IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Schneider, 2003 NSSC 209

Date: 20031027
Docket: SH 177755A
Registry: Halifax

Between:

Annie Schneider

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	February 24, 2003, in Halifax, Nova Scotia
Final Written Submissions:	August 29, 2003
Counsel:	Annie Schneider, for the Appellant (self) Pierre Muise, for the Respondent

By the Court:

INTRODUCTION

[1] As the result of an incident at the courthouse involving herself and several sheriff's officers, Ms. Annie Schneider, of Halifax, Nova Scotia, was charged with two offences under the *Criminal Code*: assault and creating a disturbance. She pleaded not guilty to both charges on September 25, 2000, and her trial was scheduled for January 16, 2001. When she attended for her trial, she asked to be tried in French pursuant to section 530 of the *Criminal Code*. Accordingly, the court set a new trial date of May 17, 2001. The trial before Prince J.P.C. lasted a

total of three days (over a period of several months). In March 2002, Judge Prince convicted Ms. Schneider on the two charges and imposed a sentence of $500 in fines and costs. Ms. Schneider appeals her conviction and sentence.

GROUNDS OF APPEAL

[2] Ms. Schneider's Notice of Appeal lists a number of grounds. She alleges errors arising from the loss of evidence and insufficiency of the transcript; errors in the trial judge's findings of credibility and fact; and errors in the judge's failure to take into account her allegation that sherriff's officers used excessive force against her and that the police targeted her for mistreatment. She claims that her sentence was unduly harsh and that she was singled out because she was "a single francophone woman and not for what I am alleged to have done."

[3] It is not necessary for me to deal with most of Ms. Schneider's grounds of appeal. I have concluded that the matter can be disposed of on the basis of a single ground, which the appellant sets out in these words:

> The Judge erred in law when he refused to adjourn the trial on May 17, 2001. I submitted to the Court a medical certificate stating I had been sick before May 17, 2001. I had no lawyer to help me (I could not find a competent and really French-speaking lawyer in Halifax). Consequently, I had to represent myself and, being sick, I could not adequately prepare my defense in Court, I think this is unfair. **I had given notice of this in front of Judge Barbara Beach on May 14, 2001, but she did not listen to my request as she does not understand French.** [Emphasis added.]

[4] After the appeal hearing I asked Crown counsel and the appellant to provide additional submissions on the impact of section 530 of the *Criminal Code* upon this ground of appeal and, further, whether the lack of opportunity to seek an adjournment in the French prior to the trial date had been fully considered by Judge Prince when he ruled on the application for adjournment.

BACKGROUND

[5] Ms. Schneider's first trial date was fixed for January 16, 2001. The trial was rescheduled to May 17, 2001, before Judge Robert Prince, one of two French speaking trial judges of the Nova Scotia Provincial Court. On April 14, 2001, about one month before the trial, Ms. Schneider appeared before Beach J.P.C. and requested an adjournment. This request was denied. Though her primary language is French, on this occasion Ms. Schneider addressed the court in English.

[6] Ms. Schneider saw her physician on April 27, 2001. In a note of the same date, her physician indicated that Ms. Schneider would be unable to participate in her trial on May 17 on account of stress. Ms. Schneider wrote to Jim MacDonald, the coordinator of the Provincial Court in Halifax, in English, enclosing the doctor's note, and requested an adjournment. This note was provided to the Crown prosecutor, who contacted Ms. Schneider to advise that her request for an adjournment would be considered on May 14, three days before the trial. On that date Ms. Schneider appeared before Judge Beach and again requested an adjournment of her trial. On this occasion, she apparently spoke in French. Judge Beach directed Ms. Schneider to seek the adjournment from the French-speaking trial judge, as she had chosen to be tried in French.

[7] Accordingly, at the outset of the trial on May 17, 2001, Ms. Schneider sought an adjournment, claiming that she had been unable to prepare for the trial because of her health and because she had been in the Provincial Court for five days in another trial two weeks earlier. The Crown opposed the adjournment, arguing that Ms. Schneider had not sought an adjournment of the other trial and that she had no difficulty in seeking an adjournment in English when she appeared before Judge Beach in April. According to the Crown, when Ms. Schneider was denied an adjournment by Judge Beach at that time, she said that she would be seeing her physician.

