

**SUPREME COURT OF CANADA**

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| **Citation:** Conseil scolaire francophone de la Colombie‑Britannique *v.* British Columbia,2013 SCC 42, [2013] 2 S.C.R. 774 | **Date:** 20130726**Docket:** 34908 |

**Between:**

**Conseil scolaire francophone de la Colombie-Britannique, Hélène Reid, Paul Rostagno, Annette Azar-Diehl, Pierre Massicotte, Line Beauchemin, Alain Milot, Mélanie Boucher, Valérie Walters, Caroline Bédard, Lise Buitendyk, Isabelle Chenail, Kim Gerry, Louise Baldo, Nicole Leblanc, Guy Bourbeau, Suzanne Martin, Lise Séguin, Kim Davis, Valérie Sicotte, Chantal Ricard, Nadie Savard, Marie-Christine Wilson, Stéphane Perron, Marie-Nicole Dubois, Bruno Calvignac, Carine Hutchinson, Jackie Pallard, Kathleen Bayzand, Guy Champoux, Rachel Chirico, Cate Korinth, Ann Quarterman and Caroline Rousselle**

Appellants

and

**Her Majesty The Queen in Right of the Province of British Columbia and Minister of Education of the Province of British Columbia**

Respondents

- and -

**Attorney General of Ontario, Commissioner of Official Languages of Canada and Association des juristes d’expression française de la Colombie-Britannique**

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**(paras. 1 to 65)**Dissenting Reasons:**(paras. 66 to 114) | Wagner J. (McLachlin C.J. and Rothstein and Moldaver JJ. concurring) Karakatsanis J. (LeBel and Abella JJ. concurring) |

Conseil scolaire francophone de la Colombie-Britannique *v.* British Columbia, 2013 SCC 42, [2013] 2 S.C.R. 774

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Languages of Canada and Association des juristes

d’expression française de la Colombie‑Britannique Interveners

**Indexed as: Conseil scolaire francophone de la Colombie‑Britannique *v.* British Columbia**

2013 SCC 42

File No.: 34908.

2013:  April 15; 2013:  July 26.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for british columbia

 *Courts — Rules of court — Affidavits — Language of exhibits — 1731 English Act received into B.C. law providing English as language of court “proceedings” — B.C. Supreme Court Civil Rules also requiring documents “prepared for use in the court” be in English unless impracticable — French language school board seeking to file affidavits attaching exhibits prepared in French prior to litigation — Whether 1731 Act or B.C. rules preclude admission of exhibits prepared in French without English translation — Whether admitting exhibits in French within inherent jurisdiction of superior courts to control own processes — Whether B.C. Civil Rules limit exercise of inherent jurisdiction — Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 22‑3(2).*

 In an action alleging the violation of French language education rights as guaranteed by the *Charter*, a B.C. French language school board (the “Conseil”), and a federation of Francophone parents, brought an interlocutory application to have exhibits to affidavits written in French introduced into evidence in order to demonstrate they had standing to bring the action. They intended to rely on the content of the exhibits, prepared before the litigation was contemplated, which described their respective roles in the protection and promotion of French‑language education in the province. British Columbia objected to the admission of the exhibits without accompanying English translations on the basis of an old English statute received into the colonial law of B.C. (the “*1731 Act*”), as well as Rule 22‑3 of the B.C. *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (“*Civil Rules*”), which respectively require court “proceedings” and any “document prepared for use in the court” to be in English. The chambers judge denied the application. The Court of Appeal dismissed the appeal.

 *Held* (LeBel, Abella and Karakatsanis JJ. dissenting): The appeal should be dismissed.

 *Per* McLachlin C.J. and Rothstein, Moldaver and Wagner JJ.: The B.C. legislature has exercised its power to regulate the language to be used in court proceedings in that province by adopting legislative provisions which require civil “proceedings”, which includes exhibits to affidavits filed as part of those proceedings, to be in English. In doing so, the legislature has ousted the inherent jurisdiction of the courts and, therefore, no residual discretion exists to admit documents in other languages without an English translation.

 The *1731 Act* was received into B.C. law and is in force in that province, pursuant to the requirements of s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: the *1731 Act* was in force in England on November 19, 1858, it was applicable to the local circumstances in B.C. at the time, and it has not been modified by subsequent legislation having the force of law. As such, the test for determining whether a law is applicable is based on its suitability and not on a more stringent test of necessity. Furthermore, applicability is to be assessed as of the date of reception and not as of the date the cause of action arose. This approach results in valuable certainty in the law and is also respectful of the courts’ role of interpreting statutes and of the legislature’s role of modifying them to reflect changing circumstances. Given that in 1858 the government in B.C. operated in English, and English was the common language of settlers, nothing about the circumstances in the province would have made a rule requiring that court proceedings be conducted in English unsuitable.

 In addition,the legislature has neither expressly repealed or modified the *1731 Act* in respect of civil proceedings, nor has it implicitly modified it by “occupying the field” with subsequent legislation. The *1731 Act* pertains not only to the language of documents filed in court, but also to that of judgments, orders, trials and evidence. A rule that covers only one aspect of the subject matter while remaining silent on other aspects cannot have the effect of impliedly modifying a received statute. Rules of civil procedure relating only to the documents used in court therefore cannot be said to occupy the entire field of language for court proceedings. This conclusion is reinforced by the fact that since 1965 the B.C. courts have repeatedly endorsed the *1731 Act* and the legislature has, rightly or wrongly, declined to act to change the law on language in court proceedings.

 Even if the *1731 Act* were found not to be applicable in B.C., Rule 22‑3 of the *Civil Rules* requires that exhibits attached to affidavits and filed in court be in English. Although the exhibits at issue were not prepared for use in court, once the exhibits were attached to the affidavits they became part of a document prepared for use in court. It cannot be possible to circumvent the rule by moving information on which a party seeks to rely from the body of the affidavit into an exhibit. If the party wishes to rely on the content of the exhibits, as opposed to their existence or their authenticity, the exhibits must comply with the rule. Rule 22‑3 therefore limits the court’s inherent jurisdiction to admit documents in languages other than English. Only those documents whose nature renders compliance with the rule impracticable can be admitted. Where, as here, the documents at issue are written in French, there is nothing inherent in them that would render translation into English impracticable, including the large volume of documents in question.

 Finally, it is not inconsistent with *Charter* values for the B.C. legislature to restrict the language of court proceedings to English. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. Although the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces; federalism is one of Canada’s underlying constitutional principles. It would be open to the B.C. legislature to enact legislation to authorize civil proceedings in French, which would no doubt further the values embodied in the language rights provisions of the *Charter*. However, in the absence of such an initiative, one cannot be imposed by the Court.

 *Per* LeBel, Abella and KarakatsanisJJ. (dissenting): Neither the *1731 Act* nor the British Columbia *Civil Rules* addresses the language of exhibits in court proceedings. In light of the silence of the British Columbia legislature, and pursuant to the court’s inherent jurisdiction, judges of the B.C. Supreme Court may allow French language documents, not prepared for use in court, to be filed in evidence as exhibits where this will ensure the administration of justice according to law in a regular, orderly and effective manner.

 Under the received *1731 Act*, the prohibition on foreign languages in “proceedings” — no matter how broadly “proceedings” is defined — does not address the language of exhibits filed as evidence, or prevent the tendering or acceptance of a document in a language other than English, even if the oral evidence is in English or translated into English. Given that the scope of the *1731 Act* does not include the language of exhibits, it is not necessary to consider whether it has been explicitly or implicitly modified and/or altered by B.C. legislation, by quasi‑constitutional federal legislation, or by the *Charter*.

