



**SUPREME COURT OF CANADA**

**CITATION:** Mazraani v. Industrial Alliance  
Insurance and Financial Services Inc., 2018 SCC  
50

**APPEAL HEARD:** May 16, 2018  
**JUDGMENT RENDERED:** November 16, 2018  
**DOCKET:** 37642

**BETWEEN:**

**Kassem Mazraani**  
Appellant

and

**Industrial Alliance Insurance and Financial Services Inc. and  
Minister of National Revenue**  
Respondents

- and -

**Barreau du Québec, Canadian Bar Association, Association des juristes  
d'expression française de l'Ontario and Commissioner of Official Languages for  
Canada**  
Interveniers

**OFFICIAL ENGLISH TRANSLATION**

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** Gascon and Côté JJ. (Wagner C.J. and Abella, Moldaver,  
(paras. 1 to 80) Karakatsanis, Brown, Rowe and Martin JJ. concurring)

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MAZRAANI v. INDUSTRIAL ALLIANCE

**Kassem Mazraani**

*Appellant*

v.

**Industrial Alliance Insurance and Financial Services Inc. and  
Minister of National Revenue**

*Respondents*

and

**Barreau du Québec,  
Canadian Bar Association,  
Association des juristes d'expression française de l'Ontario and  
Commissioner of Official Languages for Canada**

*Intervenors*

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Inc.**

**2018 SCC 50**

File No.: 37642.

2018: May 16; 2018: November 16.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Constitutional law — Charter of Rights — Official languages — Use of official languages in federal courts — Hearing in Tax Court of Canada conducted primarily in English despite requests by witnesses and by counsel to speak in French — Whether language rights of parties, witnesses or counsel at hearing were violated — If so, determination of appropriate remedy — Constitution Act, 1867, s. 133 — Canadian Charter of Rights and Freedoms, s. 19 — Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), ss. 14, 15.*

In 2012, M was working as an insurance representative for Industrial Alliance Insurance and Financial Services Inc. After his contract with Industrial, which stipulated that he was self-employed, was terminated, M asked the Canada Employment Insurance Commission to consider this employment to be insurable employment so that he could obtain employment insurance benefits. The Commission refused to do so, and its refusal was upheld by the Canada Revenue Agency. M took the case to the Tax Court of Canada (“TCC”). Industrial intervened as a party in the TCC because the case was calling its business model into question, and it also examined most of the witnesses and presented the legal arguments in support of the position that M’s contract was a contract for services and not a contract of employment.

At the hearing in the TCC, when Industrial's first witness stated that he wished to testify in French, the judge asked M if he would need an interpreter, and M answered that he would. The judge informed counsel for Industrial that if the witness testified in French, the hearing would have to be adjourned until another day so that an interpreter could attend. Further to a suggestion by counsel for Industrial, the witness testified in English, using a few words in French where necessary. During the rest of the hearing, some of the other witnesses as well as counsel for Industrial also indicated that they wanted to speak in French, but the judge asked them to speak in English instead and steered the testimony, and the presentation of counsel's argument, back to English. He no longer mentioned the possibility of calling in an interpreter. The judge decided the appeal in M's favour. Industrial appealed the TCC's decision on the ground that the language rights of its witnesses and counsel had been violated. The Federal Court of Appeal allowed the appeal and ordered a new hearing before a different judge.

*Held:* The appeal should be dismissed.

The language rights of several witnesses and of counsel for Industrial were violated. A new hearing before a different judge of the TCC is necessary in the circumstances.

All persons who appear in federal courts must be able to freely exercise their fundamental and substantive right to speak in the official language of their choice. Two legislative provisions, namely s. 133 of the *Constitution Act, 1867* and

s. 19 of the *Charter*, protect the right to use English and French in those courts, which include the TCC. In addition, the language rights of a quasi-constitutional nature that are provided for in the *Official Languages Act* (“*OLA*”) govern the exercise of the constitutional rights in federal courts such as the TCC: s. 14 of the *OLA* guarantees that any person has the right to use the official language of his or her choice, while s. 15 guarantees that each party has the right to an interpreter. The federal courts to which these sections apply must provide the resources and procedures that are needed in order to respond to requests from parties and witnesses under these sections, even where a hearing is conducted in accordance with an informal or simplified procedure. The principles established in *R. v. Beaulac*, [1999] 1 S.C.R. 768, must guide the interpretation of any right that is intended to protect the equal status of the official languages. Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. As for the rights provided for in the *OLA*, they will not help achieve the *OLA*’s objectives unless all members of the community can exercise them and are provided with the means to do so.

Judges of the courts in question are required to participate actively in protecting the language rights of the individuals involved. It is they who are primarily responsible for upholding language rights. A purposive reading of s. 19(1) of the *Charter* requires that the court attach the utmost importance to the protection of each person’s right to speak in the official language of his or her choice. The courts are also responsible for discharging this duty in light of the very words of s. 14 of the

*OLA*. If a judge of one of these courts asks a person to speak in an official language other than the language of the person's choice, this constitutes a violation of s. 14 of the *OLA*, s. 19 of the *Charter* and s. 133 of the *Constitution Act, 1867*. Although lawyers have certain ethical duties that could be violated should they fail to inform their clients and the witnesses they call of their language rights, these duties are complementary to that of the judge and do not relieve the judge of his or her responsibilities in this regard. Moreover, the *OLA* requires that in every case the federal courts provide interpretation services at the request of a party. When a judge of one of these courts sees that one party's testimony or argument will be presented in an official language the other party does not understand, the judge must inform the other party of his or her right to an interpreter.

Language rights protect a person's right to make a personal choice to speak in one official language. The right is not a right to speak in one's mother tongue or in a language that the court deems to be the person's language: it is the right to make a personal choice. That choice does not depend on external factors such as the person's command of the chosen language. The courts concerned must protect the free and informed nature of each person's choice to speak in one official language rather than the other by, in particular, being certain that all witnesses are well aware of their right to speak in the official language of their choice before testifying. The right to speak in one official language is subject to no particular form. The presence of a party who is not represented by counsel does not result in the suspension of anyone's fundamental language rights.

Where the language rights of a party or of his or her counsel are not upheld, the appropriate remedy will generally be to order a new hearing. Any remedy that is granted must support the achievement of the objective of these fundamental rights, and only a new process conducted in a manner respectful of everyone's rights will normally represent a true affirmation of language rights. The fact that a violation has had no impact on the fairness of the hearing is not relevant to the remedy. If a remedy is sought for the violation of a witness's language rights, a connection between that violation and the party who is asking for a new hearing must be established precisely, bearing in mind that the courts should favour the existence of effective remedies for violations of witnesses' language rights. In deciding on the appropriate remedy, a court can consider the degree of connection between the violations in question and the rights and interests of the party who is asking for a new hearing as well as the lawyer's conduct or interventions. The remedy must not be disproportionate in relation to the scale of the violation, its recurrence and its impact on personal dignity. A short-term violation or one that is relatively harmless for its victim, or a violation that seems to have been raised for purely tactical purposes, might not justify ordering a new hearing. Furthermore, practical considerations might justify a court's contemplating a remedy other than a new hearing, such as awarding costs or declaring that the rights of a party or a witness were violated.

Here, the language rights of several individuals who participated in this case were infringed at the hearing in the TCC. First of all, the right of Industrial's first witness to be heard in the official language of his choice was violated when the judge

asked him to choose between having the hearing adjourned and testifying in English. Next, the right of a witness of the Minister of National Revenue to testify in the official language of her choice seems to have been subordinated to M's authorization. Then there was a clear and serious violation of the constitutional right of two of Industrial's other witnesses to speak in the official language of their choice when the judge denied one of them the right to speak in French despite the witness's having clearly asked to do so and when he insisted that the other testify primarily in English. Moreover, the judge violated the rights of counsel for Industrial by denying him the right to present his argument in French. Finally, M's right to an interpreter was violated.

