COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Kilrich Industries Ltd. v. Halotier***,
2007 YKCA 12

Date: 20070918
Docket: YU525

Between:

Kilrich Industries Ltd.

Respondent
(Plaintiff)

And

Henri Halotier

Appellant
(Defendant)

And

Minister of Justice

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Vertes
The Honourable Madam Justice Huddart

R.J.F. Le Page	Counsel for the Appellant
S.L. Dumont	Counsel for the Respondent
P. Gawn and M. Gelinas	Counsel for the Intervenor, Minister of Justice
Place and Date of Hearing:	Whitehorse, Yukon 1 June 2007
Place and Date of Judgment:	Vancouver, British Columbia 18 September 2007

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Vertes

English Version of Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This is an appeal from an order allowing an action in debt after a summary trial. It raises questions regarding the scope of French language rights in civil proceedings before the Supreme Court of the Yukon Territory (the "Yukon Supreme Court"), and primarily concerns the application of ss. 4, 5 and 6 of the ***Languages Act***, R.S.Y. 2002, c. 133 (the "***Languages Act***").

[2] The appellant, Henri Halotier, maintains that he did not have a fair opportunity to present a defence because the ***Rules of Court*** were not available to him in French. He says that he was unable to speak French and be understood by the presiding judge, and that when he finally came to understand the procedure at the summary trial, he was not permitted an adjournment to obtain legal advice, despite the fact he had not filed the required materials in response to the respondent's application for summary judgment.

[3] The respondent, Kilrich Industries Ltd. ("Kilrich"), maintains that the summary trial was conducted in accordance with the Yukon ***Rules of Court*** and that M. Halotier was afforded a fair process; when M. Halotier made submissions, he had the assistance of a volunteer who interpreted from English to French for him and from French to English for the trial judge and counsel for the respondent.

[4] The intervenor, the Minister of Justice, obtained leave to file a factum and make oral submissions to assist this Court. The intervenor's position is two-fold: first, like Kilrich, she says that the hearing before Gower J. was adequate; and

second, she maintains that neither the record nor the jurisprudence indicate that M. Halotier's rights have been violated.

[5] Having considered these positions, I am persuaded that M. Halotier was denied a fundamental right accorded him by the ***Languages Act***. The failure to print and publish the ***Rules of Court*** in French seriously impaired his ability to engage in the Court's processes. For the reasons that follow, I would allow the appeal and order a new trial, with the Yukon government to bear the costs of this appeal and the abortive summary trial to both parties.

Background

[6] M. Halotier was born, raised, and educated in France. His mother tongue is French. In April 2000, he moved to the Yukon and began the construction of a bed and breakfast at Mile 900 on the Alaska Highway south of Whitehorse. He purchased building materials and other supplies on credit from Kilrich, a Whitehorse-based building materials supplier under the terms of a standard form Customer Agreement", signed 21 June 2001. After paying invoices totalling about $100,000, M. Halotier refused to pay a final invoice in the amount of $13,632.43 on the basis that some of the materials supplied were deficient and had caused damage to his building. He wanted repairs done before he paid the remaining balance.

[7] On 17 December 2003, Kilrich issued a Writ and filed a Statement of Claim and asserted a right to the outstanding balance. On 30 December 2003, M. Halotier filed an Appearance and followed this with a Statement of Defence filed on 13 January 2004. On 9 June 2004, Kilrich applied for summary judgment. On 24

August 2004, Gower J. granted a summary judgment in favour of Kilrich for the full amount due under the contract, including interest at 2% per month ($3,352.68) and special costs ($3,361.50) plus such further costs "as may be quantified at an assessment hearing". The summary trial judge relied on deemed admissions, as permitted by Rule 19(19), and held that M. Halotier had neither specifically denied owing the money nor presented evidence to support his defence. Gower J. also declared that Kilrich had "a valid and enforceable security interest in all of the Defendant's present and after acquired property pursuant to the Customer Agreement dated June 21, 2001".

[8] Because M. Halotier contests the process leading up to and including the disposition of the case on the grounds that he was not afforded appropriate services in French, it will be necessary to review those circumstances in some detail. My narrative, to a limited extent, depends on affidavits adduced as fresh evidence by M. Halotier and the intervenor, and for that limited purpose, I consider they should be admitted on this appeal.

M. Halotier's Dealings with the Registry

[9] After receiving the Writ and Statement of Claim, M. Halotier learned from an English speaker who translated the materials for him that he had to file an Appearance with the court registry within 7 days. M. Halotier went to the Supreme Court Registry in Whitehorse where he spoke in French with Edwidge Graham, a deputy clerk who apparently also filled a bilingual counter clerk position created in 1994 to ensure that bilingual services were available during office hours. Ms.

Graham gave M. Halotier a blank “Appearance” form in English and helped him to complete and file it. He understood from her that he could not file documents in French. Ms. Graham denies telling him that.

[10] Regardless of what was said, it is clear that Ms. Graham did not provide M. Halotier with a copy of any part of the ***Rules of Court*** or forms in French. She was unaware they had been translated into French in 1994; and even if she had been, the translated rules were not current, having by then been amended as provided for in the ***Judicature Act***, R.S.Y. 2002, c. 128, s. 38 (the “***Judicature Act***”). Therefore, at the time the judgment was entered against M. Halotier, neither the 1994 ***Rules of Court*** nor any of the amendments were available to him in French. (I note that he has since obtained a copy of the French translation of the 1994 ***Rules of Court*** and that the Practice Directives have been translated and published on the court’s website).

[11] On 12 January 2004, M. Halotier filed a letter in French with the Supreme Court Registry asking for “la présence d’un juge qui parle le français durant le procès”. After that, he did not produce or file any documents in French. He did, however, obtain the form for a Statement of Defence in English which he prepared in French and which he had translated by a friend. It was filed with the registry and reads:

> The defendant denies (specify)
> I have not received any response to my two letters sent to the Davis Company who is representing Kilrich Industries Ltd.
>
> The defendant says that (set out ground for defence)

> I have already paid $100,000.00 for material for windows, exterior doors and logs, but the repairs from Kilrich Industries were never carried out, despite numerous promises from Mr. Rick Boyd.
>
> Wherefore the defendant submits…
> I want, once more, to set a meeting with Mr. Rick Boyd regarding repairs needed to the windows, exterior doors and logs.

[12] In anticipation of a settlement conference to be held on 14 June 2004, M. Halotier sent a letter (in English) requesting a French-speaking judge or an interpreter to assist him with English. Although the deputy clerk advised him an interpreter would be provided, M. Halotier attended the settlement hearing with a friend to assist him with interpretation. The dispute was not resolved.

[13] On 26 July 2004, M. Halotier sent a further letter to the trial coordinator requesting "the presence of a bilingual judge or of Réjean Babineau, court interpreter".

[14] Finally, on 23 August 2004, in anticipation of the summary trial, M. Halotier returned to the registry to swear and file an affidavit in response to Kilrich's motion for summary trial. In that affidavit, M. Halotier reiterated his Statement of Defence:

> 2. I have already paid $100,000.00 for material for windows, exterior doors and logs, but the repairs from Kilrich Industries were never carried out, despite numerous promises from Mr. Rick Boyd.
>
> 3. After our last meeting in Court with Justice Veale on June 14th, 2004 where Kilrich Industries was to contact his windows representative to see if repairs could be done, nothing has been done regarding repairs of windows, exterior doors and logs.