 Similarly, the *Civil Rules* do not define “evidence” or “exhibit” and do not directly address the language of the proceedings, other than Rule 22‑3 which states documents “prepared for use in the court” must be in English. The exhibits at issue in this appeal, which include documents relating to the purpose and mission of the Conseil, were created in French long before litigation was contemplated. It could not be reasonably said that they were “prepared for use in the court”. By contrast, the affidavits to which the exhibits are attached were created for the court proceedings and must be in English. Therefore, based on the ordinary meaning of the words of the text, Rule 22‑3 does not apply to documents such as exhibits that, as in this case, were not prepared for litigation purposes.

 In the absence of clear and precise statutory language addressing the language in which documents not prepared for use in court must be filed, the British Columbia legislature has not ousted the court’s inherent jurisdiction. Therefore, the B.C. Supreme Court may exercise that jurisdiction to admit French documents if doing so would uphold, protect and fulfil the judicial function of administering justice. The matter should be remitted back to the B.C. Supreme Court accordingly. In deciding whether or not to exercise his or her discretion, the motion judge should consider relevant constitutional and quasi‑constitutional principles, including the status of French as an official language in Canada, the protection of official language minority rights, and the constitutional commitment to safeguarding and promoting both the French and English languages, as well as the specific circumstances of the parties. Here, the Conseil was established by statute of the British Columbia legislature pursuant to s. 23 of the *Charter* which guarantees French language education rights. The Conseil operates primarily in French. The trial judge, and all parties and their lawyers, except the Province of British Columbia, understand the French language and the underlying litigation is about constitutional French language rights. The motion judge must consider and weigh these and all other relevant factors in exercising the court’s inherent jurisdiction.

**Cases Cited**

By Wagner J.

 **Referred to:** *R. v. Keller*, [1966] 2 C.C.C. 380; *R. v. Watts, Ex parte Poulin* (1968), 69 D.L.R. (2d) 526, aff’d [1969] 3 C.C.C. 118; *R. v. Lajoie* (1970), 2 C.C.C. (2d) 89; *R. v. Pelletier*, 2002 BCSC 561 (CanLII); *R. v. Mercure*, [1988] 1 S.C.R. 234; *Uniacke v. Dickson* (1848), 1 N.S.R. 287; *Scott v. Scott* (1970), 2 N.B.R. (2d) 849; *McDonnell v. Fédération des Franco‑Colombiens* (1985), 69 B.C.L.R. 87; *Deeks Sand & Gravel Co. v. The Queen*, [1953] 4 D.L.R. 255; *Hellens v. Densmore*, [1957] S.C.R. 768; *Cooper v. Stuart* (1889), 14 App. Cas. 286; *Sheppard v. Sheppard* (1908), 13 B.C.R. 486; *Re McKenzie and McKenzie* (1970), 11 D.L.R. (3d) 302; *Robitaille v. Vancouver Hockey Club Ltd.* (1979), 13 B.C.L.R. 309; *Boleak v. Boleak*, 1999 BCCA 776, 183 D.L.R. (4th) 152; *R. v. Pare* (1986), 31 C.C.C. (3d) 260; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Han v. Cho*, 2008 BCSC 1208, 88 B.C.L.R. (4th) 193; *Bilfinger Berger (Canada) v. Greater Vancouver Water District*, 2010 BCSC 1104 (CanLII); *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78.

By Karakatsanis J. (dissenting)

 *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78; *R. v. Rose*, [1998] 3 S.C.R. 262; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319; *In re Coles and Ravenshear*, [1907] 1 K.B. 1; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Mahe v. Alberta*, [1990] 1 S.C.R. 342.

**Statutes and Regulations Cited**

*Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (G.B.), 1731, 4 Geo. II, c. 26, Preamble.

*Canadian Charter of Rights and Freedoms*, ss. 16 to 20, 23.

*Court of Appeal Rules*, B.C. Reg. 297/2001, r. 53.

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 530, 530.1.

*English Law Act*, R.S.B.C. 1897, c. 115.

*English Law Act*, R.S.B.C. 1960, c. 129.

*English Law Ordinance, 1867*, S.B.C. 1867, No. 7.

*English Law Ordinance, 1867* (1871), 30 Vict., No. 70.

*Evidence Act*, R.S.B.C. 1996, c. 124.

*Interpretation Act*, R.S.B.C. 1996, c. 238, s. 7.

*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 2.

*Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), Preamble.

*Statute of Uses*, 1535, 27 Hen. 8, c. 10.

*Supreme Court* *Civil Rules*, B.C. Reg. 168/2009, rr. 1‑1 “document”, “proceeding”, 1‑3, 22‑3(2), (3).

**Authors Cited**

*Black’s Law Dictionary*, 9th ed. St. Paul, Minn.: West, 2009, “proceeding”.

Blackstone, William. *Commentaries on the Laws of England*, vol. 3, by Joseph Chitty, ed. London: W. Walker, 1826.

Blickensderfer, Ulric. *Blickensderfer’s Blackstone’s Elements of Law Etc.* Chicago: Ulric Blickensderfer, 1889.

Bouck, John C. “Introducing English Statute Law into the Provinces: Time for a Change?” (1979), 57 *Can. Bar Rev.* 74.

British Columbia. *Debates of the Legislative Assembly*, 2nd Sess., 29th Parl., March 10, 1971, p. 646.

Cote, J. E. “The Reception of English Law” (1977), 15 *Alta. L. Rev.* 29.

Hogg, Peter W. *Constitutional Law of Canada*, 5thed. Supp., vol. 1. Toronto: Carswell, 2012 (updated 2012, release 1).

Jacob, I. H. “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23.

McPherson, Bruce Harvey. *The Reception of English Law Abroad*. Brisbane, Aust.: Supreme Court of Queensland Library, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

 APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Kirkpatrick, Frankel, Neilson and Bennett JJ.A.), 2012 BCCA 282, 34 B.C.L.R. (5th) 35, 323 B.C.A.C. 270, 550 W.A.C. 270, [2012] 10 W.W.R. 456, 24 C.P.C. (7th) 341, 351 D.L.R. (4th) 727, [2012] B.C.J. No. 1301 (QL), 2012 CarswellBC 1865, affirming a decision of Willcock J., 2011 BCSC 1043, 21 B.C.L.R. (5th) 62, 337 D.L.R. (4th) 45, [2011] B.C.J. No. 1475 (QL), 2011 CarswellBC 2039. Appeal dismissed, LeBel, Abella and Karakatsanis JJ. dissenting.

 *Robert Grant*, *Mark C. Power*, *Jennifer Klinck* and *Jean‑Pierre Hachey*, for the appellants.

 *Jonathan G. Penner* and *Karrie Wolfe*, for the respondents.

 *Josh Hunter*, for the intervener the Attorney General of Ontario.

 *Christine Ruest Norrena* and *Isabelle Bousquet*, for the intervener the Commissioner of Official Languages of Canada.

 *Francis Lamer* and *Casey Leggett*, for the intervener Association des juristes d’expression française de la Colombie‑Britannique.

 The judgment of McLachlin C.J. and Rothstein, Moldaver and Wagner JJ. was delivered by

 Wagner J. —

I. Introduction

1. Each of the provinces has the power under the Constitution, subject to certain restrictions, to make laws governing the language to be used in its courts. This power derives from the provinces’ jurisdiction over the administration of justice. The British Columbia legislature has exercised its power to regulate the language to be used in court proceedings in that province by adopting two different legislative provisions which require civil proceedings, including exhibits attached to affidavits filed as part of those proceedings, to be in English.
2. The appellants ask this Court to hold that the British Columbia courts retain a residual discretion to admit documents in languages other than English without an English translation. For the reasons that follow, I conclude that no such discretion exists. The British Columbia legislature has ousted the inherent jurisdiction of the courts and has required that court proceedings in the province be conducted in English. As a result, this appeal must be dismissed.