These violations were numerous, and they had an undeniable impact on the witnesses and the parties, on the conduct of the hearing and even on its outcome. They brought the administration of justice into disrepute. Nothing in the record suggests that these witnesses "waived" their right to testify in French and that counsel for Industrial did so in respect of his right to present his argument in French when the judge accepted the offer of counsel for Industrial to have his first witness speak in English, or that they themselves made a free and informed choice to speak in English. Counsel for Industrial took appropriate steps to assert his own rights as well as the rights of his client and his witnesses. His choice to defer to the judge's instructions resulted from the judge's insistence and was not a tactical move. The order for a new hearing was therefore fully justified.



## Cases Cited

**Applied:** *R. v. Beaulac*, [1999] 1 S.C.R. 768; **referred to:** *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340; *R. v. Dow*, 2009 QCCA 478, [2009] R.J.Q. 679; *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470; *R. v. Tran*, [1994] 2 S.C.R. 951; *Belende v. Patel*, 2008 ONCA 148, 89 O.R. (3d) 494; *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646; *R. v. Potvin (2004)*, 69 O.R. (3d) 641; *Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12, 161 C.R.R. (2d) 331; *Ewonde v. Canada*, 2017 FCA 112; *Beaudoin v. Canada*, [1993] 3 F.C. 518; *Doucet-Boudreau v. Nova-Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3.

## Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, ss. 14, 19, 24(1).

*Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 23.

*Constitution Act, 1867*, s. 133.

*Criminal Code*, R.S.C. 1985, c. C-46, s. 530.

*Employment Insurance Act*, S.C. 1996, c. 23.

*Federal Courts Rules*, SOR/98-106, rr. 31, 93, 283, 314, 347.

*Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), ss. 2, 14, 15, 58 et seq.

*Tax Court of Canada Act*, R.S.C. 1985, c. T-2, ss. 18.15, 18.29(1)(b).

*Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, ss. 101, 102, 123, form 123.

*Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b.

## Authors Cited

Canadian Judicial Council. *Statement of Principles on Self-represented Litigants and Accused Persons*, September 2006 (online: [https://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf); archived version: [https://www.scc-csc.ca/cso-dce/2018SCC-CSC50\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2018SCC-CSC50_1_eng.pdf)).

APPEAL from a judgment of the Federal Court of Appeal (Gauthier, Boivin and de Montigny JJ.A.), 2017 FCA 80, [2018] 1 F.C.R. 495, 2017 D.T.C. 5046, [2017] F.C.J. No. 374 (QL), 2017 CarswellNat 1457 (WL Can.), quashing a decision of Archambault J. of the Tax Court of Canada, 2016 TCC 65, [2016] T.C.J. No. 67 (QL), 2016 CarswellNat 1132 (WL Can.). Appeal dismissed.

*Cameron Fiske, David Milosevic, Caroline Garrod and David Cassin*, for the appellant.

*Yves Turgeon, Michael Shortt and Paul Côté-Lépine*, for the respondent Industrial Alliance Insurance and Financial Services Inc.

*Marc Ribeiro*, for the respondent the Minister of National Revenue.

*Sylvie Champagne*, for the intervener Barreau du Québec.

*Nicolas M. Rouleau*, for the intervener the Canadian Bar Association.

*François Larocque* and *Sara-Marie Scott*, for the intervener Association des juristes d'expression française de l'Ontario.

*Élie Ducharme* and *Christine Ruest Norrena*, for the intervener the Commissioner of Official Languages for Canada.

English version of the judgment of the Court delivered by

GASCON AND CÔTÉ JJ. —

## I. Overview

[1] In Canada, the right to speak in the official language of one's choice in certain courts is a fundamental and substantive right that is recognized in both constitutional and quasi-constitutional laws. Any person who appears in the courts in question must be able to exercise this right freely. When a person asks a judge of one of these courts for permission to speak in the official language of his or her choice, the judge's answer must be yes.

[2] That is not what happened at a hearing in the Tax Court of Canada ("TCC"), however. Some of the witnesses as well as counsel for one of the parties indicated that they wanted to speak in French, but the judge presiding the case asked

them to speak in English instead so as to accommodate one of the parties, who was unilingual. Confusing the rights of the various people involved in the case, the judge prevented the witnesses and counsel from speaking in French in the absence of an interpreter to translate what they had to say into English. In so doing, he violated the fundamental language rights of all these individuals. As for the unilingual party, he had a separate right under the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (“OLA”), to have an interpreter translate the testimony and pleadings for him, but he did not benefit from this right despite having indicated that he wanted to avail himself of it. The Federal Court of Appeal (“FCA”) ordered that a new hearing be held before a different judge. We agree that this is what is required in the circumstances.

[3] This appeal affords this Court an opportunity to consider the duties judges and lawyers must discharge in order to protect the language rights of individuals involved in proceedings in certain courts as well as the remedies that are available when those rights are not upheld. In our opinion, a purposive interpretation of the language rights in question leads to the conclusion that judges are required to participate actively in protecting them. While it is true that lawyers have a role to play in this regard in accordance with their ethical duties, a lawyer’s failure to intervene does not release a judge from his or her duties. When language rights are violated, the appropriate remedy will generally be to order a new hearing.

## II. Background

### (1) Origin of the Case

[4] In 2012, the appellant, Kassem Mazraani, was working as a personal insurance representative for the respondent Industrial Alliance Insurance and Financial Services Inc. (“Industrial”). His contract stipulated that he was self-employed. After six months, Industrial terminated the contract, which it was entitled to do if a representative failed to make any sales for five consecutive weeks.

[5] Following the termination, Mr. Mazraani asked the Canada Employment Insurance Commission to consider this employment to be insurable employment, which would enable him to obtain employment insurance benefits. To that end, he sought a determination that he had been an employee of Industrial. The Commission concluded that his employment had not been insurable employment. In accordance with the procedure set out in the *Employment Insurance Act*, S.C. 1996, c. 23 (“EIA”), Mr. Mazraani appealed the Commission’s decision to the Canada Revenue Agency (“CRA”), which upheld it. He then took the case to the TCC. He was not represented by counsel in that court.

(2) Individuals and Entities Involved in the TCC Proceedings

[6] At first, Mr. Mazraani and the other respondent, the Minister of National Revenue (“MNR”), were the only parties in the TCC proceedings. The MNR was defending the CRA’s decision under the *EIA*. Industrial intervened as a party in the TCC because the case was calling its business model into question. Mr. Mazraani was in fact one of 400 insurance representatives who had signed the same contract with Industrial and were working in similar conditions for 50 agencies that all followed the

same model for the training of and services to representatives. A conclusion that Mr. Mazraani was an employee could therefore affect the status of those 400 representatives both under the *EIA* and under the *Act respecting labour standards*, CQLR, c. N-1.1, the *Act respecting occupational health and safety*, CQLR, c. S-2.1, the *Act respecting industrial accidents and occupational diseases*, CQLR, c. A-3.001, and the *Labour Code*, CQLR, c. C-27.

[7] Because of the issues raised by this case, it was Industrial that called most of the witnesses in the TCC proceedings. Indeed, the MNR called only one witness, Ms. Lambert, the CRA officer who had made the ruling that was being appealed. Her testimony was peripheral, because the exercise of characterizing the contract between Mr. Mazraani and Industrial had to be performed anew in the TCC. Industrial called all the key witnesses, including Mr. Michaud, its senior vice-president, sales and administration, who described the company and its human resources structure; Ms. Beaudet, a lawyer working for Industrial, who outlined the representatives' contracts and Industrial's legal obligations to its representatives; Mr. Charbonneau and Ms. Woo, two other representatives who were self-employed in theory and who testified about their respective relationships with Industrial; and, finally, Mr. Leclerc, an employee of Industrial who was the manager of the agency where Mr. Mazraani worked and who explained his relationship with his representatives and with Mr. Mazraani.