[8] Judge Prince refused to grant an adjournment. He pointed out that the Crown's witnesses were present, including one who had traveled from Calgary to be in attendance for trial; thus, he considered that it would be a waste of financial resources if the matter did not proceed as scheduled. He also took into account that Ms. Schneider had four months to prepare for her trial. He stated that when trial dates are assigned for French trials, the Court considers available resources. Ms. Schneider submitted that she had attempted to seek an adjournment at the earliest possible date. She added that she had not prepared for cross-examination. Judge Prince concluded that, as the matter had been scheduled for trial four months earlier, there had been abundant time for Ms. Schneider to prepare for trial or to seek an adjournment.

[9] Judge Prince acknowledged that Judge Beach had declined to grant an adjournment because, this being a French trial, matters should proceed before a French-speaking judge. Ms. Schneider said she was denied the opportunity to seek

an adjournment before a French-speaking judge. It was the Crown who had her appear before Judge Beach and she was unable to present her request for an adjournment an any earlier date.

ISSUES

[10] The first issue is whether the appellant's right to be tried in French, pursuant to section 530 of the *Criminal Code* and section 16 of the *Charter of Rights and Freedoms*, has been infringed. Specifically, the issue is whether Ms. Schneider's right to a French trial included the right to address the Court in French on a pre-trial motion for an adjournment of the trial. The second issue is whether Judge Prince acted judicially in denying the application for an adjournment. I have decided not to deal with the other grounds of appeal as my decision on these two grounds is dispositive of Ms. Schneider's appeal.

THE LAW

[11] The relevant provisions of the *Charter of Rights and Freedoms* and the *Criminal Code* are the following:

> *Charter of Rights and Freedoms*
> *Official Languages of Canada*
>
> **16.** (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.
>
> *Criminal Code*
>
> **530.** (1) On application by an accused whose language is one of the official languages of Canada, made not later than
>
> (a) the time of the appearance of the accused at which his trial date is set, if
>
> (i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or
>
> (ii) the accused is to be tried on an indictment preferred under section 577,
>
> (b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or
>
> (c) the time when the accused is ordered to stand trial, if the accused
>
> (i) is charged with an offence listed in section 469,
>
> (ii) has elected to be tried by a court composed of a judge or a judge and jury, or
>
> (iii) is deemed to have elected to be tried by a court composed of a judge and jury,
>
> a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the

accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

Remand

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if

the circumstances warrant, who speak both official languages of Canada.

Variation of order

(5) An order under this section that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony may, if the circumstances warrant, be varied by the court to require that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada. R.S., 1985, c. C-46, s. 530; R.S., 1985, c. 27 (1st Supp.), ss. 94, 203; 1999, c. 3, s. 34.

Where order granted under section 530

530.1 Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

> (a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
>
> (b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
>
> (c) any witness may give evidence in either official language during the preliminary inquiry or trial;
>
> (d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;
>
> (e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

> (i) a transcript of everything that was said during those proceedings in the official language in which it was said,
>
> (ii) a transcript of any interpretation into the other official language of what was said, and
>
> (iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and

(h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused. R.S., 1985, c. 31 (4th Supp.), s. 94.

ANALYSIS

The meaning of "trial" in section 530

[12] It is incontrovertible that Ms. Schneider's request for a trial in French was granted by the Provincial Court on January 16, 2001. This matter was not discussed before Judge Prince when the trial opened in May.

[13] The *Criminal Code* does not specify whether the right to a trial or a preliminary inquiry includes the right to address the court in the language chosen for trial in pretrial matters. Section 530 provides the right of the accused to a trial before a judge who speaks the relevant official language. The central question is whether a "trial" for the purposes of sections 530 and 530.1 includes preliminary matters such as an adjournment application.