II. Facts

1. This is an appeal from a ruling on an interlocutory application which was brought by the Conseil scolaire francophone de la Colombie-Britannique (“Conseil”) and the Fédération des parents francophones de la Colombie-Britannique (“Fédération”).
2. The Conseil, the Fédération and numerous individual parents had brought an action against the Province of British Columbia in which they alleged violations of British Columbia’s constitutional obligations under s. 23 of the *Canadian* *Charter of Rights and Freedoms*. In the course of the proceedings, British Columbia challenged the standing of the Conseil and the Fédération to bring that action, arguing they are entitled neither to assert linguistic rights nor to bring an action to protect those rights.
3. In order to demonstrate that they had standing, the Conseil and the Fédération filed affidavits in which they described their respective roles in the protection and promotion of French-language education in the province. Attached to the affidavits were documents in the French language on whose content they intended to rely by tendering them under the business records exception to the hearsay rule. British Columbia objected to the admission of the exhibits without accompanying English translations. The Conseil and the Fédération, in turn, sought a declaration that exhibits in the French language attached to an affidavit could be considered by the court without English translations.
4. Although the issue of standing has since been decided in the Conseil’s and Fédération’s favour (2012 BCCA 422, 36 B.C.L.R. (5th) 302), this appeal has continued because a decision on whether the British Columbia courts can admit documents in French is relevant to the trial of the action.

III. Judicial History

A. *British Columbia Supreme Court, 2011 BCSC 1043, 21 B.C.L.R. (5th) 62*

1. The chambers judge dismissed the application. He considered himself bound by decisions in which the British Columbia courts had held that the language of civil proceedings in that province is English: *R. v. Keller*, [1966] 2 C.C.C. 380 (B.C.S.C.); *R. v. Watts, Ex parte Poulin* (1968), 69 D.L.R. (2d) 526 (B.C.S.C.), aff’d [1969] 3 C.C.C. 118 (B.C.C.A.); *R. v. Lajoie* (1970), 2 C.C.C. (2d) 89 (B.C.S.C.); *R. v. Pelletier*, 2002 BCSC 561 (CanLII). According to those decisions, the requirement that proceedings in the British Columbia courts be in English derives from an old English statute that has been received into the law of the province by virtue of s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. The English statute in question is entitled *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (G.B.), 1731, 4 Geo. II, c. 26 (the “*1731 Act*”).
2. The chambers judge concluded that although untranslated documents can be admitted to prove their existence or their authenticity, such documents cannot be produced as proof of their content unless a translation is provided. Therefore, the *1731 Act* applied to the exhibits the Conseil and the Fédération sought to introduce.
3. The chambers judge held that Rule 22-3 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which requires that documents prepared for use in court be in English unless the nature of the document renders this impracticable, is a manifestation of the general rule derived from the *1731 Act* that the language of the British Columbia courts is English. Whether the impugned exhibits qualified as “documents prepared for use in the court” was therefore irrelevant. Furthermore, assuming that Rule 22-3 applied to these exhibits, the chambers judge held that nothing about their nature rendered their translation impracticable. He accordingly dismissed the application.

B. *British Columbia Court of Appeal, 2012 BCCA 282, 34 B.C.L.R. (5th) 35*

1. The Court of Appeal dismissed the appeal from the chambers judge’s decision, holding that the *1731 Act* is in force in British Columbia and that civil proceedings must therefore be conducted in English. Applying the test for implied repeal set out in *R. v. Mercure*, [1988] 1 S.C.R. 234, the Court of Appeal held that the modern procedural legislation has not occupied the field so as to implicitly repeal the *1731 Act*. Although s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46, has had the effect of repealing the *1731 Act* for criminal trials by giving accused persons in British Columbia and elsewhere in Canada the right to be tried in either official language, the British Columbia legislature has not taken any steps to repeal it with respect to civil proceedings.
2. The Court of Appeal added that the *1731 Act* applies to documentary evidence of the type the Conseil and the Fédération had submitted. Rule 22-3 of the *Supreme Court Civil Rules* merely confirms that all civil proceedings in British Columbia must be conducted in English.
3. The Court of Appeal accordingly held that a judge presiding over civil proceedings in British Columbia does not have a discretion to admit documentary evidence in a language other than English without a certified translation.

IV. Analysis

1. British Columbia has advanced two legislative rules as a result of which, it says, the documents at issue in this case may not be admitted into evidence: the *1731 Act* and Rule 22-3 of the *Supreme Court Civil Rules*. In my view, both of these rules apply, and their effect is that documents submitted to British Columbia courts must either be in English or be accompanied by an English translation.

A. *Does the 1731 Act Require That Civil Proceedings in British Columbia Be in English?*

(1) Reception of English Law

1. The reception of English law into various Canadian provinces was an important step in Canada’s legal history. Reception permitted the country’s common law provinces to adopt a common law system without having to “spend nine centuries painfully building up a system of judge-made law”: J. E. Cote, “The Reception of English Law” (1977), 15 *Alta. L. Rev.* 29, at p. 30.
2. The reception of English law is a common law principle, and it applies in several Canadian provinces in which it has not even been provided for by provincial statute: see, e.g., *Uniacke v. Dickson* (1848), 1 N.S.R. 287 (Ch.); *Scott v. Scott* (1970), 2 N.B.R. (2d) 849 (S.C., App. Div.). At common law, reception was said to take place as a result of the presence of British subjects in a new territory: Cote, at p. 35. That is to say, British subjects “carr[ied]” English law with them as they settled in the colonies: Cote, at p. 47.
3. This common law principle has been codified in a number of Canadian provinces, including British Columbia. The principle of reception was originally codified in mainland British Columbia by virtue of a proclamation of the Governor of the Colony of British Columbia, Sir James Douglas, dated November 19, 1858. This was subsequently expanded to cover the entirety of the unified Colony of British Columbia in the *The English Law Ordinance, 1867*, S.B.C. 1867, No. 7. The British Columbia legislature has repeatedly confirmed this codification since the province joined Confederation: see, e.g., *English Law Ordinance, 1867* (1871), 30 Vict., No. 70; *English Law Act*, R.S.B.C. 1897, c. 115; *English Law Act*, R.S.B.C. 1960, c. 129. Currently, the reception of English law in British Columbia is governed by the *Law and Equity Act*, s. 2 of which reads as follows:

**2** Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

1. There are two criteria for an English statute to be received into law in British Columbia: (1) it must have been in force in England on November 19, 1858; and (2) it must be applicable to local circumstances. Further, in interpreting any received law, a court must consider whether that law has been modified by legislation having the force of law in British Columbia. I will return to these issues after discussing the scope of the *1731 Act* itself.

(2) Does the *1731 Act* Apply to Exhibits Attached to Affidavits?

1. As a preliminary matter, the appellants allege that even if the *1731 Act* is applicable in British Columbia, it does not have the effect of requiring that documentary evidence be presented in English. With respect, I cannot agree. It is clear from the words of the *1731 Act* that it applies to a specific set of listed documents, but also to all “proceedings”, which includes the admission of evidence.
2. The Preamble to the *1731 Act* requires all the following to be in English:

. . . all Writs, Process and Returns thereof, and Proceedings thereon, and all Pleadings, Rules, Orders, Indictments, Informations, Inquisitions, Presentments, Verdicts, Prohibitions, Certificates, and all Patents, Charters, Pardons, Commissions, Records, Judgments, Statutes, Recognizances, Bonds, Rolls, Entries, Fines and Recoveries, and all Proceedings relating thereunto, and all Proceedings of Courts Leet, Courts Baron and Customary Courts, and all Copies thereof, and all Proceedings whatsoever . . . .

The appellants argue that the words “Proceedings thereon”, “Proceedings relating thereunto” and “all Proceedings whatsoever” should be taken to be limited to procedural aspects of an action. Although I accept the appellants’ submission that there is a difference between procedure and evidence, they have submitted no arguments to explain why the word “proceedings” should be read as equivalent to “procedure”. The meaning of the word “procedure” is therefore not relevant to the interpretation of the *1731 Act*. In any event, even if it were the case that the *1731 Act* applied only to procedural law, there was a time when the law of procedure was considered to include what we would now call the law of evidence: U. Blickensderfer, *Blickensderfer’s Blackstone’s Elements of Law Etc.* (1889), at pp. 220-21.

