part of Canada where English predominated). The Court cited the decision below/at bar in stating that bilingual parties do not have fewer rights than unilingual parties and, therefore, granted the requested alteration. The Federal Court of Appeal failed to recognize that Mr. Ewonde was a self-represented litigant, whereas Industrial Alliance was represented by sophisticated counsel who had proposed an English hearing.[111]

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[106] *Ibid* at para 62.
[107] *Marshall v. Gorge Vale Golf Club*, 1987 CarswellBC 852, at para 15.
[108] *R. v. Butler*, 2002 NBBR 325, at para 43-52.
[109] *Brenneur c. R.*, 2010 TCC 610, at para. 31-34.
[110] *Rose v. Her Majesty the Queen*, 2002 CanLII 45358 (QC CS), at para. 27.
[111] *Ewonde v. Canada*, 2017 CAF 112, 2017 FCA 112, at paras. 4, 6, 17; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8.

## M. The Case at Bar is Distinguishable

107. In *Beaudoin v. Canada (Minister of National Health and Welfare),*[112] the Applicant requested the hearing proceed in French, but the Pension Appeals Board decided the hearing would take place in English (a conclusion which the Applicant was "persuaded" to accept). The Applicant was found to be admittedly at fault in not requesting an adjournment as she had apparently intended to do so in order to have counsel present.

108. Although she did not request an adjournment, she had requested a hearing in French. The Court held that an "unrepresented party's *bona fide* request, on notice, for a hearing in the other official language must always be respected in full, and its denial amounts to a denial of natural justice, since it fetters the requesting party's ability to present a case in his or her own way."[113]

109. Therefore, in *Beaudouin,* the Federal Court of Appeal ruled the Applicant was entitled to a hearing in French. Although the request for a hearing in French was not rejected outright, failure to take the request at face value had the same effect.[114]

110. The *Beaudouin* decision is an entirely different situation from the case at bar, as it involved a self-represented party and not someone represented by a major Canadian law firm with sophisticated counsel.

111. While it is true that, in *Beaudoin*, the Board had asked Ms. Beaudoin if she and her witnesses were able to speak and understand English, and Ms. Beaudoin replied in the affirmative, Ms. Beaudoin had wanted a French proceeding. She was unrepresented and vulnerable. The contrast with this case is striking: Industrial Alliance was a sophisticated party represented by competent counsel.[115]

112. The present case is also distinguishable from that of *R v. M (T.) D.* In that case, the Yukon Court of Appeal ruled the Trial Judge erred in denying the witness the right to testify in French at trial. *R v. M (T.) D.* is distinguishable because the Crown actually *requested* that the

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[112] *Beaudoin, supra* note 33, at paras 9-13, 17.
[113] *Ibid* at para. 15.
[114] *Ibid*
[115] *Ibid* at paras. 9-13, 17; Appellant's Record, Volume III, Tab 12, Trial Transcript, at pp. 269-270.

witness testify in French, but the Judge denied the request. By way of contrast, this appeal involves a lawyer's agreement for the witnesses to testify in English.[116]

113. *Tshibangu v. Canada (Minister of Citizenship and Immigration),* is also distinguishable from this case. Mr. Tshibangu was self-represented and, against his wishes, was ordered by the Board to proceed in French. In this case, senior counsel from a large national firm would certainly know both his witnesses' rights, and his own language rights. Why did he not assert those rights clearly and unequivocally at trial? Claiming denial of a client's rights, after losing at trial, should not be condoned. Far from objecting to the pragmatic compromise, counsel even thanked the Trial Judge at the conclusion of the trial for "his patience."[117]

## N. Competent Solicitor

114. A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken.[118] Professional competence requires a reasonable knowledge of the applicable or relevant law, but does not require the knowledge of all the law applicable to the performance of a particular legal service.[119] The obligations of a lawyer are as follows:

- To be skillful and careful;
- To advise his client on all matters relevant to his retainer, so far as may be reasonable necessary;
- To protect the interests of his client;
- To carry out his instructions by all proper means;
- To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; and
- To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.[120]

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[116] *R. v. M. (T.D.),* 2008 YKCA 16, 2008 CarswellYukon 82, paras. 3-7, 44; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8.
[117] *Tshibangu v. Canada (Minister of Citizenship & Immigration),* 2004 FC 1621, 2004 CF 1621, at paras. 2-7; AR, Volume III, Tab 12, Trial Transcript, at pp. 7-9; AR, Volume VII, Tab 16, Trial Transcript, at p. 288.
[118] *Central Trust Co. v. Rafuse.* 1986 CarswellNS 40, at para 58.
[119] *Ibid* at para. 59.
[120] *PCF Acquisition Corp. v. Gowling Lafleur Henderson LLP.*, 2008 CarswellOnt 2506, at para. 200.