[8] Moreover, the MNR left it to Industrial to present the legal arguments in support of the position that Mr. Mazraani's contract was a contract for services and not a contract of employment. Indeed, the argument of counsel for the MNR in the TCC is limited to 7 pages of the transcript, while that of counsel for Industrial, Mr. Turgeon, takes up over 200 pages.

(3) Conduct of the Hearing in the TCC

[9] The rules of procedure that generally apply in TCC proceedings provide for a mechanism by which parties can give the court and the other party advance notice of the official language in which they and their witnesses will be speaking and, where necessary, request that the court make an interpreter available to them (*Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, ss. 101, 102(5) and 123 and Form 123). However, Mr. Mazraani's case in the TCC was conducted in accordance with an informal procedure. Sections 18.15 and 18.29(1)(b) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, provide that certain appeals, including those arising under Part IV of the *EIA*, "shall be dealt with by the Court as informally and expeditiously as the circumstances and considerations of fairness permit". What is more, such appeals are not subject to the usual rules of evidence. One example of this is that the rules of procedure specific to an appeal such as that of Mr. Mazraani indicate neither how parties are to advise the court of the language in which they, their counsel or their witnesses wish to speak nor how they can request the presence of an interpreter.

[10] This procedural gap was problematic from the first day of the hearing. The judge commenced the hearing in English and spoke in English with Mr. Mazraani. While the judge was discussing Industrial's notice of intervention, which had been drafted in French, Mr. Mazraani told him that he had trouble understanding French. The judge immediately put the document aside and continued the hearing without any further discussion of the matter. Despite this first sign that Industrial wished to proceed in French whereas Mr. Mazraani was more comfortable doing so in English, the judge did nothing to make things clear, inquire into each party's intention and ensure that everyone understood their language rights.

[11] The hearing was scheduled to last only one day, but Mr. Mazraani's testimony turned out to be long, which meant that it had to be adjourned to the following day. On the second day of the hearing, Industrial's first witness, Mr. Michaud, was called to give evidence. He stated that he wished to testify in French. The judge then asked Mr. Mazraani if he needed an interpreter. Mr. Mazraani answered that he did. The judge informed counsel for Industrial that he was prepared to allow Mr. Michaud to testify in French but that he would then have to adjourn the hearing and put it off until another day so that an interpreter could attend to translate the witness's testimony. After consulting with Mr. Michaud, counsel for Industrial suggested that Mr. Michaud might instead testify in English, using a few words in French if necessary. The judge agreed to proceed in this way. He added that it was better to be "pragmatic" and to try proceeding like this, at the risk of having to



adjourn the hearing should there be any problems. Mr. Michaud gave his testimony in this way.

[12] In Mr. Mazraani's view, this brief exchange is crucial. He argues that Mr. Turgeon and the judge thus agreed to a compromise regarding the language to be spoken by Industrial's witnesses that would apply throughout the hearing. But that is not what the transcript shows, and in any event, such an agreement could not have bound any subsequent witnesses. We will return to this below.

[13] The case required additional hearing days. Twenty days later, on the third day of the hearing, counsel for the MNR asked about examining his witness, Ms. Lambert, in French if Mr. Mazraani did not object. Because Mr. Mazraani did object, Ms. Lambert testified in English. That same day, Mr. Charbonneau, a witness called by Industrial, asked the judge for permission to testify in French, stressing that he was more comfortable in that language and that he was surprised to have to give his testimony in English. But the judge asked him to make an effort and to testify in English. Unlike on the second day, the judge did not mention to the witnesses or to Mr. Mazraani that it would be possible to adjourn the hearing until an interpreter could be called in.

[14] At the end of the fourth day of the hearing, it was adjourned again. Two weeks later, on the fifth day, Mr. Leclerc, another witness for Industrial who had started testifying in English of his own accord, quickly showed signs of difficulty speaking that language. Even though counsel for Industrial insisted a number of times

that the witness give his evidence in French, the judge always steered the testimony back to English. That same day, when counsel for Industrial mentioned that he intended to present his argument in French the following day, which he considered necessary if he was to serve his client properly, the judge insisted that he do the best he could in English. The next day, when counsel spoke in French a few times, the judge intervened to ask him to continue in English.

### III. Judicial History

#### A. *Tax Court of Canada, 2016 TCC 65*

[15] In a lengthy judgment, the judge ruled in Mr. Mazraani's favour, concluding that Mr. Mazraani was an employee of Industrial. In his analysis of the evidence, the judge wrote scathingly about insurance companies in general and Industrial's witnesses in particular. In his opinion, Industrial had given "misleading" evidence (para. 177), and its position on its relationship with its employees was a self-serving "embellishment" of reality (para. 205). Among other things, he suggested that the witnesses had played with words and syntax to avoid telling the whole truth. To him, their testimony was "troubling", as "[s]ome of their statements embellished reality, others were misleading and still others bordered on perjury" (para. 223). He was particularly critical of Mr. Michaud and Mr. Leclerc, accusing them of being none too candid and of making misleading statements. In his view, this conclusion was justified by, among other things, contradictions in Mr. Leclerc's testimony and certain choices of words by Mr. Michaud, which were imprecise.

[16] The judge also took shots at counsel for Industrial, whom he accused of having incited his witnesses to distort the truth and to mislead the court. Finally, the judge accused Industrial, on the basis of his criticisms of the witnesses, of not having been forthcoming. He added that Industrial's attitude had been the cause of the numerous delays in the case: the hearing that had been scheduled to take one day ended up taking six. In concluding, the judge ordered Industrial, even though it was an intervener, to pay costs, relying on the TCC's residual power to prevent and discourage any abuse of its process.

B. *Federal Court of Appeal, 2017 FCA 80, [2018] 1 F.C.R. 495*

[17] Industrial appealed the TCC's decision on the grounds that the language rights of its witnesses and counsel had been violated and that there was a reasonable apprehension of bias on the judge's part. The FCA allowed the appeal in a judgment delivered from the bench. In written reasons that it deposited afterwards, it held that the judge could not seek a shortcut around the language rights of the people involved. The rights in question are constitutional and quasi-constitutional in nature and must be protected proactively. Moreover, the right to speak in the courts in the official language of one's choice under s. 133 of the *Constitution Act, 1867* is unrelated to the ability to speak correctly in one language or the other. The FCA found that the judge should not have agreed to the compromise regarding Mr. Michaud's testimony that had been suggested by counsel for Industrial on the second day of the hearing. As well, he should not have treated the requests of Mr. Charbonneau, Ms. Lambert and

Mr. Turgeon as requests for accommodation, but as the legitimate exercise of their protected right to speak in the official language of their choice. The FCA added that Mr. Mazraani's rights had also been violated, as there were long periods when testimony, in particular that of Mr. Leclerc, was given in French without being translated for Mr. Mazraani by an interpreter even though he had clearly stated that he needed interpretation services.

[18] Finally, the FCA found that there was no indication that the witnesses and Mr. Turgeon had agreed to speak in English or that they had only asserted their rights after the fact for tactical reasons. It therefore ordered a new hearing before a different judge, making it clear that the parties would not be permitted to adduce the transcript of the first hearing in evidence.

#### IV. Issues

[19] Mr. Mazraani's appeal to this Court raises two questions:

1. Were the language rights of the parties, the witnesses or counsel at the hearing in the TCC violated?
2. If so, is it appropriate to order a new hearing?

Before answering these questions, we must first determine (1) the nature of the language rights in question; (2) the responsibilities in this regard of judges and

officials of the courts concerned, or of the lawyers involved; (3) how language rights are to be exercised and whether they can be waived; and, lastly, (4) the remedies that are available should these rights be violated.