1. As to the meaning of the term “proceeding”, the appellants themselves note that *Black’s Law Dictionary* (9th ed. 2009), defines it as follows:

The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. [Emphasis added; p. 1324.]

In my view, therefore, “proceedings” include the taking of evidence for the purpose of hearing a motion or conducting a trial, and this includes documentary evidence filed as an exhibit attached to an affidavit. The taking of evidence is an act that takes place between the commencement of the action and the entry of judgment.

1. This view is confirmed by other sources, including W. Blackstone, *Commentaries on the Laws of England*, vol. 3, by J. Chitty, ed. (1826), according to which the proceedings of an action include:

1. The original writ: 2. The process: 3. The pleadings: 4. The issue or demurrer: 5. The trial: 6. The judgment, and its incidents: 7. The proceedings in the nature of appeals: 8. The execution. [pp. 271-72]

The subsequent discussion in the *Commentaries* about the “proceedings” of a trial includes the taking of evidence: pp. 349-85. This confirms that the term “proceedings” should be understood to include testimony and documentary evidence.

1. The appellants further suggest that the expressions “Proceedings thereon”, “Proceedings relating thereunto” and “all Proceedings whatsoever” should be restricted by the limited class (*ejusdem generis*) presumption. They argue that the lists of items that come before these general expressions do not include evidence or exhibits, and that the expressions themselves must therefore be interpreted as being similarly limited.
2. This argument must fail, however, for two reasons. First, I would question whether the limited class presumption should apply where the item at issue appears to be separated from the main list. When applying this presumption, “attention must be paid to the grammatical structure of the provision in question”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 239. In this case, the relevant passages from the *1731 Act* should be considered to form three distinct groups that are separated from one another by the word “and”:

(1) all Writs, Process and Returns thereof, and Proceedings thereon, and

(2) all Pleadings, Rules, Orders, Indictments, Informations, Inquisitions, Presentments, Verdicts, Prohibitions, Certificates, and all Patents, Charters, Pardons, Commissions, Records, Judgments, Statutes, Recognizances, Bonds, Rolls, Entries, Fines and Recoveries, and all Proceedings relating thereunto, and

(3) all Proceedings of Courts Leet, Courts Baron and Customary Courts, and all Copies thereof, and all Proceedings whatsoever . . . .

Each of these groups has two parts: a list of documents or courts and a general clause about “Proceedings”. It is not clear to me that the references to proceedings should be taken to be part of the lists in question, given that for each group, the last two items of the list are separated by the conjunction “and” (e.g. “all Writs, Process *and* Returns thereof”), which precedes an “and” that separates the clause about proceedings from the list (e.g. “*and* Proceedings thereon”).

1. Second, the general word “Proceedings” is never used in isolation, but always forms part of an expression such as “Proceedings thereon” or “Proceedings relating thereunto”. These expressions convey an intention to include not just specific documents, but also any actions taken in relation to them.
2. Finally, the appellants argue that, since the *1731 Act* does not explicitly permit the admission of translations into evidence, no translations can be admitted, which renders the law absurd. I am unable to see how a law that requires documents to be in a particular language can have the effect of excluding translations into that language. I cannot accept this argument.
3. In conclusion, if the *1731 Act* applies in British Columbia, I am of the view that it has the effect of requiring that all documents filed in court proceedings be in English or be accompanied by an English translation.

(3) Is the *1731 Act* Inapplicable in British Columbia?

1. Section 2 of the *Law and Equity Act* provides that “the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia”.
2. The parties agree that the *1731 Act* existed and was in force in England on November 19, 1858. They disagree, however, about whether the *1731 Act* is “from local circumstances inapplicable”. The appellants ask the Court to adopt a strict test for applicability according to which every received statute must be both *necessary* and applicable. The appellants also argue that applicability should be assessed as of the time when the facts of the case arose rather than as of the date of reception, November 19, 1858.
3. Neither of these submissions is compelling. Necessity is not a requirement for the reception of English law. Certainty in the legal system is, as the appellants acknowledge, a desirable outcome, but certainty cannot be obtained if the status of received law must be reconsidered each and every time a party seeks to rely on it. I therefore conclude that the test for determining whether such law is applicable should be based on its suitability, and that this should be assessed as of the date of reception.

(a) *What Does Applicability Entail?*

1. Whether a received statute is applicable should be assessed in terms of its suitability, as opposed to the more stringent test proposed by the appellants. The appellants urge the Court to take a narrow view of applicability, and to require that any received statute be *necessary* in order to be applicable. The appellants further argue that its necessity should be assessed purposively by considering whether the mischief the statute was intended to remedy in England exists in British Columbia. Such a test is undesirable, because under it, the assessment of applicability would depend on historical reductionism.
2. The appellants rely on *Uniacke*, a decision of the Nova Scotia Court of Chancery, to support their claim that necessity must be considered in determining whether a statute is applicable. However, necessity has never been considered to be part of the test for applicability in British Columbia: see, e.g., *McDonnell v. Fédération des Franco-Colombiens* (1985), 69 B.C.L.R. 87 (Co. Ct.); *Deeks Sand & Gravel Co. v. The Queen*, [1953] 4 D.L.R. 255 (B.C.S.C.). Nor did this Court choose to adopt a necessity test for reception in *Hellens v. Densmore*, [1957] S.C.R. 768, at pp. 782-83.
3. Moreover, a requirement that necessity be assessed by comparing the historical circumstances in England at the time of the statute’s enactment to circumstances in British Columbia would unduly narrow the range of statutes that can be received. If reception depended on comparing the very specific historical circumstances that motivated a statute, almost no statutes would be received, because it is unlikely that the exact same social circumstances would have existed in colonies that were settled after relevant social structures had been abandoned in England: B. H. McPherson, *The Reception of English Law Abroad* (2007), at p. 378.
4. This problem can be illustrated by considering one of the statutes that the appellants accept has been received, namely the *Statute of Uses*, 1535, 27 Hen. 8, c. 10. The appellants agree that the *Statute of Uses* is applicable and has been received in British Columbia (A.F., at para. 45). Yet the *Statute of Uses* was adopted to deal with the proliferation of the use, a device to avoid feudal taxes. Since feudalism, and indeed the use, never existed in British Columbia, it would be hard to argue that the *Statute of Uses* is necessary on the basis of the appellants’ own view of necessity. The test for reception cannot therefore be so narrow as to require proof of necessity as the appellants propose.
5. It is my view that the *Law and Equity Act*, rather than requiring proof of necessity, requires that statutes be considered to be received unless they are unsuitable to local circumstances in British Columbia. A suitability test is consistent with the authorities and eliminates the need to engage in detailed historical comparisons or to speculate about the legislative intent behind a statute that was adopted hundreds of years ago. According to McPherson, the test is “whether the rule of English law can reasonably be applied or is suitable, or in its nature not unsuitable, to local needs, and not whether it would be beneficial or convenient to apply it”: pp. 373-74. Peter Hogg also discusses the common law rule for determining whether received law is applicable in terms of suitability, stating that received laws “did not include those laws that were not suited to the circumstances of the colony”: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 2.2(b).