The Summary Trial

[15] During the proceedings, interpretation was provided by M. Réjean Babineau, a bilingual Legislative Counsel with the Yukon Department of Justice. It is apparent from the transcript (and M. Babineau's affidavit), that he interpreted consecutively from French to English for the Court and respondent, and consecutively from English to French by "whispering" to M. Halotier from a position beside him. M. Babineau did not have a microphone and saw his role as "trying to help out" a self-represented, French speaking litigant. His affidavit also establishes that he did so as a volunteer at the request of the Yukon Court Services Branch as "there were not many people available who could provide this kind of assistance".

[16] The process, as it took place, was consistent with the procedure adopted by the Yukon Supreme Court in its Transcript Precedent Manual: the summary trial was digitally recorded by the court clerk without a reporter being present. The location of the microphone did not, however, always permit the recording (and, consequently, the transcription) of what M. Halotier said in the course of the hearing. The first transcript provided to M. Halotier at his request for this appeal was produced in accordance with the usual procedure. It included only the English voices. On 5 April 2007, after further requests, M. Halotier received a transcript of what was said in both French and English. Unfortunately, it contained a considerable number of notes that what was said was "indiscernible."

[17] The transcript is not ideal; however, it is sufficiently complete to find that the interpretation was reasonably well done. At times, M. Babineau summarized what

the court or counsel for Kilrich or M. Halotier said; at other times, he provided a word for word translation. The transcript also establishes that M. Halotier would occasionally respond directly to a comment by the judge in imperfect English.

[18] The transcript, in my view, supports M. Halotier's major complaint about the hearing—namely, that he was not allowed to explain his defence to the summary trial judge, and was not allowed an adjournment to obtain the services of a bilingual lawyer so that he might repair the deficiencies in his materials pointed out to him by the trial judge.

Grounds of Appeal

[19] The essence of M. Halotier's appeal is that the process leading up to and including the summary trial constituted a denial of his rights under the ***Languages Act***. He attributes his lack of understanding of the summary trial process to his inability to obtain the services of a bilingual lawyer, as well as to the government's failure to make the ***Rules of Court***, relevant forms and practice directives available to him in French. His resulting difficulties were not, he submits, ameliorated or corrected by the provision of services in French or the assignment of a bilingual judge to preside at the settlement conference or summary trial.

[20] The appellant sets out a variety of grounds of appeal; however, for purposes of these reasons, I will re-state the issues on appeal by way of these questions:

> 1. Should the ***Languages Act*** be given a large, liberal and purposive interpretation in accordance with Canada's commitment to the protection of minority language rights?

2. Are the authorities interpreting similar statutory and constitutional provisions regarding language rights applicable to the interpretation of the ***Languages Act***?

3. Does the phrase "Acts of the Legislative Assembly and regulations made thereunder" in s. 4 of the ***Languages Act*** include the Rules of Court, forms, practice directives, and memoranda and notices to the profession such that they must be published in both official languages?

4. Does s. 5 of the ***Languages Act*** accord further rights, including:

   a. the right to file documents with the registry in French;

   b. the right to obtain the Rules of Court, forms, practice directives and other documents from the registry in both official languages;

   c. the right at each stage of the court's administrative processes to communicate with a court officer or designated staff person who speaks and understands French;

   d. the right to have a hearing before a judge who speaks and understands French without the need of an interpreter or translation;

   e. the right to have a transcript that includes the evidence given in French; and if an interpreter is present, that the interpreter provide a word for word translation; and

   f. the right, if an interpreter is necessary, to have the interpreter paid for by the state?

5. In the alternative, is the Senior Judge required to assign a judge who speaks and understands French to preside at a trial where a litigant wishes to speak in French?

6. Does s. 6 of the ***Languages Act*** apply to the Yukon Supreme Court Registry as the seat of a central institution of the Yukon Legislative Assembly or government of the Yukon? If so, does the appellant have rights permitting effective communication with the Registry, including:

   a. the right to submit letters in French and to receive a response written in French;

b. the right to communicate directly in French with an agent of the Yukon registry;

c. the right to receive services in French from the court registry, including receiving copies of the rules, forms, practice directives, notices to the profession in French; and

d. the right to be actively offered French services in person, in writing, through the posting of signs, on the telephone or internet website, on the letter head and with the official seal of the Yukon Supreme Court?

[21] By way of remedy, the appellant seeks a new trial and such further orders—pursuant to s. 9 of the ***Languages Act***—as would give effect to these claims.

Historical Context of Language Rights in the Yukon Territory

[22] While these issues do not require an extensive historical review, the evolution of French language rights in the Yukon Territory provides a useful backdrop for their analysis. The advent of official bilingualism in the Yukon is a relatively recent development and largely parallels the process in the Northwest Territories (see ***Fédération franco-ténoise c. Procureure générale du Canada***, 2006 NWTSC 20, [2006] N.W.T.J. No. 33, (S.C.)(QL)) and, to a lesser extent, that in Saskatchewan and Alberta (see ***R. v. Mercure***, [1988] 1 S.C.R. 234 ("***Mercure***")).

[23] The area now known as the Yukon was once part of the vast expanse of land known as the North-Western Territory. This was the land generally defined as being north and west of the area known as Rupert's Land, granted to the Hudson's Bay Company in 1670. Eventually, however, the Hudson's Bay Company came to govern the North-Western Territory. Shortly after Confederation, as foreshadowed

by s. 146 of the ***Constitution Act, 1867***, the U.K. Parliament authorized the acquisition of Rupert's Land and the North-Western Territory from the Hudson's Bay Company (***Rupert's Land Act, 1868*** (U.K.), 1868, 31 & 32 Vict., c.105). On June 23, 1870, by Imperial Order-in-Council, these lands were transferred to Canada and admitted to the union on July 15, 1870 (reprinted in R.S.C. 1970, App. II, no. 9). The entire area was renamed "The North-West Territories".

[24] In 1870, Parliament created the Province of Manitoba from the newly-admitted lands (***Manitoba Act, 1870***, S.C. 1870, c. 3 [reprinted in R.S.C. 1985, App. II, No. 8] (the "***Manitoba Act, 1870***")). By s. 23, Parliament formally recognized that either English or French might be used by any person in debates in the Provincial Legislature, as well as in the courts, and that all acts of the Legislature were to be published in both languages. Section 35 of that Act gave the new province's Lieutenant-Governor authority to govern the remainder of the North-West Territories. The U.K. Parliament confirmed Parliament's power to create new provinces and, specifically, to enact the ***Manitoba Act, 1870***, by the ***British North America Act, 1871*** (U.K.) 1871 34-35 Vict., c. 28. By s. 4, that Act enabled the Canadian Parliament to create laws for the governance of lands then not included in any province. This is the source of Parliament's power to legislate with respect to the northern territories.

[25] In 1875, Parliament adopted the ***North-West Territories Act, 1875***, S.C. 1875, c. 49 to provide for the government of the area that included all of present-day Yukon, Alberta, Saskatchewan, and parts of present-day Northwest Territories, Nunavut, northern Manitoba, Ontario and Quebec. In the beginning, there was no

provision for bilingualism; however, in 1877, the ***North-West Territories Act*** was amended (S.C. 1877, c. 7, s.11) to permit either English or French to be used in the debates of the Territorial Council and in "proceedings before the Courts". This provision continued in force in the territory in the years that followed (see ***North-West Territories Act, 1880***, S.C. 1880, c. 25, s. 94; ***North-West Territories Act***, R.S.C. 1886, c. 50, s. 110). Thus, there was a rudimentary form of official bilingualism in these northern territories as early as the 19th century. That section—re-enacted as s. 110 by the 1886 Act—can be viewed as a counterpart to the language guarantees in s. 133 of the ***Constitution Act, 1867*** (see ***Mercure***, *supra* at 253).