## V. Analysis

### A. *Language Rights*

[20] English and French are the official languages of Canada. There are a number of laws that protect an individual's right to speak in the official language of his or her choice. In *R. v. Beaulac*, [1999] 1 S.C.R. 768, this Court established the principles that must guide the interpretation of any right that is intended to protect the equal status of Canada's official languages and to ensure full and equal access to the country's institutions by Anglophones and Francophones alike (paras. 15 and 25). First of all, language rights are substantive rights, not procedural rights (para. 28). This means that the state has a duty to ensure that they are implemented (para. 24), and also that they cannot be interfered with (para. 28). Next, "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (para. 25 (emphasis in original)). Finally, language rights are distinct from the principles of fundamental justice, which require, for example, that an accused be able to understand and be understood at his or her trial (paras. 25 and 41). These rights have a purpose that is unique to them, namely the preservation and protection of "official language communities where they do apply" (para. 25). They do not relate to the person's

ability to speak one language or another. Indeed, those who are bilingual are no less entitled to exercise them than those who are unilingual.

(1) Language Rights in Federal Courts

[21] Certain language rights concern access to certain courts in Canada. There are two legislative provisions in the Canadian Constitution whose effect is to recognize the rights in question. This Court has held that the purpose of these provisions is “to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 739; see also *Beaulac*, at para. 22).

[22] The first, s. 133 of the *Constitution Act, 1867*, provides in part as follows:

**133.** . . . either of those [official] Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

[23] The second, s. 19 of the *Canadian Charter of Rights and Freedoms*, reads as follows:

**19. (1)** Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

**(2)** Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

[24] The TCC is a court established by Parliament, and both sections apply in this case. They protect the right to use English and French in the TCC.

[25] There are other language rights applicable to certain courts that are instead quasi-constitutional in nature. This is true of the rights provided for in the *OLA* (*Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 12, quoting *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23, in turn quoting *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at p. 386). Sections 14 and 15 of the *OLA*, which are relevant to the case at bar, govern the exercise of these constitutional rights in federal courts such as the TCC:

**14** English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

**15 (1)** Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

**(2)** Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

[26] There is an important distinction between the right guaranteed in ss. 14 and 15(1) of the *OLA* — the right to speak in the official language of one’s choice — and the right guaranteed in s. 15(2) of the *OLA* — the right to an interpreter. Whereas

ss. 14 and 15(1) give any person the right to use, and any witness the right to speak in, the official language of his or her choice without being placed at a disadvantage, s. 15(2) protects the right of parties to understand what happens in hearings in which they participate. These rights are distinct and need not be asserted in parallel: a person is fully entitled to choose to testify in a given language without worrying about whether an interpreter will be present. The exercise of the fundamental right to speak in the official language of one's choice does not depend on whether an interpreter is present.

[27] Furthermore, this Court held in *Beaulac* that these rights must be interpreted in light of their objective, which is described in s. 2 of the *OLA*:

The objective of protecting official language minorities, as set out in s. 2 of the *Official Languages Act*, is realized by the possibility for all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. [para. 20]

Thus, the rights provided for in the *OLA* will not help achieve the *OLA*'s objectives unless all members of the community can exercise them and are provided with the means to do so. These language rights must be understood as individual and personal rights. They must also be interpreted as guaranteeing access to services of equal quality, as this is the only interpretation that allows their objective to be fully achieved (*Beaulac*, at para. 22). The federal courts to which ss. 14 and 15 of the *OLA* apply must therefore provide the resources and procedures that are needed in order to



respond to requests from parties and witnesses under these sections. Moreover, given the quasi-constitutional nature of the *OLA*, ss. 14 and 15 apply even to a hearing in one of those courts that is conducted in accordance with an informal or simplified procedure.

[28] From this perspective, ss. 14 and 15(1) of the *OLA* restate the essence of the right guaranteed in s. 19(1) of the *Charter*. *Beaulac* requires nothing less. Language rights are not procedural rights related to the dispute that brought the parties before the court in question. Rather, they are fundamental rights related to access of the parties and their witnesses to that court in the official language of their choice. Absent vigilance on the judge's part, this bilingual status is purely symbolic. A purposive reading of s. 19(1) of the *Charter* requires that the court attach the utmost importance to the protection of each person's right to speak in the official language of his or her choice.

[29] A number of courts that have the constitutional duty to allow any person to speak in the official language of his or her choice have therefore adopted special measures to facilitate the exercise and assertion of this right. As we mentioned above, the *Tax Court of Canada Rules (General Procedure)* include standard forms that require the parties to specify the language in which their witnesses will be testifying. This requirement has the advantage of making it clear that the choice of language is not to be made by the court or by the other party, and also of encouraging discussions with witnesses on this subject and ensuring that the other party is informed in this

regard. The Federal Courts have enacted similar rules (*Federal Courts Rules*, SOR/98-106, rules 314 and 347). However, the TCC's rules that apply to cases like the case at bar in which a simplified procedure is followed are silent in this regard (*Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b).

[30] Regarding the right to an interpreter, given that only Mr. Mazraani could have raised the issue of the judge's failure to act on his request under s. 15(2) of the *OLA*, and that he has not invoked that violation in this Court, there is no need to consider the nature of that right or how it is to be exercised. We note, however, that although the costs of interpretation services are usually paid for by the Federal Courts and the TCC (*Federal Courts Rules*, rules 93 and 283; *Tax Court of Canada Rules (General Procedure)*, ss. 101 and 102), the rules for proceedings to which a simplified procedure applies do not mention this possibility. Moreover, whereas the rules of the Federal Courts include a mechanism for asking the courts' officials to provide interpretation services (*Federal Courts Rules*, rules 31 and 93), the TCC's rules are less clear on this point.

[31] That being said, the absence of rules to facilitate the exercise of the rights provided for in the *OLA* does not mean that those rights do not exist. On the contrary, the *OLA* requires that in every case the TCC, a federal court, provide interpretation services at the request of a party and allow every person to speak in the official language of his or her choice. It is of course desirable for the rules of procedure of the federal courts that have such duties to provide litigants with the tools needed to

facilitate the assertion and exercise of the rights in question. But when potential language-related difficulties are not identified and managed ahead of time by way, for example, of an adequate proactive institutional infrastructure, the roles of the judge and of counsel for the parties in protecting the language rights of individuals participating in a hearing become particularly important.

(2) Roles of the Judge and of Counsel

[32] With this in mind, it should be noted that it is the judge of the federal court in question who is primarily responsible for upholding the language rights of witnesses, of parties and of any individual who appears before him or her. There are two reasons for this. First, it is because language rights are “a fundamental tool for the preservation and protection of official language communities where they do apply” (*Beaulac*, at para. 25) and must be interpreted in a way that supports the achievement of that objective. As this Court pointed out in *Beaulac*, it is more sensible not to assume that lawyers will systematically inform the parties (and in the instant case, the witnesses) of their language rights (para. 37). This conclusion also flows naturally from the fact that language rights are not procedural, but substantive rights. And it is just as valid in the context of s. 19 of the *Charter*.

[33] Second, the courts are responsible for discharging this duty in light of the very words of ss. 14 and 15 of the *OLA*. Section 14 does not require that a specific request be made or that a special procedure be followed so that one language or the other can be used in the court in question. It merely decrees that the two official

languages have equal status in the sense that any person can use one or the other in the federal courts. This means that individuals should have to do no more than speak in the official language of their choice in order to exercise their right. Moreover, s. 15 provides that it is incumbent on the *court* to ensure that the rights of the parties and the witnesses are upheld. This responsibility is intentionally assigned to the court in the *OLA*: s. 2(c) provides that one of the Act's purposes is in fact to "set out the powers, duties and functions of federal institutions with respect to the official languages of Canada". This role is particularly important in the case of witnesses, given that, even though they are called by one of the parties, they do not necessarily have the same interests as that party and will therefore not always be informed of their rights by the party's counsel, whose priority is to defend his or her client's interests and to win the case.

[34] Consequently, a judge cannot ask a person to speak in an official language other than the language of the person's choice. A request to that effect is in and of itself a violation of s. 14 of the *OLA*, s. 19 of the *Charter* and s. 133 of the *Constitution Act, 1867*. Judges of the courts to which these sections apply must have no doubt that all witnesses are well aware of their right to speak in the official language of their choice before testifying. A witness's choice in this regard must be informed. Any sign that a witness is uncomfortable in one language or wishes to speak in the other official language must not be disregarded, as that could result in a violation of the witness's language rights.