(b) *As of What Date Must Applicability Be Assessed?*

1. In my view, whether a received statute is applicable must be assessed as of the date it was received, which was November 19, 1858, in British Columbia. To accept the appellants’ argument that a statute’s applicability should be reassessed each time a party attempts to rely on it would be to introduce an unacceptable level of uncertainty into the law and to impose significant and unnecessary burdens on litigants. Moreover, it would be inconsistent with the approach Canadian courts have generally adopted for assessing applicability.
2. Section 2 of the *Law and Equity Act* represents the most recent version of a codification of the common law principle of reception in British Columbia: J. C. Bouck, “Introducing English Statute Law into the Provinces: Time for a Change?”(1979), 57 *Can. Bar Rev.* 74, at pp. 76-77. When a common law principle is codified, there is a presumption that “its substance remains the same”: Sullivan, at p. 436. And where such a principle has been codified, it remains appropriate to refer to the common law to interpret the legislation: Sullivan, at p. 436. In interpreting s. 2 of the *Law and Equity Act*, therefore, the common law approach to the time when applicability is assessed should be considered.
3. I accept McPherson’s view that the “balance of authority” outside the United States favours a “full inheritance” approach under which applicability is assessed once and for all as of the date of reception: pp. 374-75. However, I also agree with the modification to this approach proposed by the Privy Council in *Cooper v. Stuart* (1889), 14 App. Cas. 286, which this Court adopted in *Hellens*, to the effect that statutes that are reasonably capable of being applied are considered to be “dormant” until such time as circumstances arise that might call for their application: McPherson, at p. 376.
4. Indeed, the British Columbia courts have clearly tended toward the view that applicability should be assessed as of 1858: see, e.g., *Sheppard v. Sheppard* (1908), 13 B.C.R. 486 (S.C.); *Re McKenzie and McKenzie* (1970), 11 D.L.R. (3d) 302 (B.C.C.A); *Poulin*.
5. This approach results in valuable certainty in the law, as a statute’s applicability will be assessed once, rather than on an ongoing basis. It is also respectful of the courts’ role of interpreting statutes and of the local legislatures’ role of amending them to reflect changing circumstances. The proper function of the courts is not to continually redefine the content of the received law in light of contemporary local conditions by identifying statutes that are no longer suitable.
6. The appellants argue against this approach on the basis that the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 7, requires that provisions expressed in the present tense be applied “to the circumstances as they arise”. In my view, the appellants’ approach is inconsistent with a statutory provision which codifies a principle of the common law. If a statute’s applicability were to be assessed each time a new case arose, this would amount to a change in the common law. I cannot discern any such intention in s. 2 of the *Law and Equity Act*.

(c) *Application to the 1731 Act*

1. It seems clear from an assessment of the applicability — understood to mean suitability — of the *1731 Act* as of November 19, 1858, that this statute was not “from local circumstances inapplicable”. At that time in British Columbia, the government operated in English. Immigration to the province was coming largely from the United States as a result of the Fraser Canyon gold rush, which meant that English was the common language of settlers. Given that I have rejected the appellants’ purposive approach to the assessment of applicability, it is irrelevant that the problems the *1731 Act* was meant to address (the use of archaic languages in court proceedings) never existed in British Columbia. Nothing about the circumstances in the province would have made a rule requiring that court proceedings be conducted in English unsuitable. The *1731 Act* was therefore received into law in British Columbia and is now in force there, subject to any modifications, which I will discuss below.

(4) Has the *1731 Act* Been Modified?

1. The *1731 Act* has not been modified in respect of civil proceedings in British Columbia. It is common ground that the British Columbia legislature has not expressly repealed or modified the *1731 Act*. What remains at issue is whether the *1731 Act* has been *implicitly* modified. Although the parties to this case appear to disagree about the test for implied modification, a closer reading of the authorities reveals that both the appellants and the respondents propose a test based on the concept of occupation of the field. Applying this test, I am unable to conclude that any legislation has “occupied the field” of the *1731 Act* with respect to civil proceedings to the extent required for a finding of implied modification.

(a) *What Is the Test for Implied Modification?*

1. The parties’ disagreement about the test for implied modification appears to centre on whether the effect of this Court’s decision in *Mercure* is that a finding of implied repeal requires proof of conflict between the two statutes. The appellants state that the test should be whether the legislature intended to occupy the field in a fairly comprehensive fashion, regardless of whether there is an actual conflict or inconsistency. They attempt to distinguish this test from the Court’s approach in *Mercure*. The respondents rely on *Mercure*, as the Court of Appeal did. The respondents are of the view that *Mercure* requires that conflict be proved before an implied repeal can be found to have taken place, and they argue that the Court of Appeal held in the case at bar that conflict is necessary. In my view, that was not the approach this Court adopted in *Mercure*, nor was it the approach adopted by the Court of Appeal in the instant case.
2. The test for an implied repeal as set out in *Mercure* is that “a prior statute is repealed by implication only ‘if the entire subject-matter has been so dealt with in subsequent statutes that, according to all ordinary reasoning, the particular provisions in the prior statute could not have been intended to subsist’”: p. 265 (emphasis added; citation omitted). That is to say, an implied repeal has occurred if subsequent legislation has occupied the field to such an extent that the court can infer that the legislature intended to repeal the earlier statutes. There was no mention in *Mercure* of a requirement to prove conflict. Both the test for implied repeal and the test for implied modification are based on the occupation of the field by subsequent legislation.