[26] When Parliament created the Yukon Territory in 1898, it continued the laws of the North-West Territories as the laws of Yukon by section 9 of ***The Yukon Territory Act*** 1898 Vict, c.6 (Canada). That provision read:

> Subject to the provisions of this Act, the laws relating to civil and criminal matters and the ordinances as the same exist in the North-west Territories at the time of the passing of this Act, shall be and remain in force in the said Yukon Territory in so far as the same are applicable thereto until amended or repealed by the Parliament of Canada or by any ordinance of the Governor in Council or the Commissioner in Council made under the provisions of this Act.

[27] Therefore, the language rights provided by s.110 continued in effect, at least until Parliament repealed the ***North-West Territories Act*** of 1886, and with it s.110, in 1907 (S.C. 1907, c.43).

[28] Language rights remained uncontroversial in the courts until 1983 when a Whitehorse taxi driver named Daniel St. Jean challenged a traffic ticket on the

ground that it violated the ***Charter of Rights and Freedoms*** because the ordinance enacting it was printed and published only in English: ***R. v. St. Jean***, [1986] Y.J. No. 76, 2 Y.R. 116 (S.C.). Although M. St. Jean's claim was rejected, it prompted serious discussion about the status of the French language in both territories. At that time, the federal government was in the process of drafting the ***Official Languages Act***, S.C. 1988, c. 38 (the "federal ***Official Languages Act***") and the question arose as to whether it would apply in the two territories.

[29] This question was not without significance. Despite a continuing trend toward greater representative and responsible government at the territorial level throughout the 1970s and 1980s, the fact was, and continues to be, that the Yukon is not a province and remains subject to the all-encompassing legislative authority of the Parliament of Canada. The Yukon Legislature—the Commissioner and the Legislative Assembly—has only the powers delegated to it by the ***Yukon Act*** (formerly R.S.C. 1985, c.Y-2; since replaced by the ***Yukon Act***, S.C. 2002, c.7 (the "***Yukon Act***"). Until 2002, the ***Yukon Act*** provided in what was then s.17 that all laws enacted by the Yukon Commissioner-in-Council were subject to not just the ***Yukon Act*** itself, but to any other Act of Parliament. Today, the ***Yukon Act*** provides that in case of conflict between a territorial and a federal enactment, the federal enactment shall prevail (s. 26). It also provides that the Governor-in-Council may disallow any statute passed by the Yukon Legislature (s.25) within one year of its passing, and may direct the Yukon Commissioner to withhold assent to any bill before the Legislative Assembly (s.24).

[30] The discussions that ensued regarding the application of the federal ***Official Languages Act*** resulted in a compromise between Canada and the Yukon. To avoid the application of the federal ***Official Languages Act***, the Yukon government entered into the *Canada-Yukon Language Agreement* of 28 April 1988, in which the Yukon undertook to enact legislation to protect both French and English. It did so three weeks later by the enactment of the ***Languages Act***, S.Y. 1988, c.13. In return, Parliament included s. 3 in the federal ***Official Languages Act*** by which it exempted "any institution of the Legislative Assembly or government of Yukon" from its application. The federal government also agreed to pay the costs associated with the implementation of the ***Languages Act***.

[31] This compromise was more than a mere expression of good intention, for Parliament specifically provided additional protection to the ***Languages Act*** in s. 27(1) of the ***Yukon Act***:

> The ordinance entitled the Languages Act made on May 18, 1988 under the former Act and any successor to it may not be repealed, amended or otherwise rendered inoperable by the Legislature without the concurrence of Parliament by way of an amendment to this Act.

[32] Although the ***Languages Act*** represents a relatively recent development in terms of official bilingualism, its history, the circumstances of its enactment, and as will become apparent, its terms, suggest it was a compromise that sought both to place Canada's two official languages on a quasi-constitutional footing in the Yukon and to afford protections similar in principle to the language rights contained in the ***Canadian Charter of Rights and Freedoms*** and s. 133 of the ***Constitution Act, 1867***.

The Languages Act

[33] The relationship between constitutional language rights and the language rights provided in the ***Languages Act*** becomes evident when one compares their wording. Section 1 of the ***Languages Act*** recognizes French and English as the official languages of Canada and is similar to s. 16(1) of the ***Charter***. It reads:

1(1) The Yukon accepts that English and French are the official languages of Canada and also accepts that measures set out in this Act constitute important steps towards implementation of the equality of status of English and French in the Yukon.	**1**(1) Le Yukon accepte que le français et l'anglais sont les langues officielles du Canada et accepte également que les mesures prévues par la présente loi constituent une étape importante vers la réalisation de l'égalité de statut du français et de l'anglais au Yukon.
(2) The Yukon wishes to extend the recognition of French and the provision of services in French in the Yukon.	(2) Le Yukon souhaite étendre la reconnaissance du français et accroître la prestation des services en français au Yukon.

[34] Section 4 of the ***Languages Act*** concerns enactments of the Legislative Assembly and tracks the language of s. 18 of the ***Charter***. It reads:

4 Acts of the Legislative Assembly and regulations made thereunder shall be printed and published in English and French and both language versions are equally authoritative.	**4** Les lois adoptées par l'Assemblée législative et leurs règlements d'application sont imprimés et publiés en français et en anglais, les deux versions ayant également force de loi et même valeur.

[35] Section 5 deals with proceedings and processes in court and parallels the language of s. 19 of the ***Charter***:

5 Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislative Assembly.

5 Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par l'Assemblée législative et dans tous les actes de procédure qui en découlent.

[36] Section 6 relates to communication with public institutions and other institutions of government and is in substance identical to s. 20 of the ***Charter***:

6(1) Any member of the public in the Yukon has the right to communicate with, and to receive available services from, any head or central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French, and has the same right with respect to any other office of any such institution if

(a) there is a significant demand for communications with and services from that office in both English and French; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be in both English and French.

(2) The Commissioner in Executive Council may make regulations prescribing circumstances in which for the purposes of subsection (1) significant demand shall be deemed to exist or in which the nature of the office is such that it

6(1) Le public a, au Yukon, droit à l'emploi du français ou de l'anglais pour communiquer avec le siège ou l'administration centrale des institutions de l'Assemblée législative ou du gouvernement du Yukon ou pour en recevoir les services. Il a le même droit à l'égard de tout autre bureau de ces institutions là où, selon le cas :

a) l'emploi du français et de l'anglais fait l'objet d'une demande importante;

b) l'emploi du français et de l'anglais se justifie par la vocation du bureau.

(2) Pour l'application du paragraphe (1), le commissaire en conseil exécutif peut, par règlement, fixer les conditions dans lesquelles l'emploi du français et de l'anglais fait l'objet d'une demande importante ou se justifie par la vocation du bureau.

> is reasonable that communications with and services from that office be in English and French.

[37] Section 9 contains the enforcement provision and follows the broad remedial language set out in section 24(1) of the ***Charter***. It provides:

> **9** Anyone whose rights under this Act have been infringed or denied may apply to a court of competent jurisdiction to obtain any remedy the court considers appropriate and just in the circumstances.
>
> **9** Toute personne, victime de violation ou de négation des droits que lui reconnaît la présente loi, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[38] Section 13 gives additional force to s. 4, by rendering both pre-existing and future laws of no effect if not published in both French and English:

> **13**(1) No Act or regulation made after December 31, 1990, will be of any force or effect if it has not already been published in English and French at the time of its coming into force.
>
> (2) No Act or regulation made before December 31, 1990, will be of any force or effect if it has not been published in English and French before January 1, 1994. S.Y. 1988, c.13, s.13.
>
> **13**(1) Sont inopérants les lois adoptées et les règlements pris après le 31 décembre 1990, s'ils ne sont pas publiés en français et en anglais au moment de leur entrée en vigueur.
>
> (2) Sont inopérants les lois adoptées et les règlements pris avant le 31 décembre 1990, s'ils ne sont pas publiés en français et en anglais avant le 1er janvier 1994. L.Y. 1988, ch. 13, art. 13

Discussion and Analysis

1. *Should the **Languages Act** be given a large, liberal and purposive interpretation in accordance with Canada's commitment to the protection of minority language rights?*

[39] The appellant's first submission is that the ***Languages Act*** is a quasi-constitutional document that should be given a large, liberal, and purposive interpretation. The intervenor agrees that the ***Languages Act*** deals with a "special subject matter" (language rights are fundamental human rights: ***Mercure***, *supra* at 268) and should be construed broadly, though she, like the respondent, emphasizes the continued relevance of the ordinary principles of statutory interpretation.