[35] In fact, when a judge sees that a party will be calling a witness to testify — or will be arguing — in an official language the other party does not understand, the judge must inform the other party of his or her right to an interpreter. The judge can always, and must in many cases, adjourn the hearing so that arrangements can be made for the services of an interpreter. It goes without saying that the parties should be encouraged to plan for and request interpretation services in advance.

[36] That being said, a party's decision not to exercise his or her right to an interpreter should never be used to force other parties, witnesses or lawyers to speak in that party's official language. We also find it risky for a judge to offer to translate testimony to help a party understand it. Judges do not often have the expertise that is needed to translate testimony correctly, and their intervention could be problematic in the event of an appeal should the translation prove to be erroneous. Such a substitution of roles is not advisable.

[37] It is also true that lawyers have certain ethical duties, such as that of acting in the best interests of their clients (*Code of Professional Conduct of Lawyers*, CQLR, c. B-1, r. 3.1, s. 23). These duties could be violated should the lawyer fail to inform his or her client and the witnesses who are called of their rights, or to insist personally on arguing in the official language in which he or she can serve the client properly. However, these duties, which are complementary to that of the judge, do not relieve the judge of his or her responsibilities in this regard. The language rights of a party or a witness as well as the corollary duty of the court and the judge to uphold

them come into play even before anyone intervenes in that regard. While it is true that lawyers are encouraged to intervene should a violation occur, a lawyer's failure to formally object to the violation of a person's language rights does not excuse a failure by the court to discharge its duties (see *R v. Dow*, 2009 QCCA 478, [2009] R.J.Q. 679, at paras. 58 et seq.). Nor can a failure to intervene constitute a form of implicit waiver of the right to make an informed personal choice of language.

[38] When language rights are violated, the lawyer's conduct or interventions can of course be considered, as can the degree of connection between the violations in question and the rights and interests of the party who is asking for a new hearing, when deciding on the appropriate remedy. The injury suffered by a witness whose language rights are violated by a judge even though counsel for the party who called the witness has intervened is just as great as the injury suffered in a situation in which the judge fails to react to a violation of the witness's language rights by that same lawyer. This distinction has no effect on the conclusion that the judge failed to take proactive measures to uphold the substantive rights provided for in the legislative provisions discussed above. The two situations may call for different remedies, however. A party may not attempt to save resources by, for example, sacrificing his or her witnesses' rights and then invoke those rights in order to obtain a new hearing. Similarly, a lawyer who, although not compromising the language rights of the witnesses he or she calls, is indifferent when it comes to upholding their rights will be hard pressed to convince a court that the violation of those rights was harmful to his or her client or impaired the client's interests. In such circumstances, the court might

conclude that the party is trying to take advantage of the violation for purely tactical purposes.

[39] Finally, we are sensitive to the fact that the rise in the number of parties who appear in court without counsel to represent them can cause additional problems for judges when it comes to implementing the protection of language rights. Judges must sometimes adapt the procedure to account for the fact that such individuals are unfamiliar with the justice system in order, for example, to ensure that proceedings are conducted efficiently and to preclude the use of purely tactical manoeuvres by more experienced adverse parties. However, the presence of a party who is not represented by counsel does not result in the suspension of anyone's fundamental rights. As is explained in the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council, which this Court endorsed in *Pintea v. Johns*, 2017 SCC 23, [2017] 1 S.C.R. 470, one of the measures a judge can take to ensure that such individuals can fully understand and participate in a proceeding is to engage in case management activities. A judge should also take the time to explain the process to the parties and to ensure that they are aware of the options that are available to them in this area. By contrast, an attempt to simplify the hearing in this regard without properly consulting the parties and the witnesses with respect to their options and their needs could lead to unnecessary complications. In the case at bar, taking measures such as these would undoubtedly have been preferable and could have mitigated the impact of Mr. Mazraani's being unrepresented while ensuring that everyone's language rights were respected.

(3) Exercising the Right to Speak in the Official Language of One's Choice

[40] With these guideposts in mind, it bears repeating that the right at issue in this case is that of speaking in the official language of one's choice. As this Court explained in *Beaulac*, language rights protect a person's right to make a personal choice that does not depend on external factors such as the person's command of the chosen language or his or her linguistic heritage: ". . . Canadians [have the freedom] to freely assert which official language is their own language" (para. 34). When a person exercises this right, there is thus no need to verify whether he or she speaks better in one language or the other. A person may choose to stick to a single official language or may even change his or her mind while testifying.

[41] The nature of this right becomes particularly significant when it must be determined how a person can exercise it or assert it, and how it can be waived. Mr. Mazraani's arguments require that these points be clarified. Mr. Mazraani alleges that Industrial's witnesses and counsel either took full advantage of their right and chose to speak in English, or waived their right to speak in French through Mr. Turgeon, who, on the second day of the hearing, proposed that it proceed in English with some sentences in French if necessary.

[42] In our view, it seems inappropriate to speak in this regard of "waiver" of a right, be it directly or through counsel. The right is not a right to speak in one's mother tongue or in a language that the court deems to be the person's language: it is the right to make a personal *choice*. If what the right protected was merely speaking



in one official language or the other, it would protect nothing: a person *must* speak a language in order to talk and *must*, at least summarily, choose one of the two languages before speaking. What the courts concerned must protect is not just the fact of speaking in one of the official languages, but also the free and *informed* nature of the choice to speak in one of them rather than the other.

[43] As a result, any “waiver” of language rights should at the very least be as informed as the waiver of the right to an interpreter guaranteed by s. 14 of the *Charter* that was discussed in *R. v. Tran*, [1994] 2 S.C.R. 951: it “has to be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights” (pp. 996-97). From this perspective, it seems wrong to speak of an informed “waiver” of an informed choice. If the choice is informed, there is no waiver, but only a choice; if the choice is not informed, a waiver of the choice cannot be informed either. The two go hand in hand.

[44] The principles enunciated by this Court in *Tran* remain relevant: in the instant case, as in *Tran*, the exercise of the language rights depended on a choice made by the holder of the rights. The mere fact of speaking in one official language does not always reflect an exercise of those rights. Individuals who are unaware of their language rights could think that they are required to speak in the other official language. In the context of language rights, the court must have no doubt, before concluding that the rights in question were properly exercised and rejecting an

allegation that they have been violated, that the person has made a free and informed choice to speak in one official language or the other.

[45] The “assertion” of the right to speak in one official language is subject to no particular form. In our view, while there are a number of signs that would suffice to alert a judge with respect to his or her duties, none of them are necessary on their own. For example, the fact that a witness began his or her testimony in one language or switched to a language after having testified for some time in the other official language will generally be sufficient as an indication in due form of the witness’s choice to speak in that language. In fact, if a person switches languages during certain parts of his or her testimony or asks to speak in the other official language, that could be a sign that the person’s original choice was not informed. Vigilance on the judge’s part thus remains necessary, especially in the presence of individuals, such as witnesses, who may not be informed as regards this right. In any event, given that the right to speak in the official language of one’s choice is distinct from the parties’ right to an interpreter under s. 15(2) of the *OLA*, the right to speak in the official language of one’s choice does not have to be “asserted” by submitting a request for an interpreter to an official of the court or to the judge. It is for the party who wishes to obtain the services of an interpreter to apply for them.

#### (4) Possible Remedies in the Event of a Violation

[46] Finally, any remedy that is granted when language rights have not been upheld must itself also support the achievement of the objective of these fundamental

rights, namely the full and equal participation of linguistic minorities in the country's institutions, or more specifically in the courts in question (*Beaulac*, at paras. 54 and 56). Furthermore, because language rights are not procedural rights, the fact that a violation has had no impact on the fairness of the hearing is in principle not relevant to the remedy (*ibid.*). Indeed, even if there was no error in the decision on the merits, the language rights in question would be compromised if no remedy was granted (see *Belende v. Patel*, 2008 ONCA 148, 89 O.R. (3d) 494, at para. 24).