(b) *Is the Test for Implied Modification Met in This Case?*

1. No legislation having the force of law in British Columbia has occupied the field of the *1731 Act* in the context of civil proceedings. To reach this conclusion, it is necessary to consider the true subject matter of the *1731 Act*, the role of the *Supreme Court Civil Rules*, the legislature’s response to repeated endorsements of the *1731 Act* by the British Columbia courts,and *Charter* values.
2. The appellants have improperly characterized the subject matter of the *1731 Act* by taking an overly general view of its scope. Their view is that the subject matter of the *1731 Act* is procedural law generally, and that in British Columbia, this field has been occupied by various statutes and rules of court. According to the appellants, this modern legislation is more detailed and specific than the *1731 Act*, and therefore has the effect of completely displacing the *1731 Act*.
3. I am of the view that, properly characterized, the subject matter of the *1731 Act* is the language to be used in court proceedings. The *1731 Act* is focused on the issue of language. Although it refers to various procedural documents, it is not a general procedural law statute. Indeed, to say that the *Law and Equity Act* or the *Evidence Act*, R.S.B.C. 1996, c. 124, is more detailed or specific on the subject of language of court proceedings strains credulity, since neither of those statutes contains specific provisions on the language of court proceedings.
4. Given that the subject matter of the *1731 Act* is the language of court proceedings, there are only two legislative provisions that might be considered to have modified that Act in respect of *civil* proceedings: Rule 22-3 of the *Supreme Court Civil Rules* and its counterpart, Rule 53 of the *Court of Appeal Rules*, B.C. Reg. 297/2001. These rules provide that “document[s] prepared for use in the court” (Rule 22-3) and “documents prepared for the use of the court” (Rule 53) must be in English. Rule 22-3 provides for a limited exception in cases in which the nature of the document renders compliance with the rule “impracticable”. In respect of *criminal* proceedings, on the other hand, there is no dispute that the *1731 Act* has been modified by s. 530 of the *Criminal Code*.
5. Two issues arise in considering whether the rules of court in question have modified the *1731 Act*. First, can rules of court, ostensibly subordinate legislation that takes the form of a regulation, modify received statutes such as the *1731 Act*? Second, is the scope of such rules sufficient for them to displace the *1731 Act*?
6. With respect to the first issue, I accept the appellants’ submission that British Columbia’s rules of court are considered to have the force of statute law: *Robitaille v. Vancouver Hockey Club Ltd*. (1979), 13 B.C.L.R. 309 (S.C.); *Boleak v. Boleak*, 1999 BCCA 776, 183 D.L.R. (4th) 152, at para. 21. It is therefore conceivable that a rule of court, such as Rule 22-3 or Rule 53, could modify the *1731 Act*.
7. I part ways with the appellants on the second issue, however, as I do not see how two rules relating to the documents used in court can be said to occupy the entire field of language for court proceedings. As I mentioned above, the *1731 Act* pertains not only to the language of documents filed in court, but also to that of judgments, orders, trials and evidence. A rule that covers only one aspect of the subject matter while remaining silent on other aspects cannot have the effect of impliedly modifying a received statute. This situation can be distinguished from the implied modification by s. 530 of the *Criminal Code*, which establishes a complete system for criminal proceedings.
8. This conclusion is reinforced by the fact that, since 1965, British Columbia courts have repeatedly endorsed the *1731 Act* and the legislature has not intervened in this regard. The first reported case in which a court considered the *1731 Act* was *Keller*. In *Keller*, the accused was a Hungarian immigrant who had been served with documents in English. He argued that he had not received adequate notice, because he was not capable of understanding English. Harvey Co. Ct. J. relied on the *1731 Act* to conclude that the notice was sufficient. The same conclusion was reached in several subsequent decisions: *Poulin*; *Lajoie*; *R. v. Pare* (1986), 31 C.C.C. (3d) 260 (B.C.S.C.). This issue has also been considered since the enactment of s. 530 of the *Criminal Code* and the *Charter*. In 2002, in *Pelletier*, Shaw J. applied the *1731 Act* to require that a parole eligibility hearing under the “faint hope” clause in the *Criminal Code* be conducted in English.
9. Faced with these decisions, the British Columbia legislature has, rightly or wrongly, declined to act to change the law on the language of court proceedings in the province. A bill was in fact introduced in 1971 to provide the courts with a discretion to conduct civil trials in French. The bill was never adopted, however, and during second reading, the Attorney General expressed concerns about the capacity of the court system to deal with cases in French: *Debates of the Legislative Assembly*, 2nd Sess., 29th Parl., March 10, 1971, at p. 646.
10. My conclusion on this issue is based on an implied exclusion, or *a contrario*, argument. The legislature’s failure to act in the face of repeated endorsements of the rule reflects an acceptance of the current state of the law. Although the strength of this presumption always depends on the circumstances in which it is invoked, it seems clear, in light of the number of cases and the passage of time between them, that there was at the very least no legislative intention to modify the *1731 Act*.
11. Finally, the appellants urge this Court to adopt an approach to these issues based on *Charter* values and constitutional principles. The appellants argue that the *Charter* requires that legislation, including received legislation, be interpreted in a manner consistent with *Charter* values. The Court has of course repeatedly noted the role that *Charter* values play in the evolution of the common law and in statutory interpretation: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477. The *Charter* explicitly provides that English and French are the official languages of Canada: s. 16. The Court has also recognized the important role of linguistic minorities in Canada: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 79.
12. However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country’s official languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The *Charter* does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of English and French. In my view, therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada’s underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.
13. This being said, in light of s. 16(3) of the *Charter*, which specifically provides that provincial legislatures may advance the equality of status of English and French, it would be open to the British Columbia legislature to enact legislation, like that proposed in 1971, to authorize civil proceedings in French. Such legislation would no doubt further the values embodied in s. 16(3), which protects legislative initiatives intended to increase the equality of the official languages but does not, as this Court has already held, confer any rights. However, given the absence of any such initiative by the British Columbia legislature, it is not possible for this Court to impose one on it.

B. *What Is the Effect of Rule 22-3?*

1. Even if the *1731 Act* were not applicable to British Columbia or if it had been modified, Rule 22-3 of the *Supreme Court Civil Rules* requires that exhibits attached to affidavits and filed in court be in English. The respondents advanced this as an alternative argument, and it was accepted by both of the courts below. Rule 22-3(2) states:

(2) Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper.

1. Although the appellants argue that the exhibits attached to the affidavits were not prepared for use in court, because they were prepared in the usual course of their business, it is my view that once the exhibits were attached to the affidavits, they became part of a document prepared for use in court. It cannot be possible to circumvent the rule by moving information on which a party seeks to rely from the body of the affidavit into an exhibit. If the appellants wish to rely on the content of the exhibits, as opposed to their existence or their authenticity, the exhibits must comply with the rule, since an exhibit that is relied upon for its content is effectively incorporated into the affidavit.
2. This is different from the case of documents produced in the discovery process. The appellants argue that because Rule 22-3 does not require documents produced on discovery to be translated, the same should be true for documents introduced as evidence. The appellants rely on two cases in which it was held that discovery documents do not need to be translated: *Han v. Cho*, 2008 BCSC 1208, 88 B.C.L.R. (4th) 193; *Bilfinger Berger (Canada) v. Greater Vancouver Water District*, 2010 BCSC 1104 (CanLII). In my view, those cases are inapplicable, since documents exchanged on discovery are not prepared for use in court. Indeed, it is quite possible that such documents will never find their way into a court file. Discovery documents are not filed with the court, but simply pass from one party to another. Moreover, in both of the cases cited by the appellants, the judge acknowledged that if any of the discovery documents were to be used in court, they would have to be translated: *Han*, at para. 14; *Bilfinger*, at para. 18.
3. However, Rule 22-3 does introduce a certain discretion to admit documents that do not comply with the rule if their nature would render compliance “impracticable”. The word “document” is defined in the rules to include photographs, films, sound recordings and “information recorded or stored by means of any device”: Rule 1-1(1). Rule 22-3 requires not only that documents be in English, but also that they be “legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper”. In light of the expanded definition of “document”, it seems clear that the impracticability exception was intended to apply to items such as photographs, films, receipt books or business ledgers, to which the formatting requirements cannot logically apply.
4. Where, as in the instant case, the documents at issue are written in French, it is clear that there is nothing inherent in them that would render it impracticable to have them translated into English. As the chambers judge found that there was “no basis upon which I can hold that the nature of the documents exhibited to the affidavits in this case renders it impracticable that they be translated into the English language” (para. 58), I do not accept that the large volume of documents in question can change “the nature of the documents” so as to render compliance with the rule impracticable.
5. There is no doubt that the British Columbia Supreme Court has the inherent jurisdiction and discretion to fulfill its judicial function, but as this Court noted in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, at para. 32, they are subject to the requirement that the court exercise them without contravening any statutory provision. In the case at bar, Rule 22-3 limits the court’s discretion to admit documents in languages other than English. The court can exercise this discretion only if the criterion of “impracticab[ility]” discussed above is satisfied. Only those documents whose nature renders compliance with the rule impracticable can be admitted.

V. Disposition

1. Although costs are usually awarded to the successful party, there are exceptions. In this case, the appellants have raised a novel issue in the context of a broader *Charter* challenge, and for that reason I would award them their costs.
2. I would therefore dismiss the appeal with costs throughout to the appellants.

 The reasons of LeBel, Abella and Karakatsanis JJ. were delivered by

 Karakatsanis J. (dissenting) —

I. Introduction

1. Section 23 of the *Canadian Charter of Rights and Freedoms* gave life to the Conseil scolaire francophone de la Colombie-Britannique (“Conseil”), a French language school board. The Conseil was created by statute passed by the British Columbia legislature pursuant to s. 23 *Charter* rights of the French-speaking residents of the province. In the course of its daily functions, the Conseil created internal documents in French regarding its mandate, vision, activities, policies, and procedures. These documents represent artifacts of the Conseil’s right to exist under s. 23 of the *Charter* and are direct expressions of the linguistic duality of Canada.
2. The Conseil, along with a federation of Francophone parents, sought to file these documents, in their original French form, in the British Columbia Supreme Court as exhibits supporting its claim of standing in litigation against the Province of British Columbia. The underlying litigation alleges the violation of French language education rights as guaranteed by s. 23 of the *Charter*. The Conseil asked the court to exercise its judicial discretion to permit these documents to be admitted as evidence on the standing motion.
3. The courts below concluded that an English statute from 1731, received into British Columbia law, precludes the admission of exhibits in any language but English and that there was no judicial discretion to consider whether to accept documents written in French. The majority of this Court agrees.
4. With respect, and for the reasons that follow, I do not accept that either the received 1731 English statute — *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (G.B.), 1731, 4 Geo. II, c. 26 (the “*1731 Act*”) — or the British Columbia *Supreme Court* *Civil Rules*, B.C. Reg. 168/2009 (“*Civil Rules*”), preclude a superior court judge from accepting as exhibits documents that were prepared in French in the course of business well before litigation was contemplated. I conclude that the British Columbia legislature has not ousted the inherent jurisdiction of the courts to do so.
5. In the absence of a clear legislative prohibition ousting the court’s inherent jurisdiction to accept such documents and admit them into evidence, the motion judge should be permitted to consider and decide whether to do so. I would allow the appeal and remit the matter back to the B.C. Supreme Court.