[40] The submissions on this point raise limited controversy. In ***R. v. Beaulac***, [1999] 1 S.C.R. 768 ("***Beaulac***"), the Supreme Court of Canada adopted unequivocally the position that statutory language rights should be given a broad, purposive interpretation and explicitly rejected the restrained approach to language rights once favoured by that Court (see ***MacDonald v. City of Montreal***, [1986] 1 S.C.R. 460 ("***MacDonald***"); ***Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education***, [1986] 1 S.C.R. 549 ("***Société des Acadiens***"); and ***Bilodeau v. Attorney General of Manitoba***, [1986] 1 S.C.R. 449 ("***Bilodeau"***)).

[41] The basis of this restrained approach resembles the intervenor's submissions made on this appeal. In ***Société des Acadiens*** (at 578) Beetz J. explained:

> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle.

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

[42] Mr. Justice Beetz then went on (at 579 - 80) to state that the advancement of official languages was a subject best left to Parliament or the provincial legislatures:

> …The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.
>
> . . .
>
> In my opinion, s. 16 of the *Charter* confirms the rule that the courts should exercise restraint in their interpretation of language rights provisions.
>
> [Emphasis added.]

[43] The rejection of that approach and the affirmation of a broad, purposive approach to the interpretation of language rights is most clearly articulated in the judgment of Bastarache J. (for the majority) in ***Beaulac*** at para. 25:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; see *Reference re Public Schools*

> *Act (Man.)*, *supra*, at p. 850. To the extent that *Société des Acadiens du Nouveau-Brunswick*, *supra*, at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply. It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin. I will return to this point later.

[44] This liberal and purposive approach to language rights was taken as early as ***Jones v. Attorney General of New Brunswick***, [1975] 2 S.C.R. 182 and was affirmed in ***Attorney General of Quebec v. Blaikie***, [1979] 2 S.C.R. 1016 and ***Attorney General of Quebec v. Blaikie***, [1981] 1 S.C.R. 312 ("***Blaikie No. 2***"). This approach is illustrated by ***Re Manitoba Language Rights***, [1985] 1 S.C.R. 721, where the Court held that Manitoba's statutes were invalid because they were not published in French and commented at 739:

> If more evidence of Parliament's intent is needed, it is necessary only to have regard to the purpose of both s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, <u>which was to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike.</u>
>
> [Emphasis added.]

[45] Finally, in ***Arsenault-Cameron v. Prince Edward Island***, [1999] 3 S.C.R. 851 ("***Arsenault-Cameron***") the Supreme Court of Canada reaffirmed the proposition from ***Beaulac*** that language rights must be given a purposive interpretation that takes into account the historical and social context of language rights, past injustices, and their importance.

[46] It is apparent from this survey that the restrained approach supported by the intervenor no longer has any place in the consideration of statutory minority language rights. Moreover, as the appellant points out, this broad and purposive approach to language rights is buttressed by the Constitution's underlying concern with the protection of minority rights, about which the Supreme Court reflected in ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217 ("***Re Quebec Secession***") at para. 80:

> . . . we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the *Charter*'s provisions for the protection of minority rights. See, e.g., *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and *Mahe v. Alberta*, [1990] 1 S.C.R. 342.
>
> [Emphasis added.]

[47] The ***Languages Act*** represents a historic compromise between the governments of the Yukon and Canada to ensure the official recognition of Canada's bilingualism in governmental institutions. And while Parliament has excluded the Yukon Territory from the application of the federal ***Official Languages Act***, the ***Yukon Act*** requires Parliament's consent to any change to the ***Languages Act***. This requirement creates quasi-constitutional obligations. (See the discussion of "manner and form" requirements in ***Mercure***, *supra* at 276-279 and ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525 at 561). Arguably, this renders the ***Languages Act*** more akin to a constitutional obligation than either the

federal ***Official Languages Act*** or the New Brunswick ***Official Languages Act***, S.N.B. 2002, c. O-0.5 (the "New Brunswick ***Official Languages Act***"), both of which have been described as quasi-constitutional by the Supreme Court of Canada, despite being capable of amendment by their respective enacting body. (See ***Lavigne v. Canada (Office of the Commissioner of Official Languages)***, [2002] 2 S.C.R. 773 at para. 23 and ***Charlebois v. Saint John (City***), [2005] 3 S.C.R. 563 at para. 30 ("***Charlebois***")).

[48] In my view, the purpose of the ***Languages Act*** is to commit the Yukon to official bilingualism. As well as being apparent from its legislative history, this purpose is explicit in s. 1 which states that the Yukon accepts that "English and French are the official languages of Canada" and sets down as objects the "implementation of the equality of status of English and French in the Yukon" and the "recognition of French and the provision of services in French in the Yukon". While the ***Yukon Act*** does not declare French an official language of the Yukon, its impact in the legislative, central government and judicial spheres is the same.

[49] The final and perhaps strongest indicator of the object and purpose of the ***Languages Act*** is its virtual identity with the language of the guarantees enshrined in ss. 16 to 22 of the ***Charter***. The appellant does not press this Court to decide whether those provisions of the ***Charter*** are applicable to the Yukon government. Regardless, the two cover the same terrain. To give but one example, s. 5 of the ***Language Act*** states:

5 Either English or French may be	5 Chacun a le droit d'employer le

used by any person in, or in any pleading in or process issuing from, any court established by the Legislative Assembly.	français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par l'Assemblée législative et dans tous les actes de procédure qui en découlent.

[50] Section 19 of the ***Charter*** reads:

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.	19. (1) Chacun a le droit d'employer le français ou l'anglais dans toutes les affaires dont sont saisis les tribunaux établis par le Parlement et dans tous les actes de procédure qui en découlent.

[51] I would, however, add one cautionary note arising from the respondent's submission and the majority opinion in ***Charlebois***, *supra*, where the Supreme Court of Canada held that a broad, purposive interpretation does not permit the court to disregard the ordinary rules of statutory interpretation. That case concerned the meaning of the word "institution" in the New Brunswick ***Official Languages Act***. The respondent City had filed pleadings in English, which, the appellant argued, contravened that Act. Section 22 required Her Majesty or an "institution," when a party to a civil matter, to use the official language chosen by the other party. The question was whether municipalities fell within the meaning of the term institution. In dismissing the appeal, Charron J. (for the majority) (at para. 23) referred to the continued salience of ***Bell ExpressVu Limited Partnership v. Rex***, [2002] 2 S.C.R. 559 and cautioned against interpretations that would eschew the ordinary approach to statutory interpretation:

> In the context of this case, resorting to this tool [*Charter* values] exemplifies how its misuse can effectively pre-empt the judicial review of the constitutional validity of the statutory provision. It risks distorting the Legislature's intent and depriving it of the opportunity to justify any breach, if so found, as a reasonable limit under s. 1 of the *Charter*. …

[52] As Charron J. suggests, this Court must be mindful of the limits of the ***Languages Act*** and avoid pre-empting judicial review of the constitutional status of language rights in the Yukon Territory. This is particularly so where, as in the present case, the Yukon government has not been given the opportunity to justify an alleged breach in accordance with s. 1 of the ***Charter***.