[47] In *Beaulac* and in other cases concerning s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides for the right of an accused to be tried by a judge who speaks the same official language as him or her, a finding that this right has been violated has usually led to a new preliminary inquiry (*R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646, at paras. 148-49) or a new trial (*Dow*, at para. 106; *R. v. Potvin* (2004), 69 O.R. (3d) 641, at paras. 37 and 41). New hearings have also been ordered in civil proceedings (*Belende; Kilrich Industries Ltd. v. Halotier*, 2007 YKCA 12, 161 C.R.R. (2d) 331, at paras. 5 et 106). Moreover, a failure to take the language rights provided for in the *OLA* into account has been characterized as an error of law (*Ewonde v. Canada*, 2017 FCA 112, at paras. 14 and 28). The FCA has also concluded in a civil context that denying a party the right to a hearing in the official language of her choice amounted to a denial of natural justice (*Beaudoin v. Canada*, [1993] 3 F.C. 518 (C.A.), at pp. 526-27).

[48] Thus, a new hearing will generally be an appropriate remedy for most language rights violations. A new hearing is needed because such a violation deprives one party of the possibility of having access to Canadian justice in the official language of his or her choice. Because the violation occurred in the context of a judicial proceeding, only a new process conducted in a manner respectful of everyone's rights represents a true affirmation of language rights. A judge's failure to take the rights of the persons before him or her into account constitutes both an error of law and a denial of natural justice independently of the quality of his or her judgment and the absence of substantive errors.

[49] Parties may seek such a remedy if they allege that their language rights or those of their counsel have been violated: the right of a party to speak in the official language of his or her choice implies that the party's counsel can speak in an official language that suits the party, be it a language that the party personally understands or the language in which the party believes his or her counsel will be most effective. On the other hand, a party cannot rely on a violation of the language rights of the opposing party or those of counsel for the opposing party in support of the remedy being sought.

[50] As for witnesses, whether it is appropriate for a party to claim that their rights have been violated will depend on the context. A judge who must determine whether that is the case must consider, among other things, the relationship between the party and the witness, the importance of the testimony to the party's case, and the

relationship between the party's language interests and those of the witness. Where a violation of a witness's rights entails a violation of the party's right to conduct the case in the official language of his or her choice, there is in effect a violation of the party's language rights. Similarly, where the violation of an important witness's language rights has an impact on the judge's perception or assessment of that witness's testimony, this will give the affected party a genuine interest to raise the violation. The connection between the violation of a witness's language rights and the party who is asking for a new hearing must of course be established precisely: a party must not benefit unduly from violations that have little to do with his or her own rights and interests. Generally speaking, however, the courts should favour the existence of effective remedies for violations of witnesses' language rights.

[51] That being said, if the violation of a person's language rights has had a genuine impact on the party who is asking for a new hearing, that remedy should be granted where the violation in question brings the administration of justice into disrepute. This will generally be the case given that language rights have a systemic aspect and that the individual right also exists in favour of the community. A violation that seems minor at a personal level will nonetheless have some weight simply because it contributes to putting a brake on the full and equal participation of members of official language communities in the country's institutions and undermines the equality of status of the official languages. Moreover, a violation of language rights can shake the public's confidence in the administration of justice: if a judge gives an advantage at a hearing to members of one language group to the

detriment of the other group, that could be perceived as a sign of bias (*Munkonda*, at para. 63).

[52] However, a remedy cannot be disproportionate in relation to the scale of the language rights violation, its recurrence and its impact on personal dignity. A short-term violation or one that is relatively harmless for its victim might not justify ordering a new hearing. The same is true of a violation that seems to have been raised for purely tactical purposes, such as when a party showed no concern about it at the hearing. On the other hand, the courts must be sensitive to the fact that unrepresented parties may have more difficulty intervening at the hearing to assert their language rights and those of their witnesses.

[53] Furthermore, practical considerations, such as the length and complexity of a hearing and the significance of its impact on the individuals participating in it, or the relative importance of the testimony at issue, might also justify a court's contemplating a remedy other than a new hearing. It should be borne in mind that upholding language rights does not require perfection and that, for example, saying a few words in the other language does not automatically constitute a violation of those rights (*Munkonda*, at para. 109; *Potvin*, at para. 37).

[54] Therefore, when a new hearing is not justified, the court can award costs if the violation resulted from, among other things, the conduct of one of the parties, or declare that the rights of a party or a witness were violated. It is also open to a person whose rights under the *OLA* have not been upheld to make a complaint by means of

the mechanism established in that Act (see ss. 58 et seq.). Finally, there may be situations that lend themselves to the development of more creative remedies under s. 24(1) of the *Charter* (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 24-45). But the decision not to order a new hearing must always be carefully explained in light both of the violation's seriousness and of the remedy's impact.

B. *Application to the Facts*

[55] With these considerations in mind, we are of the opinion that the two questions raised in this case must be answered in the affirmative. The language rights of several witnesses and of counsel for Industrial were not upheld in the TCC, the impact of those violations has been established and the circumstances of the case require a new hearing.

(1) Language Rights Violations at Issue

[56] Several individuals who participated in this case had their language rights infringed at the hearing in the TCC.

[57] First of all, the judge placed on Mr. Michaud the burden of the informal nature of the proceedings and of the fact that Mr. Mazraani, who was not represented by counsel, had not informed anyone that he needed an interpreter. Asking the witness to choose between having the hearing adjourned and testifying in English was

incompatible with the witness's right under s. 15(1) of the *OLA* to be heard in the official language of his choice.

[58] In addition, counsel for the MNR seems to have subordinated his witness's right to speak in French to Mr. Mazraani's authorization. In the circumstances, and in light of what the witness and her lawyer said, the judge should have intervened to explain that the right to testify in the official language of one's choice is unconditional.

[59] Then, on the third day of the hearing, the judge denied Mr. Charbonneau the right to speak in French despite his having clearly asked to speak that language on beginning his testimony. On that day, Mr. Turgeon, counsel for Industrial, began examining his witness in French. But the judge intervened to ask him to proceed in English, after which the judge interrupted the lawyer, who had just begun to give his answer, the full content of which will never be known, and addressed the witness directly to ask whether he spoke English. The judge's insistence in this regard clearly made Mr. Charbonneau uncomfortable:

JUSTICE ARCHAMBAULT: [TRANSLATION] Is it possible to —  
[ORIGINAL IN ENGLISH] to do it in English?

[ORIGINAL IN ENGLISH]

MR. TURGEON: Oh, oh yeah, I'm sorry, I'm not sure ---

JUSTICE ARCHAMBAULT: Can you speak . . . .

[TRANSLATION]



MR. CHARBONNEAU: Can I just say something?

JUSTICE ARCHAMBAULT: Yes.

MR. CHARBONNEAU: Yes, as a matter of fact, I'm better in French . . .

JUSTICE ARCHAMBAULT: Yes.

MR. CHARBONNEAU: . . . and I'm a little surprised because at work our meetings are basically, everything is done in French.

JUSTICE ARCHAMBAULT: Uh-huh.

MR. CHARBONNEAU: Can I answer in French?

JUSTICE ARCHAMBAULT: But the taxpayer . . . the person before us today whose . . . whose appeal this is . . .

MR. CHARBONNEAU: Yes.

JUSTICE ARCHAMBAULT: . . . tells us that he has trouble understanding French. So we're asking witnesses as much as possible to speak in English. Are you relatively comfortable speaking English?

MR. CHARBONNEAU: Well, I'll try . . .

JUSTICE ARCHAMBAULT: Yes, fine.

MR. CHARBONNEAU: . . . to do my best . . .

JUSTICE ARCHAMBAULT: All right.

MR. CHARBONNEAU: . . . and we'll be able to . . .