II. Analysis

1. Although this motion arises in the context of a language rights trial, the legal issue is narrow: Does any legislation in force in British Columbia preclude a superior court in that province from exercising its inherent jurisdiction to admit exhibits in French?

A. *Courts Have Inherent Jurisdiction to Fulfil Their Judicial Functions*

1. Inherent jurisdiction was described by this Court in *R. v. Caron*,2011 SCC 5, [2011] 1 S.C.R. 78, at para. 24:

The inherent jurisdiction of the provincial superior courts, is broadly defined as “a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so”: I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 51.  These powers are derived “not from any statute or rule of law, but from the very nature of the court as a superior court of law” (Jacob, at p. 27) to enable “the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner” (p. 28).

1. While the specific exercise of inherent jurisdiction may be ousted by applicable and relevant legislation, the power is otherwise broad and supplementary. As Jacob writes:

The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

(I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970), 23 *Curr. Legal Probs.* 23, at p. 25)

1. There is no real dispute that a B.C. superior court may exercise its inherent jurisdiction to receive documents written in French as evidence unless prohibited by law. At para. 32 of *Caron*, this Court cited Jacob (at p. 24): “. . . the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision” (emphasis deleted).
2. The question before us is whether any applicable legislation ousts a superior court’s inherent jurisdiction to consider whether to admit exhibits in French, in order to fulfil the judicial function of administering justice according to law in a regular, orderly, and effective manner.

B. ***Does the 1731 Act Preclude or Limit the Exercise of Inherent Jurisdiction to Admit a Document Written in French Into Evidence?***

 (1) Does the *1731 Act* Address the Language in Which Exhibits Shall Be Tendered?

1. In 1867, before British Columbia joined Confederation, the existing colonial legislature stipulated that the laws in force in England on November 19, 1858, would be considered to be in force in the nascent colony under *The English Law Ordinance,* *1867*, S.B.C. 1867, No. 7. Subsequent legislative amendments by the provincial legislature reconfirmed the reception of English law on that date (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 2.5(c); J. E. Cote, “The Reception of English Law” (1977), 15 *Alta. L. Rev.* 29, at p. 91).[[1]](#footnote-1)
2. The *1731 Act*, which requires that court proceedings be conducted in English, is one of many thousands of statutes “received” in British Columbia pursuant to s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which currently reads:

. . . the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

1. I agree with the majority’s view that the *1731 Act* was not “from local circumstances inapplicable” in colonial British Columbia upon its reception.
2. In my view, the central interpretive question is whether the *1731 Act* addresses a language requirement for the exhibits that the appellant seeks to admit in French.
3. Statutory interpretation usually requires an understanding of the ordinary words, in the context of the entire legislation, to determine the intention of the legislature. This is more difficult in the case of a received statute such as the *1731 Act*, as it represents the English legislator’s will in legislating for a particular mischief in eighteenth century England. The specific terms of the *1731 Act* did not represent the response of the B.C. legislature to conditions in the province; as Hogg notes, “[t]he only function of received law was to ensure that there was no vacuum of law in the colony” (s. 2.6).
4. The *1731 Act*’s origins, precise meaning and scope remain shrouded in antiquity. Furthermore, it is difficult to apply the *1731 Act* to modern day proceedings. It was enacted to address court procedures in another realm in another time.
5. The *1731 Act* states that proceedings are to be conducted in English. With respect to the contrary view of Wagner J., however, this is not the end of the inquiry. The purpose behind the enactment appears to have been an access to justice measure such that ordinary people could understand the administration of justice, abolishing the use of foreign languages and requiring proceedings to be conducted in the language of the realm.
6. On my reading, however, the prohibition on foreign languages in “proceedings” — no matter how broadly “proceedings” is defined — would not necessarily preclude the tendering or receipt of *physical evidence* or a document as *original* evidence in a language other than English, for example, in order to prove authenticity or intention or a position taken at the time the document was written. Furthermore, while there is an extensive list of items to which the *1731 Act* refers, it does not refer to exhibits in particular or to evidence in general. Finally, the scope of application of the *1731 Act* itself is not clear. For one, the *1731 Act* did not apply universally to the courts of equity. Thus, while the *1731 Act* says that “proceedings” are to be conducted in English, and certain enumerated legal documents — prepared by counsel for the proceedings — are to be submitted only in English, nothing on the face of the *1731 Act* specifically addresses the language of exhibits filed as evidence. There is nothing explicit in the statute that prohibits filing a document written in another language even if the oral evidence is in English, or translated into English.
7. As noted by Cory, Iacobucci and Bastarache JJ. in *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 133, inherent jurisdiction can only be ousted by clear and precise statutory language. Thus, anyuncertainty resolves in favour of the court’s inherent jurisdiction to control its processes for an orderly and fair trial. As a result, I conclude that the *1731 Act* does not preclude the exercise of inherent jurisdiction to allow pre-existing non-litigation documents originally written in French to be filed as exhibits.

 (2) Must the *1731 Act* Be Held “To Be Modified and Altered by All Legislation That Has the Force of Law in British Columbia”?

1. Given my conclusion on the scope of the *1731 Act*, it is not necessary in this case to consider whether the Act has been “modified and altered by all legislation that has the force of law in British Columbia”, as provided in s. 2 of the *Law and Equity Act*.However, I do not agree with the majority’s approach to this issue.
2. Wagner J. concludes that the test for implied repeal in *R. v. Mercure*, [1988] 1 S.C.R. 234, requires the court to determine whether subsequent legislation has “occupied the field” such that courts can infer a legislative intention to repeal the earlier statute; and that both the test for implied repeal and the test for implied alteration or modification are based on occupation of the field by subsequent legislation. He examines whether the B.C. legislature has enacted legislation covering “the entire field of language for court proceedings” (para. 51).
3. I do not agree. In my view, the British Columbia Court of Appeal erred in applying too strict a test to determine whether statutes that were enacted by a domestic legislature have implicitly repealed the received law (2012 BCCA 282, 34 B.C.L.R. (5th) 35). Under s. 2 of the *Law and Equity Act*, it is not only a question of whether subsequent legislation has *repealed* the received law, but rather to what extent the contents of the received law have been *modified or altered* by current statutory provisions.
4. In my view, the strict test for whether any legislation has “occupied the entire field” in order to find modification or alteration of the *1731 Act*, as applied by the majority, is misplaced and too onerous in light of the specific provisions of s. 2 of the *Law and Equity Act*. While it is true that the B.C. legislature has never directly addressed the provisions of the *1731 Act*, s. 2 of the *Law and Equity Act* asks whether the law itself “must be held to be” modified and altered by subsequent legislation that addresses the contents of the received law. This is not a question of repeal, directly or indirectly. Rather, it is a matter of interpretation requiring judicial determination.
5. The *1731 Act* has been clearly modified, for example, by ss. 530 and 530.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which permit French proceedings for criminal trials. As far as the language of civil proceedings, the *1731 Act* has not been *explicitly* modified or altered by legislation that has the force of law in British Columbia. However, that still leaves the question of whether it has been *implicitly* modified by current legislation such as the quasi-constitutional *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), which recognizes French as an official language of Canada, or by the official language rights enshrined in the *Charter* and their underlying values. I would not foreclose the possibility that these important enactments have modified or altered the *1731 Act*, allowing courts to exercise their inherent discretion to permit the use of French not only in exhibits, but also in aspects of court proceedings beyond the scope of this appeal.