2. *Are authorities interpreting similar statutory and constitutional provisions regarding language rights applicable to the interpretation of the* ***Languages Act****?*

[53] To the extent the wording of the provisions in the ***Languages Act*** is similar to language used in the ***Charter*** and s. 133 of the ***Constitution Act, 1867***, it follows naturally from their similar purpose that the interpretation of those constitutional provisions will provide considerable guidance in the interpretation of the ***Languages Act***. Nevertheless, the interpretation in other decisions cannot be determinative. This Court's task is to interpret the ***Languages Act*** taking a broad and purposive approach, but in the unique context of the Yukon and with the caution from ***Charlebois*** firmly in mind.

[54] Moreover, the corollary also follows that limited weight should be given to authorities considering entirely different schemes, such as the minority language education rights in s. 23 of the ***Charter***. (See ***A.G. (Que.) v. Quebec Protestant School Boards***, [1984] 2 S.C.R. 66; ***Arsenault-Cameron***, *supra*, ***Reference re***

Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; ***Mahe v. Alberta***, [1990] 1 S.C.R. 342; ***Doucet-Boudreau v. Nova Scotia (Minister of Education)***, [2003] 3 S.C.R. 3).

3. *Does the phrase "Acts of the Legislative Assembly and regulations made thereunder" in s. 4 of the* ***Languages Act*** *include the Rules of Court, forms, practice directives, and notices to the profession such that they must be published in both official languages?*

[55] The appellant's primary submission on this issue is that s. 4 of the ***Languages Act*** requires the Yukon government to publish the ***Rules of Court*** in French. His argument turns on three central premises: (1) that the ***Languages Act*** imposes the requirement to publish all "regulations" in French; (2) that the term "regulation" includes the ***Rules of Court***; and (3) that because the ***Rules of Court*** are amended and evolve by practice directives and associated court communications, they also fall within the meaning of "regulation" and must likewise be published in French. I do not agree.

[56] Nor do I agree with the intervenor's response that s. 4 does not require the printing and publication of the ***Rules of Court*** in French because they are excluded by the definition of "regulation" in the ***Regulations Act***, R.S.Y. 2002, c. 195 (the "***Regulations Act***"). I consider the ***Rules of Court*** must be published in English and French because they are established by the ***Judicature Act*** and their publication is necessary to give meaning and effect to ss. 4 and 5 of the ***Languages Act***.

[57] Most of the difficulty with this issue arises from the manner and form in which the ***Rules of Court*** are made and published. The rest derives from the lack of a consistent meaning for the word "regulation" in the Yukon statute book.

[58] The establishment of the rules of court is governed by s. 38 of the ***Judicature Act***, R.S.Y. 2002, c. 128. It provides:

> 38. Subject to this and any other Act, the *Rules of the Supreme Court of British Columbia* in force from time to time shall, *mutatis mutandis*, be followed in all causes, matters, and proceedings, but the judges of the Court may make rules of practice and procedure, including tariffs of fees and costs in civil matters and fees and expenses of witnesses and interpreters in criminal matters, adding to or deleting from those rules, or substituting other rules in their stead.

[59] There seems to be no legislative provision for their publication. The B.C. ***Supreme Court Rules***, B.C. Reg. 221/90 (the "***B.C. Rules***") are available to the public in the Yukon, as in British Columbia, because they have been made by the Lieutenant Governor in Council under the authority of s. 2 of the ***Court Rules Act***, R.S.B.C.1996, c. 77 and are published officially in the *British Columbia Gazette*. Because the Yukon ***Rules of Court*** are not included in the definition of "regulation" under the ***Regulations Act***, there is no comparable requirement for their publication in the *Yukon Gazette.*

[60] To date, the judges of the Yukon Supreme Court have not made rules that substitute entirely for the ***B.C. Rules***. They have instead amended those rules from time to time and published the amendments in the form of practice directives. In the absence of an official publication, it seems likely counsel and litigants most often use

the internet or commercial services to obtain copies of those practice directives, as well as the ***B.C. Rules*** as needed.

[61] Questions regarding the scope of statutory provisions comparable to s. 4 of the ***Languages Act*** have arisen in both Quebec and Manitoba, and were also touched upon by La Forest J. for the majority in ***Mercure***, *supra*. The *locus classicus* for the discussion of this issue is ***Blaikie (No. 2)***, *supra*. In that case, the Supreme Court held that the duty of the Legislature of Quebec to print and publish its "Acts" in English pursuant to s. 133 of the ***Constitution Act, 1867*** included regulations and the rules of practice of court. The obligation was seen to be a necessary incident of the right to use either French or English in a Quebec court, as the majority explained at 332-3:

> Rules of practice are not expressly referred to in s. 133 of the *B.N.A. Act*. Given the circumstances described above, they are unlikely to have been overlooked but in our view the draftsmen must have thought that they were subject to the section by necessary intendment.
>
> The point is not so much that rules of practice partake of the legislative nature of the Code of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which s. 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under s. 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action (*Rules of Practice of the Superior Court of the Province of Quebec in civil matters*, November 10, 1978, ss. 49 to 56), a proceeding in the Superior Court, a process of the Superior Court. <u>All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only.</u>

> Furthermore, and as was noted by Deschênes C.J.S.C., (at p. 49 of his reasons), this fundamental right is also guaranteed to judges who are at liberty to address themselves to litigants in the language of their choice. When they so address themselves collectively to litigants as they peremptorily do in rules of practice, they must necessarily use both languages if they wish to safeguard the freedom of each judge.
>
> We accordingly reach the conclusion that, given the nature of their subject-matter, rules of court stand apart and are governed by s. 133 of the *B.N.A. Act*.
>
> [Emphasis added.]

[62] As this passage indicates, the obligation imposed by s. 133 does not flow from a strict reading of the provision, but from the spirit of the Constitution and the view that the absence of the rules of court would deprive litigants of their fundamental right to use either French or English in the court's processes.

[63] Because the Legislative Assembly chose to use language in s. 4 of the ***Languages Act*** that tracks that in s. 18 of the ***Charter***, s. 133 of the ***Constitution Act, 1867*** (***Société des Acadiens***, *supra* at 573), s. 23 of the ***Manitoba Act, 1870***, and s. 110 of the ***North-West Territories Act***, I am persuaded it should be read as imposing the same obligation on the Yukon government. (See ***Re Manitoba Language Rights***, *supra* at 744 and ***Mercure***, *supra* at 273). In my view, all enactments, including delegated legislation, are to be published in both languages; so, too, are the rules of court made by judges.

[64] In reaching that conclusion, I have considered the submissions of the intervenor and the respondent that despite the afore-mentioned case law, the ordinary meaning of s. 4 excludes the requirement to publish the Yukon ***Rules of Court*** in French.

[65] The main submission on this point turns on the application of the definitions of "regulation" in the ***Interpretation Act***, R.S.Y. 2002, c. 125 (the "***Interpretation Act***") and the ***Regulations Act***. As I see it, neither can be determinative of the interpretation of the same word in the ***Languages Act***, nor is particularly helpful in discerning the intention of the Legislative Assembly in adopting s. 4 of that Act.