JUSTICE ARCHAMBAULT: We all make mistakes in English, so please don't worry about that.

MR. CHARBONNEAU: Thank you. [Emphasis added.]

[60] In our opinion, this passage illustrates a clear violation of the constitutional right to speak in the official language of one's choice in a federal court. Although the judge had a duty under s. 15(1) of the *OLA* and s. 19(1) of the *Charter* to take proactive measures to ensure that Mr. Charbonneau's rights were upheld, he

instead asked Mr. Charbonneau not to assert his right but to testify in a language chosen by the judge in the interest of the other party. He continued this insistence even in response to a direct question: [TRANSLATION] “Can I answer in French?” What is more, when Mr. Charbonneau tried to explain himself, perhaps to qualify his response and to limit his undertaking to answer in English, the judge interrupted him.

[61] Similarly, the judge should never have insisted on the fifth day of the hearing that Mr. Leclerc testify primarily in English. This is true even though Mr. Leclerc had stated at the beginning of his testimony that he would be speaking in English. Indeed, counsel for Industrial repeatedly reminded his witness of his right to testify in French by explicitly inviting him to answer in that language, but the judge prevented the witness from exercising this right either directly, by telling him to speak English, or indirectly, by asking him questions in English. In the context of this testimony, which was clearly tense, the witness could quite certainly have interpreted these interventions by the judge as calls to order. In fact, at one point in his testimony, Mr. Leclerc himself stated that he would answer in French, before immediately changing his mind and saying that he would do so in English. This clearly shows that at this point in the hearing, the question of language had become problematic. The discussions on this point were intense and arduous. One exchange between the judge and counsel for Industrial on Mr. Leclerc’s right to testify in French illustrates this in no uncertain terms:

JUSTICE ARCHAMBAULT: [ORIGINAL IN ENGLISH] You know, I've let you go, but, you know, technically he's your witness and you ask leading questions. I would prefer if you ask him what do you do with ---

[TRANSLATION]

MR. TURGEON: Okay. But y'know it's not easy either, My Lord, as my mother tongue is not English.

JUSTICE ARCHAMBAULT: Uh-huh.

MR. TURGEON: It's not the witness's either, and that's where things get absolutely difficult. I'm trying to find a way for us . . . I understand that we have to speak in English, but I don't think that can be done to the detriment of one of the parties either.

JUSTICE ARCHAMBAULT: I understand you very well, but you know . . . you're a lawyer. You do litigation, so you know the difference.

MR. TURGEON: Yes, yes, My Lord, I know the rule.

JUSTICE ARCHAMBAULT: Okay.

MR. TURGEON: But I'm trying to see here how we can "manage" a situation, because in litigation, generally the rule is that it's always in the witness's language. That's the universal rule, always.

JUSTICE ARCHAMBAULT: And so if we want to do it in both languages, interpretation services must be requested.

MR. TURGEON: Okay, but I don't have a problem. I'm comfortable in both languages.

JUSTICE ARCHAMBAULT: Yes, I understand, but [ORIGINAL IN ENGLISH] we're faced with a situation where we have the taxpayer ---

[ORIGINAL IN ENGLISH]

MR. TURGEON: Yeah.

JUSTICE ARCHAMBAULT: --- who says he doesn't understand [French] and ---

MR. TURGEON: But he should then require ---

JUSTICE ARCHAMBAULT: But the issue is we're trying to do the best under ---

MR. TURGEON: Yeah, yeah, but I just want the Court to — I understand the objection, My Lord.

JUSTICE ARCHAMBAULT: I do understand it makes it a little bit more difficult for you but I know you can handle it. [Emphasis added.]

[62] Mr. Turgeon was thus insistent in raising the applicable procedural law and his witness's right to speak in the official language of his choice. When the question of an interpreter came up again, he tried to explain to the judge that Mr. Mazraani could request an interpreter, noting first that the interpreter would not be there in his interest, but the judge interrupted him. The fact that the lawyer then chose to continue his examination-in-chief does not have the effect of lightening the judge's responsibility to favour the protection of the witness's language rights. Just as in the case of Mr. Charbonneau, the violation of Mr. Leclerc's rights was serious, wilful and repeated, and it resulted in several confrontations between the judge and counsel for Industrial.

[63] Lastly, the judge violated Mr. Turgeon's constitutional rights and his rights under s. 14 of the *OLA* by denying him the right to present his argument in French in this discussion that took place in English on the fifth day of the hearing:

MR. TURGEON: Just to be clear, everything I have here is in French. I intend to plead in French tomorrow. We may resume for the witness but I don't think I will serve correctly my client if I'm not doing ---

JUSTICE ARCHAMBAULT: Okay.

MR. TURGEON: And all the precedent[s] are mainly in French.

JUSTICE ARCHAMBAULT: Okay. Anyway, do your best tomorrow.

MR. TURGEON: Okay.

JUSTICE ARCHAMBAULT: . . . But I would encourage you to do [the] best you can do in English.

MR. TURGEON: Okay.

JUSTICE ARCHAMBAULT: But, you know, if you need to do it in French I'll let you do it and we'll translate if necessary. That will just slow the process. [Emphasis added.]

Mr. Turgeon's assertion of his right to speak in French was perfectly clear. While he was explaining the reason for his choice and why he considered it important, the judge interrupted him, apparently to tell him that he could argue in French, but the judge then qualified this by asking Mr. Turgeon to do the best he could in English, specifying that if he insisted on speaking French, "[t]hat will just slow the process".

[64] On the sixth and final day of the hearing, Mr. Turgeon therefore presented his argument mainly in English. The judge observed that Mr. Turgeon was less fluent in that language and even made the following comment, in English: ". . . it is apparent that you don't practice as much in English . . ." The judge nonetheless repeatedly asked him to speak English when he was presenting certain ideas in French. The judge eventually had to let Mr. Turgeon clarify certain aspects of his argument in French, as he could see that the lawyer was having trouble speaking in English, and Mr. Turgeon himself said "[m]y English is very bad". The judge's insistence that Mr. Turgeon speak English during most of his argument constitutes a flagrant violation of the lawyer's language rights.

[65] Although this has no impact on our analysis or on our conclusions, we would like to point out in closing that s. 15(2) of the *OLA* was also not complied with at the hearing in the TCC. As the FCA noted, despite the pressure exerted by the judge, a number of parts of the testimony of Industrial's witnesses and the presentation of its argument took place in French. Yet Mr. Mazraani had stated, on the second day of the hearing, that he would need an interpreter if the hearing was to proceed in French much of the time. Despite this, the judge did not inform him of his right to be provided an interpreter at the TCC's expense or of the procedure to follow to request one. Because Mr. Mazraani was an unrepresented party, a proactive approach would have been particularly appropriate in this case. Even though Mr. Mazraani has not raised this violation in this Court, it did nevertheless occur. And what is more, it was the source of all the other violations against Industrial and its witnesses, who were ultimately made to bear the burden of this absence of an interpreter.

(2) Impact of the Violations

[66] The language rights violations in question in this case were not only numerous, they had an undeniable impact on the witnesses, on the parties and on the hearing. And much of the judge's harsh criticism, in his reasons, of Mr. Michaud, Mr. Leclerc and counsel for Industrial was in fact directly related to problems that are difficult to separate from the language issue.

[67] For example, the judge faulted Mr. Michaud for using certain expressions that he saw as signs of misleading or evasive testimony, such as “to be honest with you” (para. 226), as well as “make sure”, which (in his view) had been used in place of “supervise” or “compliance” (paras. 240-42). He seems to have seen bad faith in what may simply have been an awkward use of expressions in a language in which the witness was not fluent.