C. *Does Any British Columbia Legislation Preclude the Exercise of Inherent Jurisdiction to Accept French Documents Into Evidence?*

1. The *Civil Rules* regulate the court proceedings in the instant case.
2. The *Civil Rules* define “proceeding” broadly, as “an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under Rule 18-2 or appeal”. “Document” has “an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device” (Rule 1-1(1)).
3. The *Civil Rules*, however,do not define “evidence” or “exhibit”.The *Civil Rules* also do not directly address the language of the proceedings; the only rules referring to language are Rules 22-3(2) and (3):

(2) Unless the nature of the document renders it impracticable, every document prepared for use in the court must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper.

(3) Transcripts of oral evidence must conform to subrule (2).

1. Rule 22-3(2) expressly addresses the language of documents *prepared* *for use in the court*. I read this as requiring any pleadings, notices of motions, and affidavits, among others, to be prepared in the English language and in a certain format using specified paper (unless doing so would be impracticable, which is not applicable here).
2. While exhibits of original documents are *used* in court, they are often not *prepared* *for use* in court. Indeed, in this case, the motion judge found that the exhibits in question were not *prepared* for litigation purposes (2011 BCSC 1043, 21 B.C.L.R. (5th) 62).
3. It seems to me, based upon the ordinary meaning of the words of the text, that Rule 22-3 does not apply to documents that were not prepared for use in court.
4. The distinction between documents prepared for litigation purposes and those not prepared for those purposes is not a novel one. It also arises in the application of litigation privilege, with consequences for admissibility of the documents. This Court has held that litigation privilege attaches only to documents created for the dominant purpose of litigation; see *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at paras. 59-60.
5. The exhibits at issue in this appeal, which include documents relating to the purpose and mission of the Conseil, were created in French long before litigation was contemplated. It could not be reasonably said that they were “prepared for use in the court”. (Indeed, because they were prepared for other uses, they may not have been prepared using the stipulated quality and size of paper.) By contrast, the affidavits to which the exhibits are attached were created for the court proceedings. Of course, if they are appropriately qualified, documents can be tendered as exhibits by witnesses or by counsel. Whether a document is filed as an exhibit with or without an affidavit is immaterial.
6. Rule 22-3(3) requires transcripts in English. Therefore, any reading of a French document during the proceedings, like any testimony in French, would be translated.
7. Thus, in my view, Rules 22-3(2) and (3), based upon their express terms, do not preclude the B.C. Supreme Court from exercising its inherent jurisdiction to accept the documents in their original form if they were not prepared for use in court.
8. This conclusion is consistent with the broader approach to the interpretation of rules of civil procedure, reflected in the famous maxim from Lord Collins M.R. in *In re Coles and Ravenshear*, [1907] 1 K.B. 1 (C.A.), at p. 4: “Although . . . a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress . . . .” In other words, procedural law, as the *Civil Rules* provide, is meant to facilitate and assist in the application of the substantive law.
9. This principle is reflected in the codification of flexibility and proportionality in the *Civil Rules* under Rule 1-3 which reads as follows:

(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

(2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to

(a) the amount involved in the proceeding,

(b) the importance of the issues in dispute, and

(c) the complexity of the proceeding.

1. Thus, the *Civil Rules* should be interpreted in a flexible manner so as to give life to the substantive law. Furthermore, the B.C. Supreme Court may exercise its inherent jurisdiction to supplement procedures in the *Civil Rules*.
2. As Jacob notes:

The powers of the court under its inherent jurisdiction are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other.

. . .

. . . by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. [pp. 50-51]

1. In my view, the British Columbia legislature has not clearly addressed the language in which documents *not* *prepared for use in court* must be filed. Coupled with the role of bilingualism in the Canadian constitutional context as I will discuss below, I conclude that the B.C. Supreme Court may exercise its inherent jurisdiction to admit French documents if doing so would uphold, protect, and fulfil the “judicial function of administering justice . . . in a regular, orderly and effective manner” (Jacob, at p. 28).

D. *Factors Relevant to the Exercise of Inherent Jurisdiction*

1. I would therefore allow the appeal and remit the matter back to the B.C. Supreme Court. In my view, various constitutional principles, as well as the specific circumstances of this proceeding, should guide the motion judge in determining whether to exercise his or her inherent jurisdiction to receive the exhibits in French.
2. Sections 16 and 23 of the *Charter* affirm the fundamental importance of bilingualism in the Canadian constitutional fabric. Section 16(1) of the *Charter* declares that English and French are the two official languages of Canada.[[2]](#footnote-2)
3. The *Official Languages Act* manifests the fundamentally bilingual character of Canada. This Court has recognized it as a quasi-constitutional statute: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23. While aspects of s. 16 and the *Official Languages Act* require the equal status and equal treatment of each language in federal institutions, the commitment and the aspiration to express Canada’s bilingualism is evident. The Preamble of the *Official Languages Act* makes this clear:

AND WHEREAS the Government of Canadais committed to enhancing the vitality and supporting the development of English and French linguistic minority communities, as an integral part of the two officiallanguage communities of Canada, and to fostering full recognition and use of English and French in Canadian society;

1. This Court’s jurisprudence confirms the status of French and bilingualism more generally. As for s. 23 of the *Charter*,Dickson C.J. stated in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, that it “represents a linchpin in this nation’s commitment to the values of bilingualism and biculturalism” (p. 350).
2. Thus, the motion judge should consider relevant constitutional values in exercising his or her inherent jurisdiction. These include the status of French as an official language in Canada, the protection of official language minority rights, and the constitutional commitment to safeguarding and promoting both the French and English languages.
3. The specific circumstances of the parties in this case are also relevant to the exercise of inherent jurisdiction. This context includes the nature of the parties, their capacity to understand the French documents, the nature of the documents, and the nature of the underlying action.
4. Here, the Conseil was established by enacted statute of the British Columbia legislature. By virtue of s. 23 *Charter* rights, the Conseil operates primarily in French. The trial judge, and all parties and their lawyers, except the Province of British Columbia, understand the French language. The British Columbia government must also have some institutional capacity to understand French (particularly as it is mandated under the *Criminal Code* to provide French trials). Furthermore, the underlying litigation is about constitutional French language rights.
5. Of course, while I have outlined some of the important factors, it will be up to the motion judge to consider and weigh all relevant factors in exercising his or her inherent jurisdiction.

III. Conclusion

1. Neither the *1731 Act* nor the British Columbia *Civil Rules* addresses the language of exhibits in court proceedings. In light of the silence of the British Columbia legislature on this issue, and pursuant to the court’s inherent jurisdiction, judges of the B.C. Supreme Court may allow French language documents, not prepared for use in court, to be filed in evidence as exhibits where this will ensure the administration of justice according to law in a regular, orderly and effective manner.
2. I would allow the appeal and remit the matter to the B.C. Supreme Court.

 *Appeal dismissed with costs throughout to the appellants,* LeBel*,* Abella *and* Karakatsanis JJ. *dissenting.*

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 Solicitor for the intervener the Attorney General of Ontario:  Attorney General of Ontario, Toronto.

 Solicitor for the intervener the Commissioner of Official Languages of Canada:  Office of the Commissioner of Official Languages, Ottawa.

 Solicitors for the intervener Association des juristes d’expression française de la Colombie‑Britannique:  Shapray, Cramer & Associates, Vancouver; Martin & Associates, Vancouver.

1. The legislation formally receiving English law has been re-enacted and amended several times. The most recent version is the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which continues the formal reception of English laws from the same date — November 19, 1858. [↑](#footnote-ref-1)
2. In addition to ensuring the equal status and use of both languages in Canada’s federal institutions, this section also declares that English and French are official languages in Canada — an independent declaratory statement of general principle. [↑](#footnote-ref-2)