[66] In my view, each definition applies only for the purposes of the Act that includes it, and neither Act purports to make its definition apply to every other enactment. The ***Interpretation Act*** acknowledges the definitions are different by using the phrase "a regulation as defined in the *Regulations Act*" in s. 17(3). One of the differences relates to ***Rules of Court***. The ***Interpretation Act*** includes "rules of court" in its definition of regulation, whereas the ***Regulations Act*** excludes them. Section 21(1) of the ***Interpretation Act*** applies to other enactments. It defines an "Act" as "an ordinance of the Yukon enacted pursuant to the ***Yukon Act*** (Canada)" and "Rules of Court" as "the Rules of Court established under the *Judicature Act*," but does not include a definition of "regulation".

[67] Furthermore, s. 27 of the ***Yukon Act*** prohibits the Legislature from limiting the scope of application of the ***Languages Act*** unless it has "the concurrence of Parliament by way of an amendment to this [Yukon] Act". To interpret "regulation" as excluding the ***Rules of Court*** from the French publication requirement would be to limit the reach of s. 4 of the ***Languages Act***. That cannot have been the Legislature's intention as neither the Commissioner nor the Legislative Assembly sought the consent of Parliament to so. The definition in the ***Interpretation Act*** better suits the ***Languages Act***, or, at the very least, is not inconsistent with it.

[68] In any event, it is not evident that the ***Rules of Court*** are a "regulation" however defined. On my reading of s. 38 of the ***Judicature Act***, the Legislative Assembly chose to incorporate the ***B.C. Rules*** directly into that statute. Thus, for example, Rule 18A, under which the summary trial was conducted, takes its effect directly from the ***Judicature Act***. Referential incorporation in itself does not affect the Yukon government's obligations: ***Re Manitoba Language (No. 2)***, [1992] 1 S.C.R. 212 at 229-30. The Yukon government could have left the rules to the judges of the Supreme Court or given the authority to establish rules by regulation (as defined in the ***Regulations Act***) to the Commissioner in Executive Council or some other body or person, but the Legislature chose to require that ***B.C. Rules*** be followed, subject to any variations the judges of the Yukon Supreme Court might make under the authority delegated to them in s. 38 of the ***Judicature Act***. Parliament granted that power to the Legislature in s. 18(1)(k) of the ***Yukon Act***.

[69] In my view, as a result of the method the Legislature used to establish them, the ***Rules of Court*** are statutory in effect. They are legislative acts that must be printed and published in both French and English and include the forms prescribed by those rules and all practice directives issued by the judges of the Supreme Court to amend the ***B.C. Rules*** as permitted by s. 38 of the ***Judicature Act***, all of which have the force of law and are effectively delegated legislation. That variations in the ***Rules of Court*** are made by practice directive is a question of form, not substance.

[70] I wish to make clear that the obligation to publish the ***Rules of Court*** in French includes only those instruments that are of a legislative nature and

compulsory character, and that are made by virtue of s. 38 of the ***Judicature Act*** (see ***Re Manitoba Language (No. 2)***, *supra).*

4. *What rights flow from s. 5 of the* ***Languages Act?***

[71] The appellant next asserts that s. 5 of the ***Languages Act*** imposes positive obligations on the government to communicate and understand M. Halotier in either official language. Section 5 permits "any person" to use English or French "in any pleading in or process issuing from" the Yukon Supreme Court—a court established by the Legislative Assembly in the ***Supreme Court Act***, R.S.Y. 2002, c. 211.

[72] Consideration of some of the claimed rights is straight-forward. The right to file documents with the registry in French and the right to use French in communicating orally or in writing with the registry flow naturally from the language of s. 5 of the ***Languages Act***. When proceedings are required by law to be recorded, a person using either French or English has the right to have his words recorded in that language (***Mercure***, *supra* at 275-6). It follows that any transcript of such a proceeding should include testimony in the language (if French or English) in which it was given. Otherwise, as La Forest J. noted in ***Mercure***, the right to use one's chosen language would be seriously truncated, particularly if the proceedings continued on to the Court of Appeal. And consistent with my view of s. 4, for the right to use English or French in a court proceeding to have any meaning, the court must make its rules (including forms and practice) available to the public in French in the same way it does in English.

[73] The other rights the appellant claims are more difficult of analysis, particularly those that imply a positive obligation on the court, such as the obligation to provide a bilingual judge, clerk or officer of the court, or an interpreter. However desirable these services may be, I am not persuaded s. 5 imposes an obligation to provide them.

[74] To begin, the Supreme Court of Canada has refused to find the imposition of any positive duty in the comparable language of s. 133 of the ***Constitution, 1867***, or s. 19(2) of the ***Charter***. In ***Société des Acadiens***, *supra*, Beetz J. (for the majority) explained at 574:

> It is my view that the rights guaranteed by s. 19(2) of the *Charter* are of the same nature and scope as those guaranteed by s. 133 of the *Constitution Act, 1867* with respect to the courts of Canada and the courts of Quebec. As was held by the majority at pp. 498 to 501 in MacDonald, these are essentially language rights unrelated to and not to be confused with the requirements of natural justice. These language rights are the same as those which are guaranteed by s. 17 of the *Charter* with respect to parliamentary debates. They vest in the speaker or in the writer or issuer of court processes and give the speaker or the writer the constitutionally protected power to speak or to write in the official language of his choice. And there is no language guarantee, either under s. 133 of the *Constitution Act, 1867*, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice.
>
> [Emphasis added.]

[75] Counsel for the appellant acknowledged his claims clash with ***Société des Acadiens*** and ***MacDonald***, *supra*, but suggests that these decisions have been over-taken by more recent decisions, particularly ***Beaulac***, *supra*, and that on its purposive approach to language rights, positive obligations should be imposed as

necessary to give meaning to his statutory right to use French in court proceedings. The appellant also says that this interpretation of s. 5 recognizes not only his language rights, but also with the aspirations of the Yukon francophone community to develop and expand.

[76] I am not prepared on the record in this case to attempt to distinguish considered decisions of the Supreme Court of Canada. Furthermore, there are good reasons to support the view that s. 19 of the ***Charter*** and s. 5 of the ***Languages Act*** impose few positive obligations on the court or government.

[77] First, s. 6 of the ***Languages Act***, like the parallel provisions of s. 20 of the ***Charter***, provides for the "right to communicate with, and to receive available services from … the central office of an institution of the Legislative Assembly or of the Government of the Yukon in English or French", and the same right with respect to any other office of any such institution when certain numerical or qualitative conditions are met. While I appreciate that this provision is not determinative of the scope of s. 5, it does provide strong support for a more limited reading than that suggested by the appellant. So does the absence of a provision comparable to those found in other legislative schemes that specifically address the language capacities of a judge (See s. 19(2) of the New Brunswick ***Official Languages Act***; s. 16 of the federal ***Official Languages Act***; and s. 530 of the ***Criminal Code of Canada***, R.S.C. 1985, c. C-46).

[78] Second, s. 5 of the ***Languages Act***, like s. 19 of the ***Charter***, uses the presumptively permissive term "may". This term does not normally connote a

positive obligation to act and contrasts with the mandatory "shall" used in s. 4 (***Re Manitoba Language Rights***, *supra* at 742).

[79] A third reason to reject an interpretation that requires a bilingual judge or interpreter, or imposes some other positive obligation is that it may have constitutional implications as Beetz, J. suggested in ***Société des Acadiens***, when he explained (for the majority) at 580:

> Before I leave this question of equality however, I wish to indicate that if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences and would constitute a surprisingly roundabout and implicit way of amending the judicature provisions of the Constitution of Canada.