[68] In Mr. Leclerc’s case, the judge seems to have accepted that the witness’s vocabulary was limited and imprecise, and he did not fault Mr. Leclerc for sometimes choosing vague words. Yet he concluded that the word “help” was for Mr. Leclerc a synonym of “supervise” and “control” (footnote 239). This interpretation of Mr. Leclerc’s testimony, which was unfavourable to Industrial and had been made possible because the witness was speaking in a language in which everyone — including the judge — acknowledged that he was not fluent, may certainly have influenced the finding that Mr. Leclerc had contradicted himself (paras. 235-37). Conversely, the judge did not consider the witness’s difficulties in speaking in order to determine whether the parts of his testimony that seemed contradictory were in fact contradictory. While it is admittedly difficult to determine the extent to which the violations affected the judge’s perception of the testimony, these examples as a whole suffice to establish that the impact of the violations was probably not insignificant.

[69] As for Mr. Turgeon, counsel for Industrial, he was undeniably asking his own witness, Mr. Leclerc, leading questions, as underlined by the judge (para. 234).

This may explain why the judge stated in his reasons that he believed Mr. Leclerc was misleading the court *with the help* of Mr. Turgeon, which is a serious accusation to make against a lawyer (para. 235). But on at least two occasions when the judge raised this issue, Mr. Turgeon explained that he was asking such questions because he was trying to obtain clear testimony despite the language barrier. The judge did not mention these explanations in his reasons.

[70] Moreover, nothing in the record suggests that these witnesses and Mr. Turgeon “waived” their right, or knowingly chose to testify or to argue in English. Yet that is what Mr. Mazraani submits. In this regard he argues, first, that all of Industrial’s witnesses and its counsel were bound by the suggestion that had been made on the second day of the hearing to the effect that Mr. Michaud would testify in English with, where needed, some sentences in French and that, consequently, no interpreter would be called in.

[71] We cannot accept this argument. To begin, it is clear from the transcript that this suggestion applied only to Mr. Michaud, and to no one else. On the second day of the hearing, when the judge declared that the hearing would have to be adjourned if Mr. Michaud testified in French, Mr. Turgeon replied, “Let me see if he ---”, and the judge asked whether he wanted to take a break to discuss how they should proceed, for Mr. Michaud’s testimony only (emphasis added). The compromise suggested by Mr. Turgeon after the break referred to Mr. Michaud, and not generally to Industrial’s witnesses: “Well, what we propose [is] that we have the



testimony in English and the witness will do the best . . . he can. . . . But at some point, he may, if it . . . comes to very technical issues, he may ask to testify in French and we may briefly translate it to the other parties” (emphasis added). That was the proposal the judge agreed to, and it was not renewed for any other witness.

[72] Also, the courts in question have a duty to protect the language rights of every person. They must therefore consider each case individually. This proactive role must be performed even if counsel for a party seems to agree that the language rights of the witnesses he or she calls can be compromised. A party cannot decide on the language in which all of its witnesses will testify unless the witnesses confirm that that language is in fact their informed personal choice.

[73] Mr. Mazraani then argues, second, that the witnesses themselves chose to speak in English and that language rights do not require a judge to prevent a person who seems to be a Francophone from speaking in English, and vice versa. With respect, this argument does not take into account the adequacy of the choice so made, an aspect that is in fact protected by the *Constitution Act, 1867*, the *Charter* and the *OLA*. Any person who addresses a federal court may do so in the official language of his or her choice. The question the judge must ask is not whether the person chose an official language given that that choice is inevitable, but whether the person’s choice was free and informed. It was not free and informed if the person who made the choice wrongly believed that he or she had to speak in the language of the judge or of a party. Since three people participating in the hearing in the TCC clearly stated that

they wanted to speak in French and were all told that they had to continue in English, we cannot conclude that their choice to speak in English was free and informed; quite the contrary.

[74] As we mentioned above, if a lawyer refrains for tactical reasons from intervening in response to a language rights violation, it is possible that a party who seeks to obtain a sanction for that violation will not be granted a new hearing. But that is not what happened in this case. Counsel for Industrial took appropriate steps to assert his own rights as well as the rights of his client and his witnesses. The question of language was raised on the second day of the hearing, at the time of Mr. Michaud's appearance. Mr. Turgeon also tried to examine his next Francophone witness, Mr. Charbonneau, in French. He tried to respond to the judge's request to proceed with the examination in English, but was interrupted by the judge, who then spoke directly to the witness. When the witness himself indicated that he wished to speak in French, the judge told him that it would be better if he spoke in English. In these circumstances, while it is true that others might have considered it necessary to reiterate their disagreement more firmly, Mr. Turgeon's decision to comply seems in our view to be nothing more than a wise and informed choice not to insist further in the face of the judge's directions.

[75] A confrontation in this regard did nevertheless eventually take place on the fifth day of the hearing, when Mr. Turgeon repeatedly intervened, as he saw clearly that the violation of Mr. Leclerc's rights was causing the witness great

difficulty and was threatening to affect the quality of his testimony. The transcript reveals a tense situation in which the witness switched back and forth between French and English in accordance with the contradictory instructions of the lawyer and the judge, and a strong assertion by Mr. Turgeon of Mr. Leclerc's right to be examined and to testify in the official language of his choice. The transcript also shows that an attempt was made to point out that an interpreter must be requested by the party who requires one and not by the witness, counsel or the other party, but that this was cut short by the judge's insistence that it was necessary to adapt to the situation at hand.

[76] In this case, counsel for Industrial clearly did not remain silent in order to benefit from the violations in a purely tactical manner with the goal of eventually having a ground for appeal in the event of an unfavourable decision. The witnesses' language rights were not used as an ace up his sleeve, but were on the contrary clearly raised from the start of the hearing and reiterated forcefully throughout it. His choice to defer to the judge's instructions to present his argument and examine the witnesses in English resulted from the judge's insistence that this was necessary, and was not a tactical move on counsel's part.

[77] The fact that counsel for the MNR, the respondent in the TCC proceeding, did not insist on the rights of Industrial's witnesses and of his own witness, Ms. Lambert, does not change anything. The MNR was in this case defending an administrative decision that did not really affect her, whereas Industrial, although an intervener, was defending its business model. The MNR called only one

witness, whose testimony was secondary, and argued for only a few minutes in defence of the original decision, leaving it to counsel for Industrial to deal with all the evidence concerning the relationship between Mr. Mazraani and Industrial and to present arguments on the law regarding contracts of employment and contracts for services. The real issues were those of Industrial, not those of the MNR.

(3) Ordering a New Hearing

[78] Thus, in light of the facts of this case, the order for a new hearing was fully justified. In this regard, Industrial complains first about the violation of the language rights of its counsel, Mr. Turgeon, a complaint that it can in fact make. Mr. Turgeon's right to speak in the official language of his choice is related to his client's right to participate in the hearing in the official language of its choice. In addition, Industrial can to the same extent complain about the violation of the rights of the witnesses it called. One of the witnesses, Mr. Michaud, is in fact one of its senior executives. Moreover, it is clear from the transcript of the exchanges between counsel for Industrial, the judge, and witnesses Michaud, Charbonneau and Leclerc that Industrial wished to conduct its case in French to the extent possible. And the language rights of these three witnesses are consonant with those of Industrial. The violations were numerous and, in some cases, serious and repeated, and they brought the administration of justice into disrepute.

[79] Furthermore, the violation of the rights of all of these individuals clearly had an impact on the conduct of the hearing and even on its outcome. The points for

which the judge faulted Industrial's witnesses and counsel in his reasons were attributed to the party itself, which was ordered to pay costs despite its status as an intervener. As the judge explained, these costs were intended to sanction Industrial's failure to be forthcoming and its responsibility for the length and the complexity of the hearing, which had verged on an abuse of process. The conclusion that the witnesses were not very credible and that their testimony was "troubling" (para. 223) and, "to put it in the best possible light", misleading (para. 237) inevitably affected the judge's assessment of the evidence.

## VI. Conclusion

[80] We would accordingly dismiss the appeal and affirm the decision of the FCA ordering a new hearing before a different judge of the TCC. Because Industrial is not seeking costs, each party will bear its own costs in this Court, as, moreover, was the case in the FCA.

*Appeal dismissed.*

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