115. Further, a lawyer has a requirement in both Quebec and Ontario to advise his or her client, in appropriate circumstances, about language rights. The Ontario Rules of Professional Conduct ("**Ontario Code**") state the following:

> **3.2-2A** A lawyer shall, when appropriate, advise a client of the client's language rights, including the right to use.
> (i) the official language of the client's choice; and
> (ii) a language recognized in provincial or territorial legislation as a language in which a matter may be pursued, including, where applicable, aboriginal languages.
> 3.2-2B If a client proposes to use a language of his or her choice, and the lawyer is not competent in that language to provide the required services, the lawyer shall not undertake the matter unless he or she is otherwise able to competently provide those services and the client consents in writing.[121]

116. In the *Code of Professional Conduct of Lawyers* in Quebec, Article 26 states "…a lawyer must communicate with his client in such a manner as to be understood by the client."[122] The argument could be made that, by not informing the client regarding language rights, the client could not properly understand his lawyer, or was not properly advised by the lawyer.

117. In this case, the client was a corporation and most of its witnesses were part of the corporation. During the initial recess when the language issue first arose, Mr. Turgeon used the term "we" to suggest he and the client had agreed to a "pragmatic compromise" (i.e. that the proceeding would go ahead in English with some French on technical terms).[123] If we assume that the client was advised of its language rights, as it ought to have been, as it appears from the record that Industrial Alliance held a private meeting with counsel during the recess, then it clearly and willingly chose to waive such rights by proposing the English hearing with some French.

118. In *Wittenberg v. Fred Geisweiller*, Rivard J. noted the Defendant (who had requested a French trial) had <u>not</u> waived his right to a French trial because the Judge proceeded in English:

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[121] *The Ontario Rules of Professional Conduct Rules*, 3.2-A, 3.2-2B.
[122] *Code of Professional Conduct of Lawyers (Quebec), An Act Respecting the Barreau du Québec*, chapt. B-1, S4, Rule 26.
[123] AR, Volume III, Tab 12, Trial Transcript, at p. 9.

"…the waiver of such a right must be clear and informed".[124] A clear and informed waiver of a French hearing existed here since counsel for Industrial Alliance proposed an English hearing, supplemented by some French, to avoid having to adjourn for translators.[125]

119. In this case, Archambault J. faced what the Ontario Superior Court has recently characterized as: "the challenge for the Court is to do justice – to balance the sometimes competing principles of economy, consistency, finality, fairness and the integrity of the administration of justice."[126] Under the circumstances, Archambault J. carefully balanced the competing interests of all Parties. This balancing is entitled to considerable deference.

120. Archambault J. had a positive duty under s. 15 of the *Official Languages Act* to adjourn for translators if a witness, party, or lawyer wished to proceed in French. In this case, the parties wished to proceed in English (with some French to avoid adjourning the matter). There is nothing in the record to suggest that Archambault J. forced any witness to proceed in English.[127]

**O. Were Mazraani's language rights violated?**

121. The Federal Court of Appeal stated in its decision that Mazraani's English language rights were also violated at certain points during the course of the proceedings – such as when Archambault J. did not translate testimony given in French. Critically however, Mazraani never asserted a language rights violation and was content with the result of the proceedings.

122. Notwithstanding, the Federal Court of Appeal appears to put an *alleged* violation of the Appellant's language rights in its decision to justify a remand for a new trial. Giving a new trial to the Respondents partly because Mazraani's rights were *supposedly* violated is not appropriate. Mazraani does not wish to go through the time and expense of a second trial because Archambault J. failed to translate at certain instances (which had no bearing on the outcome) from French to English. It should be remembered Mazraani did make objections, and that the

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[124] *Wittenberg v. Fred Geisweiller / Locomotive Investments Inc.*, 1999 CarswellOnt 1888, at para. 11.
[125] AR, Volume III, Tab 12, Trial Transcript, at pp. 7-10.
[126] *Aviva Insurance Company v. Intact Insurance Company*, 2018 ONSC 238, at para. 25.
[127] AR, Volume IV, Tab 13, Trial Transcript, at p. 56 (Ms. Lambert); AR, Volume IV, Tab 13, Trial Transcript, at pp. 109-110; AR, Volume VI, Tab 15, Trial Transcript, at pp. 145, 225-226 (counsel Turgeon); AR, Volume III, Tab 12, Trial Transcript, at pp. 7-8.

Judge immediately reverted back to English. Further, Mazraani had agreed to the English proceeding with some French.[128]

123. To order a new trial based on an *alleged* violation of the Appellant would bring the entire system of justice into disrepute. By way of analogy, one of the reasons why courts have traditionally not allowed ineffective assistance of counsel to be a ground of appeal in civil proceedings owes to the fact that a trial conducted negligently by the losing party's counsel would then force the winning party to have to endure a second trial. Traditionally, Courts have preferred not to prejudice respondents over negligence involving appellant's counsel at trial by forcing a second trial.[129]

## P. Alleged Bias Issue

124. The Federal Court of Appeal has failed to rule on the alleged bias of Archambault J.[130] This Honourable Court, if it overturns the Federal Court of Appeal on the language rights issue, should not remit the matter to that Court for further review This Honourable Court should simply rule there was no bias in light of a Judge's obligation to assist self-represented persons (which can involve asking questions).