[80] Almost inevitably, the implication of construing s. 5 as including positive obligations would be to pre-empt constitutional review and the opportunity for the government to justify its decision under s. 1 of the ***Charter***—something which Charron J. warned against in ***Charlebois***, *supra.*

[81] A final reason for rejecting a more expansive interpretation of s. 5 is that courts have unequivocally recognized that the right to speak and be understood is protected by the requirements of natural justice and the right to a fair hearing. Important for the Yukon, in particular, is the explanation offered by Bastarache J. at para. 41 of ***Beaulac***:

> …The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the *Charter*, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions. Thus, in *MacDonald v. City of Montreal*, *supra*, Beetz J., at pp. 500-501, states that:
>
> > It would constitute an error either to import the requirements of natural justice into . . . language rights . . . or vice versa, or to relate one type of right to the other. . . . Both types of rights are conceptually different. . . . To link these two types of rights is to risk distorting both rather than reenforcing either.

[82] On this point, reference can also be made to the recent dissenting reasons of Bastarache J. in ***Charlebois***, *supra*, where he wrote (at para. 54):

> Although the quasi-constitutional status of the *OLA* requires a purposeful and generous interpretation, there is here no basis for imputing to the Legislature the intention to extend the definition of the terms used in furtherance of s. 16(3) of the *Charter*. On the contrary, there is every reason to believe that the Legislature was conscious of the distinction between language rights and the right to a fair trial, and the distinction noted earlier in these reasons between the use of one's official language in pleadings on one part, and communications with government offices under s. 20(1) of the *Charter* on the other. ...

[83] In summary, as I see it, the right to registry services in French and English is to be considered under s. 6 of the ***Languages Act***. The right to be understood directly or through an interpreter, and the right to a transcript that includes interpretation of the original French or English voices are left to the discretion of the trial judge who is obliged to conduct a fair trial, with full regard for the right of every

person in a Yukon court to speak and produce documents in French or English and to other rights guaranteed by the ***Charter***, including the right to an interpreter under s. 14, and the need to give "true meaning" to the principle of equality which Bastarache J. noted in ***Beaulac*** (at para. 22).

5. *In the alternative, is the Senior Judge required to assign a judge who speaks and understands French to preside at a trial where a litigant wishes to speak in French?*

[84] The essence of the appellant's argument on this issue is that the unwritten constitutional principle of the protection of minorities requires the Senior Judge, in his or her administrative capacity, to assign a bilingual judge to preside at a settlement conference or a trial when a party expresses an intention to speak French. He says this duty comes not by way of a right, but from the duty of administrative decision-makers to exercise their discretion in conformity with the constitution, including its unwritten principles. (See ***Lalonde v. Ontario (Commission de restructuration des services de santé)*** (2001), 56 O.R. (3d) 505 (C.A.)). The result, he submits, is that the Senior Judge must assign a French-speaking judge if a party chooses to use French at a hearing.

[85] For the reasons I rejected the submission that s. 5 of the ***Languages Act*** imposes such an obligation, I do not accept this submission. It seems to me that this is another way of seeking to impose an obligation to communicate or be understood in French, which, as I have said, does not follow from the language of s. 5.

[86] Moreover, as McLachlin J. (as she then was) noted in ***MacKeigan v. Hickman***, [1989] 2 S.C.R. 796 at paras. 69 to 71, the exclusive control over the

assignment of judges is central to the institutional independence of the judiciary. (See also ***R. v. Valente***, [1985] 2 S.C.R. 673 and ***Provincial Judges Reference***, [1997] 3 S.C.R. 3). While the assignment of judges may be seen as an administrative function, it is not so by statutory delegation and is a function that directly affects adjudication. The exercise of that power by the Chief Justice or Senior Judge on behalf of the court is an implicit institutional requirement flowing from ss. 96 to 100 of the ***Constitution, 1867***. It follows that a Chief Justice or Senior Judge, when in the performance of that task, enjoys immunity from compulsion by Parliament or the Executive (or I would add, another court by way of judicial review).

[87] In any case, the very essence of a judge's institutional role is to exercise authority in conformity with the written and unwritten principles of the constitution, which include the protection of linguistic minorities (***Re Quebec Secession***, *supra* at para. 80). The Senior Judge, no less than any other judge, will endeavour to fulfil that obligation to the best of his or her ability. If the result of an assignment is an unfair trial, that error will be remedied as any other error of a judge in the performance of a duty: by way of appeal.

6. *Does s. 6 of the **Languages Act** apply to the Yukon Supreme Court as the central office of an institution of the Yukon Legislative Assembly or the Government of the Yukon?*

[88] The ***Languages Act***, unlike the New Brunswick ***Official Languages Act*** at issue in ***Charlebois***, does not define the term "institution". However, to me it is self-evident that the Supreme Court must fall within the meaning of the term, as it is an

organized body established by the Yukon Legislative Assembly. It is enough to look to the ordinary meaning of the word as used in the authorities cited on this appeal to decide the Legislative Assembly intended to include Superior Courts within its meaning. The Supreme Court of Canada has referred time and again to the court as an "institution" and to the importance of the "institutional independence" of the courts. Likewise, given its administrative arrangements, the registry in Whitehorse has to be seen as the court's "central office".

[89] Furthermore, the structure of the Yukon Supreme Court also attests to its position as an institution. The Legislative Assembly established the Supreme Court of the Yukon Territory by s. 2 of the ***Supreme Court Act*** as it was authorized to do under s. 18(1)(k) of the ***Yukon Act***. The Court's Clerk is appointed by the Commissioner in Executive Council, as are "any other officers [it] considers necessary for the due administration of justice and the dispatch of business of the Court"(***Supreme Court Act***, s. 8). She has charge of the Court's seal by which all "proceedings in the Court" are certified and authenticated (***Judicature Act***, s. 40). Her office is in the Court's registry in the Law Courts at Whitehorse and her duties are set out in s. 41 of the ***Judicature Act***:

> The duties of the clerk shall be
>
> (a) to attend at the clerk's office and keep it open on those days of the week, other than holidays, and during those hours that the Commissioner in Executive Council may set;
>
> (b) on application of any person by themselves or their agent
>
> (i) to receive all complaints and other papers required to be filed in Court,

> (ii) to issue all statements of claim, warrants, precepts, writs of execution, and other documents rendered necessary or requisite for the effectual disposition of those matters, and
>
> (iii) to tax costs, enter judgments, and record all judgments and orders pronounced, given or made;
>
> (c) to keep an account of all fines, fees, and money payable or paid into Court and to enter all such amounts in proper books or accounts as may be prescribed;
>
> (d) to attend all trials before the Court unless the clerk's attendance is dispensed with by the Court; and
>
> (e) to do and perform all other acts and duties necessary for the administration of justice in the Yukon or as may be prescribed.

[90] In view of these legislative provisions and the other provisions of the ***Languages Act***, I cannot attribute to the Legislative Assembly the intention to exclude the Supreme Court and its registry from the ordinary meaning of the word "institution".

[91] The real question is the meaning of "the right to communicate with, and to receive available services from" that office. In ***Société des Acadiens***, Beetz J. affirmed (at 575) what seems obvious, "the right to communicate in either language postulates the right to be heard or understood in either language". Thus, it follows that every person has the right to communicate directly in French with a member of the staff of the registry personally, by telephone, in writing, and to receive all the services in French that are available to the general public in English.

[92] M. Halotier's concern is that he could not communicate in French with the trial co-ordinator who arranged both the settlement conference and the summary trial or with the clerk present in court on those two occasions, as well as with a more

general sense that his language is not respected in the provision of telephone services, the provision of signs, and the design of the court's official seal and website.

