S.C.C. File No.: 37642

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

B E T W E E N:

KASSEM MAZRAANI

APPELLANT

- and -

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

RESPONDENTS

-and-

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(Pursuant to Order of Justice Karakatsanis dated March 29, 2018*)*

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1. Reply Factum

A. Overview

1. The four interveners have failed to address the fact that the parties, the witnesses, and their counsel *chose* to proceed in English by agreement and on the understanding that French could be used as necessary (with translation assistance provided by the Trial Judge).[1]

2. Mr. Jilwan, on behalf of the Ministry of National Revenue indicated that his witness, Ms. Lambert, would proceed in English.[2] Mr. Michaud testified in English but with some French after Mr. Turgeon's *own* proposal *after* the Judge indicated that a translator could be obtained.[3] Mr. Leclerc told the trial Judge that he would let him know if he had difficulties in English.[4] Mr. Charbonneau was asked by the Trial Judge if he was capable of testifying in English (in accordance with the pragmatic compromise) and he indicated he would try (with no objection).[5] Mr. Turgeon proceeded in English and then later on in the trial hinted at some internal hesitancy with his second-language skills. Mr. Turgeon chose to conduct the closing argument in English after the Judge offered to translate his oral submissions from French to English.[6]

B. The problem posed by unilingual self-represented parties: the Judge as translator

3. Federal courts provide free translation services to parties appearing before them, yet Quebec Superior and Municipal courts do not. The Barreau du Québec says judges should generally not be acting as translators but this ignores the significant implications of that position.[7] Although this Honourable Court's decision only directly affects federal courts, it must be remembered that all Quebec courts are subject to s. 133 of the *Constitution Act*. In other words, the decision will still affect Quebec courts because, at present, any lawyer or witness is entitled to plead or testify in French or English.

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[1] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10, 29 (testimony of Michaud); AR, Volume IV, Tab 13, Trial Transcript, pp. 109-110 (testimony of Charbonneau); AR, Volume V, Tab 14, Trial Transcript, at pp. 4-5 (testimony of Beaudet); AR, Volume VI, Trial Transcript, at p. 155 (testimony of Leclerc); AR, Volume VI, Tab15, Trial Transcript, at pp. 225-226 (counsel Turgeon); Factum of the Intervener The Commissioner of Official Languages for Canada ("COLC"), at para. 2, 24, 26.
[2] AR Volume IV, Tab 13, Trial Transcript, p. 56 (testimony of Lambert).
[3] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10, 29 (testimony of Michaud).
[4] AR, Volume VI, Trial Transcript, at p. 155 (testimony of Leclerc).
[5] AR, Volume IV, Tab 13, Trial Transcript, pp. 109-110 (testimony of Charbonneau).
[6] AR, Volume VI, Tab15, Trial Transcript, at pp. 145-146, 225-226 (counsel Turgeon).
[7] Factum of the Intervener Barreau du Québec, at para. 20.

4. In a city like Montreal, it is inevitable that self-represented unilingual Francophones and self-represented unilingual Anglophones will litigate against each other.[8] If trial judges are restricted from providing translations, *all* cases involving unilingual self-represented litigants of the opposite language, where neither party can afford a translator, would have to be stayed (unless the Quebec Government is ordered to provide free translation). The question of whether there ought to be free translation *in Quebec* has never been addressed by this Court.[9]

C. Language rights should not be used strategically

5. Language rights in Canada ensure the protection of our country's official languages – they should not be used as a tool in the litigator's handbook. Language should not be used as a tactical device. If a party, lawyer, or witness uses language as a strategy the entire system of justice is brought into disrepute. For example, in *R c. Émond,* a Francophone wished to proceed in English with Anglophone co-accused rather than Francophone co-accused as a consequence of his perception that the Anglophone co-accused were *more likely* to be acquitted. The request was denied.[10]

6. The decision below creates the risk that some witnesses or counsel will strategically reverse their language preference to secure a practical advantage or grounds of appeal. As such, any test developed by this Honourable Court should take into account the very real potential for abuse.