125. The Federal Court of Appeal decision was released at approximately the same time as *Pintea v. Johns*, wherein this Honourable Court fully endorsed the *Statement of Principles on Self-Represented Litigants and Accused Persons* established by the Canadian Judicial Council. One of those principles entitles a Judge to assist with questioning witnesses.[131]

126. The questioning of the witnesses in this case, in the context of a self-represented litigant, is in line with the *Statement of Principles on Self-Represented Litigants and Accused Persons*. Simply put, Mazraani was a relatively unsophisticated party and the Respondents were represented by competent counsel. In these circumstances it is expected that Judges will partake

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[128] FCA Decision, *supra* note 15, at paras 24-26.
[129] *W. (D.) v. White*, 2004 CarswellOnt 3379, at paras 51-55.
[130] FCA Decision, *supra* note 15 at para 27.
[131] *Pintea v. Johns*, *supra* note 56; Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006) pp. 1-2.

in questioning. Furthermore, under the *Tax Court of Canada Act* these proceedings are intended to be informal.[132]

**Q. Conclusion**

127. The Appellant was a self-represented litigant in the Federal Tax Court of Canada. The Respondent, a sophisticated corporate party, was represented by experienced counsel. At the behest of Mr. Turgeon, and in order to spare an adjournment of proceedings, the Parties agreed to conduct the hearing primarily in the English language, with direct French to English translation provided by Archambault J. as needed.

128. None of this offends the spirit of language rights legislation in Canada. To the contrary, "pragmatic compromise" is the hallmark of Canadian linguistic tradition. The manner in which the language rights issue has been addressed by the Respondents and the Federal Court of Appeal below does a disservice to this tradition.

129. Ultimately, the language rights question is an esoteric conundrum far removed from the practical reality faced by the Appellant. Mr. Mazraani, as a self-represented litigant in Federal Tax Court, obtained a favourable result. The decision of Archambault J. was sound. In the name of judicial economy, and the interest Canadians have in stable and reliable outcomes, highly discretionary decisions about the conduct of courtroom proceedings should not be interfered with. Rather, this Honourable Court should allow the Appellant's appeal and reinstate Archambault J.'s decision.

## PART IV: SUBMISSIONS ON COSTS

130. The Appellant seeks the costs of this proceeding, and before the Federal Court of Appeal along with the costs awarded at trial.

## PART V: ORDER SOUGHT

131. The Appellant requests:

a. that the appeal be allowed;

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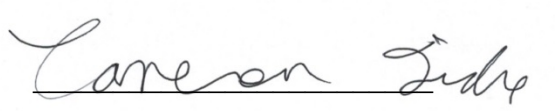
[132] *Ibid*; *TCC Act*, *supra* note 60, ss. 18 (1), (2), 18.15(1), (2) (3)

b. an order reinstating the original decision of Archambault J.;

c. any such other order as this Honourable Court deems just, taking into account the particular hardship Mr. Mazraani insists he has faced since these proceedings began in 2013; and

d. the Appellant, in his personal capacity, having been a *pro se* litigant until just recently, also has insisted that counsel include that Mr. Mazraani believes that this Honourable Court should censure Industrial Alliance for the excessive termination of advisors. Mr. Mazraani asserts that such terminations have had a negative impact upon himself and the families of advisors.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 13th day of February, 2018.



Cameron Fiske

**Counsel for the Appellant**

## PART VI: TABLE OF AUTHORITIES

**CASES** **PARAGRAPH(S)**

**SECONDARY SOURCES**

**LEGISLATION**

*Code of Professional Conduct of Lawyers (Quebec), An Act Respecting the Barreau du Québec*, chapt. B-1, S4, Rule 26

Code de déontologie des avocats, Article 26

*Constitution Act, 1867* 30 & 31 Victoria, c. 3 (U.K.), R.S.C. 1985, App. II, No. 11, s. 133. *Constitution Act*, 1982, *Canadian Charter of Rights and Freedoms* Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto s. 14, 15, 16, 19

*Lois constitutionnelles de 1867 à 1982*, 30 & 31 Victoria, ch. 3 (R.U.) s. 14, 15, 16, 19, s. 133

*Federal Courts Rules* (SOR/98-106), ss. 31, 93.

*Règles des Cours fédérales* (DORS/98-106), ss. 31, 93

*Official Languages Act*, R.S.C. 1985, c. 31 (4th Suppl.), ss. 2, 14, 15, 18

*Loi sur les langues officielles* (L.R.C. (1985), ch. 31 (4e suppl.)), s. 2, 14, 15, 18

*Tax Court of Canada Act* (R.S.C., 1985, c. T-2), ss. 18 (1), (2), 18.15(1), (2) (3)

*Loi sur la Cour canadienne de l'impôt* (L.R.C. (1985), ch. T-2), ss. 18(1), (2), 18.15(1), (2), (3)

The Ontario Rules of Professional Conduct Rules, 3.2-A, 3.2-2B

Barreau de l'Ontario Règlements administratifs 3.2-A, 3.2-2B