[93] While I conclude that s. 6(1) of the ***Languages Act*** applies to the court registry in Whitehorse, the record of this case does not lend itself to the setting of a precise standard for the provision in French of each administrative service. Although communication with a central office of a governmental institution under s. 6(1) is not subject to the same qualitative and quantitative indicators as ss. 6(1) (a) or (b) of the ***Languages Act***, human and financial resources are not unlimited. The question of resources is particularly troublesome when it comes to the needs of self-represented litigants. Whatever their language of choice, self-represented litigants face challenges in coping with an adversarial system of justice; they, in turn, pose challenges to the court clerks and judges who do their best to provide services in a system that depends heavily on counsel for its efficient operation. Among those challenges is being even-handed as between opposing parties.

[94] Because all service-providing systems will be imperfect in the eyes of someone, it seems to me that any analysis of the requirements of the obligations under s. 6(1) can only be by way of comparison to services provided in comparable circumstances. The record in this case permits only a limited analysis. Indeed, M. Halotier was able to communicate orally with the bilingual deputy court clerk on most occasions when he attended the court registry in Whitehorse and, at times, by telephone. He was thus able to navigate some of the court's processes. Nevertheless, his participation was limited and subject to misunderstandings,

particularly as to the extent to which he could engage with the registry and courts in French.

[95] In my view, s. 6 of the ***Languages Act***, when read with its object and purpose, requires the registry to provide the same assistance to self-represented French-speaking litigants as it provides to self-represented English speaking litigants. A simple example of a comparable service would be to answer the telephone with a bilingual greeting ("Bonjour/Hello"), followed by a transfer to the bilingual counter clerk if the caller responds in French.

Application to this proceeding

[96] In my view, M. Halotier has established a breach of his language rights that entitles him to a remedy under s. 9 of the ***Languages Act***:

> Anyone whose rights under this Act have been infringed or denied may apply to a court of competent jurisdiction to obtain any remedy the court considers appropriate and just in the circumstances.

[97] Without the ability to obtain a complete and current copy the ***Rules of Court*** in French, M. Halotier could not effectively exercise the right granted him by s. 5 of the ***Languages Act*** and use French throughout this proceeding, in pleadings, at the settlement conference, and at the summary trial. For this reason alone, I would allow the appeal, set aside the order of Gower J. and remit the matter for a new trial. Although I note this remedy typically follows from a breach of procedural fairness, (see ***Bilodeau*** and ***Mercure***, *supra)*, it is appropriate in light of the overall circumstances of this case and the language of s. 9.

[98] The only inference possible from what occurred from the beginning of this case is that neither the Minister of Justice nor the Yukon Supreme Court fully appreciated that M. Halotier had a statutory right to use French in this proceeding. Indeed, the fact that the bilingual registry clerk was unaware of the translation of the 1994 ***B.C. Rules*** speaks loudly of a general lack of appreciation of the ***Languages Act***. The same can be said of the Transcript Precedent Manual, which makes no provision for a trial where a participant chooses to use French. From the delay in receiving a proper transcript of the summary trial, it appears the transcription services contract may also need revision. Happily, the Yukon Government seems on the track to fulfilment of its obligations and the situation in which the parties now find themselves is unlikely to recur.

[99] The failure of the judicial system to appreciate M. Halotier's rights is best illustrated by two comments at the summary trial. The first was to the effect that M. Halotier could have fulfilled his obligation to understand the process if he had sought the assistance of an English-speaking lawyer and used an interpreter to deal with that lawyer, rather than taking the risk of representing himself when he could not find a bilingual lawyer willing to advise him. The second was that M. Halotier ought to have made an application for a bilingual trial if he wished to use French. Nothing in the ***Rules of Court*** or practice directives, if they had been available in French, would have suggested that this was required. In any event, M. Halotier had written a formal letter requesting a hearing in French when he filed his Statement of Defence and he did not receive a reply.

[100] While setting aside the trial judge's order provides a remedy to M. Halotier, it does not resolve a broader issue raised by the ***Languages Act***. That is because s. 13(1) of the ***Languages Act*** provides:

> No Act or regulation made after December 31, 1990, will be of any force or effect if it has not already been published in English and French at the time of its coming into force.

[101] When read in conjunction with ss. 4 and 5, as I have interpreted them, this provision would appear to invalidate the ***Rules of Court***. Authorities indicate the Legislature is bound by its own "manner and form" requirements, even where they are not constitutionally entrenched (see ***Mercure***, *supra*). Counsel for M. Halotier suggests that, since the Yukon Government has chosen to comply with s. 4 by adopting new rules of court and publishing them in French and English, this Court might consider the course taken by the Supreme Court in ***Re Manitoba Language Rights***, *supra*, and render the rules temporarily in effect for a period of three months. In the absence of any suggestion the Legislature will seek Parliament's consent to repeal the ***Languages Act*** or the parts of it related to language rights in Yukon courts, I am attracted to the proposition that this Court should take that course to avoid a legal vacuum. I have no record of the intervenor's response to this suggestion, but consider 12 months from the judgment date would be more appropriate; there is no evidence as to when the Rules Committee may complete its work or how the new rules are to be established. Accordingly, I would declare the ***Rules of Court*** of no force and effect, but suspend the operation of this declaration for a period of 12 months from the date of the release of this judgement to enable

the Yukon Supreme Court and Government to comply with the requirements of ss. 4 and 13 of the ***Languages Act***.

[102] M. Halotier would also have this court direct that his new trial not be held until the new rules come into force. A more appropriate remedy in this case would be to require the Yukon government to pay for the services of a qualified interpreter who could assist M. Halotier either directly or through an English-speaking lawyer to understand the ***Rules of Court*** so as to permit him to defend himself. This remedy would acknowledge the continuing validity of the ***Rules of Court*** pending their publication in French, as well as ensuring that neither he nor Kilrich will suffer from further delay.

[103] The last matter is the question of costs. In view of his success on this appeal, in ordinary circumstances, M. Halotier would be awarded costs of the summary trial and appeal against the respondent. But this is not an ordinary case. In my view, the judicial system has failed not only M. Halotier, but also the respondent, Kilrich. Had those responsible for the provision of court services or the administration of the court appreciated the reach of the ***Languages Act***, this matter could have been resolved in a timely and relatively inexpensive manner.

[104] While counsel for Kilrich (not counsel on this appeal) might have anticipated this appeal if he had turned his mind to M. Halotier's situation, he cannot be faulted for what happened. What happened was a systemic failure. I am, therefore, persuaded the Government should bear the costs of both parties for the abortive trial

and for this appeal. Because this systemic failure caused unnecessary expense to both parties, I would order the Minister of Justice to pay their special costs.

[105] That leaves one remaining issue, the respondent's request for an order requiring M. Halotier to deposit security for the amount of its claim. This is a most unusual request, one, in my experience, without precedent. As a result of this Court's order, the respondent has no judgment against M. Halotier. In this, recourse must be had to the Supreme Court for any pre-judgment security order to which the respondent considers it might be entitled.

Conclusions

[106] For these reasons, I would allow the appeal, set aside the order of Gower J. and remit the matter to that court so the appellant may file a new Statement of Defence and have a new trial.

[107] I would order special costs of the appeal and of the summary trial be paid by the Minister of Justice.

[108] Finally, I would declare the ***Rules of Court*** of no force and effect, as not having been made following the manner and form requirements of s. 4 of the

Languages Act. I would suspend the effect of that order for a period of 12 months from the date this Court pronounces judgment to permit the Legislative Assembly to establish ***Rules of Court*** in compliance with that provision.

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The Honourable Madam Justice Huddart

I agree:

_____
The Honourable Chief Justice Finch

I agree:

_____
The Honourable Mr. Justice Vertes