D. The accommodation of self-represented parties is noble but not required

7. It is common practice for a Trial Judge to politely ask lawyers in Montreal if they are willing to plead in the language of a unilingual self-represented litigant. While most lawyers who appear before the Superior Court in Montreal acquiesce to such requests, there is no requirement to do so.[11] In the present case, Justice Archambault did not actually ask Mr. Turgeon or his client

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[8] The Honourable Justice Allan R. Hilton "The Practice of Law in Quebec: The Perspective of an Anglophone Quebecker" ("The Practice of Law in Québec"), at 5b-12; *9088-2895 Quebec inc. c. Brattas*, 2007 QCCS 2163 (CanLII) at para. 31.
[9] *Finney v. Gauthier*, 2006 QCCA 54, 2006 CarswellQue 58, at para. 5-6; *McCullock Finney v. Canada (Attorney General)*, 2009 QCCS 4646, at para. 62.
[10] *Édmond c. R*, 2012 QCCS 7223 (CanLII), at para. 22.
[11] "*The Practice of Law in Québec*", at 5b-12 http://www.lsuc.on.ca/media /third_ colloquium_ allan hilton.pdf.

to plead or testify in English at the outset. *It was Mr. Turgeon and his client who proposed to do so.*[12]

8. In its factum, the Barreau du Québec suggests that the Appellant has argued that the rights of a self-represented litigant are greater than the rights of parties represented by counsel. Respectfully, this is incorrect. The Appellant was only pointing out the possible motivation for Mr. Turgeon and his witnesses choosing to proceed in English. That is, they may have done so to accommodate the Appellant because he was unilingual. They may also have done so to avoid an adjournment. The point is that they *chose* to do so.[13]

9. Ultimately, we will never know what Industrielle Alliance or Mr. Turgeon's motivation was to propose the pragmatic compromise. The answer cannot come out of oral argument or a factum without the benefit of cross-examination on affidavit. Further, we do not know why Mr. Charbonneau chose to continue in English even after the Judge asked him whether he was comfortable in the English language.[14]

E. The test for a Federal Judge in Official Languages Act matters

10. In light of s. 15 of the *Official Languages Act*,[15] it is proposed by the Appellant that this Court should set a test for judges to ensure that a witness's language rights are met. The scenario at bar is wholly different from s. 530 of the *Criminal Code*. In s. 530(3) of the *Criminal Code*, an accused is to be informed by a Provincial Court Judge, on a first appearance, of the right to make an application to be heard in the official language of the accused's choice. This positive duty only arises once whether the accused has a lawyer or not.[16]

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[12] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10.
[13] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10, 29 (testimony of Michaud); AR, Volume IV, Tab 13, Trial Transcript, pp. 109-110 (testimony of Charbonneau); AR, Volume V, Tab 14, Trial Transcript, at pp. 4-5 (testimony of Beaudet); AR, Volume VI, Trial Transcript, at p. 155 (testimony of Leclerc); Factum of the Barreau du Québec, at para. 21; Factum of the Intervener L'Association des juristes d'expression française de l'Ontario, at para. 22
[14] AR, Volume III, Tab 12, Trial Transcript, pp. 7-10, 29 (testimony of Michaud); AR, Volume IV, Tab 13, Trial Transcript, pp. 109-110 (testimony of Charbonneau); AR, Volume V, Tab 14, Trial Transcript, at pp. 4-5 (testimony of Beaudet); AR, Volume VI, Trial Transcript, at p. 155 (testimony of Leclerc); Factum of the Intervener COLC, at para. 24.
[15] *Official Languages Act*, R.S.C. 1985, c. 31 (4th Suppl.), s. 15.
[16] *Criminal Code* (R.S.C., 1985, c. C-46), s. 530 (3)

11. In this case, the parties were already at the appeal (a trial in *form*). This is a civil case. Trial dockets are already congested. Translators have to be booked in advance of trial just as in an out of court oral examination.[17] Trial Judges must be able to rely on counsel to sort out the issue of translation services as this *directly* affects trial length and the scheduling of other cases.

12. If the Judge has to inform each witness of his or her language rights as they get on the witness stand, this increases the danger of language being used as a litigation strategy. Lawyers should inform their clients and witnesses with respect to their language rights and inform the trial judge as to what language the witness will testify in advance.[18]

13. The following test is proposed by the Appellant with respect to the duties of a Federal Judge and section 15 of the *Official Languages Act* and the obligations of lawyers:

- Lawyers should have a positive duty to inform both their clients and witnesses of their right to testify in English or French in advance of trial or examination.[19]
- Lawyers should have a positive duty to ensure that witnesses testifying in the other official language have a translator (if needed) at trial.[20]
- In the case of self-represented litigants, an opposing lawyer should have a positive duty to take all necessary steps in advance of trial to inquire of the self-represented litigant as to what language they understand, what language they will proceed in, and what language their witnesses will testify in -- all of which should be reported to the Court. In the case of difficulty contacting the self-represented litigant or receiving a response, perhaps a case conference should take place to clarify the issue (and such a mechanism should exist even when operating in the informal procedure).[21]

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[17] *Federal Courts Rules* (SOR/98-106), 93.
[18] The Ontario Rules of Professional Conduct Rules, 3.2-A, 3.2-2B; *Code of Professional Conduct of Lawyers (Quebec), An Act Respecting the Barreau du Québec*, chapt. B-1, S4, Rule 26, 122 Model Code of Professional Conduct as amended on March 14, 2017, at page 22, Rules 3.2-2A, 3.2-2B and commentary https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf; Factum of the Intervener, The Canadian Bar Association, at para. 23.
[19] *Ibid* and in response to the Factum of the Intervener, The Canadian Bar Association, at para. 23.
[20] *Federal Courts Rules* (SOR/98-106), 93.
[21] George R. Hendy, "The *per se* litigant / Self-representation" (2015) Barreau de Montreal at page 21; Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons" (2006), Section C, page 6-7. A lawyer reporting languages to be used at trial

- With respect to s. 15 of the *Official Languages Act*, and somewhat similar to the remand provision in s. 530(4) of the *Criminal Code*, a Trial Judge should adjourn any proceeding for translators wherein it is objectively demonstrable that the witness is having difficulty expressing themselves in the official language(s) that they were supposed to testify in. Cost consequences could be factored in if counsel *ought to have known* in advance of the trial of the language difficulty.[22]

- In rare cases, trial judges should be able to assist with translation (where the parties agree and the Judge is willing to accept the task).

14. While Federal Judges must ensure that the language rights of the witnesses are protected, it is not a proper answer to put the *entire* burden on Judges.[23]

15. Our system simply must rely on counsel to assist the Judge (especially when there is a self-represented litigant).[24] In the case at bar, Archambault J. did the best he could with parties who had not worked out the language issue beforehand. At no point did Archambault J. deny any witness the right to speak in French. The parties, witnesses, and lawyers chose to proceed in English but with some French on technical terms. We must assume that the witnesses were prepared by the lawyers to testify,[25]that the lawyers for the Ministry and Industrial Alliance were competent, and that the lack of clear objection to testimony or pleading in English resulted from the desire of the parties and witnesses to willingly maintain the pragmatic compromise.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2018.

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Counsel for the Appellant

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to the Court will ensure that a Judge can fulfill their obligations to self-represented litigants, page 7, Tax Court of Canada Rules (Informal Procedure).

[22] *Criminal Code* (R.S.C., 1985, c. C-46) S. 530 (4).
[23] Factum of the Intervener, The Canadian Bar Association, at para. 23
[24] Thomas G. Heintzman, O.C., Q.C., "Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System", Papers from the 9th Colloquium, October 2007, online at http://www.lsuc.on.ca/latestnews/a/hottopics/committee-on-professionalism/papers-from-past-colloquia.
[25] *International Insurance Co. v Morden & Helwig Ltd.*, 2001 CanLII 28077 (ONSC), at para. 64 and see also the Law Society of Ontario's Rules of Professional Conduct s. 5.1-2 and the Code of Professional Conduct of Lawyers (Quebec), s. 122; Plumpton and Henein "The Advocates Society Symposium on Professionalism A Lawyer's Duty to Client's and Witnesses", at pg. 13 [Reply Book of Authority Tab 1].

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