[14] In *R. v. Barrow*, [1987] 2 S.C.R. 694, the Supreme Court of Canada held (following *Basarabas and Spek v. The Queen*, [1982] 2 S.C.R. 730) that "trial" takes different meanings depending on what provision of the *Criminal Code* is being considered, because different sections protect different interests. Thus, for the purpose of the provision allowing a juror to be discharged due to illness, the trial commenced when the accused was placed in charge of the jury. Since a juror could be replaced without affecting the accused's right to be tried by a 12-person jury, the word "trial" received a narrow interpretation in that context. On the other hand, where the issue related to "the examination of prospective jurors by the trial judge, relating in part to their impartiality and following arraignment and plea", the trial encompassed that earlier stage of proceedings (p. 705).

[15] In *R. v. Stacey* (1999), 184 Nfld. & P.E.I.R. 7 the Newfoundland Court of Appeal addressed the question of when a trial commences. The issue was when s.475 of the Criminal Code could be invoked to allow the court to continue with a trial where it was alleged that the accused had absconded "during the course of his trial". The accused had left the province after his arraignment, plea and setting down for trial. He did not appear on the day of the trial proper. The Crown applied to proceed in his absence pursuant to s. 475. At para 18, the Court stated:

> **¶ 18** It is sufficient to say, without canvassing the cases, that there has been a variety of conclusions as to the point in time at which a trial begins. The Supreme Court of Canada in Basarabas v. The Queen (1982), 2C.C.C. (3d) 257 canvassed its own prior decision and those of many other courts. The Court acknowledged the

credible, but different, conclusions in those cases, and came to its own conclusion that:

> "... the time of commencement of a jury trial will vary according to the circumstances and the language of the section of the Criminal Code being applied."

The following further comments, by Dickson J. as he then was, shed some light on the basis for that conclusion:

> Thus, the word "trial" in s. 577(1) which assures the accused the right to be present "during the whole of his trial" will be liberally construed to afford the accused the right to be present during the selection of the jury. In like manner, the word "trial" in s. 566 which denies the prosecutor the right to direct a juror to stand by on the trial of an indictment for the publication of a defamatory libel will be interpreted to embrace the proceedings preceding the empanelling of the jury. In other sections "trial" may have a different connotation depending upon the section of the Code being applied....
>
> *** * ***

¶ 19 A more direct explanation for the Court's conclusion that the time of commencement of a trial will vary according to circumstances and the language of the section of the Code being applied can be found in its decision in R. v. Barrow (1987), 38 C.C.C. (3d) 193. Dickson C.J.C., after reviewing the court's decision in Basarabas, at p. 201, said:

> The reason for varying starting points is that different sections of the Code protect different interests. Section 573 allows the judge to remove a juror who for some reason is unable to continue, but the removal of a juror is a very serious matter. An accused has the right to be tried by 12 jurors (ss. 560(5) and 572(1) and every effort must be made to avoid a jury of less than 12 members. If the jury has heard no evidence, as in Basarabas, then a juror can be replaced and s. 573 should not be used. "Trial" there refers to the heart of the trial, the presentation of evidence before the trier of fact. Section 577, however, protects different interests and in my opinion should be given an expansive

> reading. The words "whole of his trial" mean just that, the whole of the trial.

[16] The court also pointed out that it was important to consider the interest being protected:

> **¶ 20** In determining whether the trial of the appellant had started by the time the appellant left the province, the Court must consider the circumstances, **the language of s. 475 and the interest being protected by that section**. [emphasis added].

[17] The court found that section 475 permitted a trial to proceed without the accused having the benefit of hearing the evidence against him, cross-examining witnesses, making a full answer and defense, and without the benefit of rights accorded under ss. 7 and 11(d) of the *Charter*. The corresponding provision for summary conviction offences authorized the court to deal with the matter in the absence of the accused. The court interpreted the "trial" to begin at

> the start of the first session of the court consisting of the specific judge to whom, or the judge and jury to which, the case for the prosecution and the case for the defence is to be presented, called for the purpose of then hearing the start of the prosecution's case against the accused on the offence with which the accused is charged. [para. 37.]

[18] In arguing that the trial started when the plea and election were taken, the Crown argued that Section 475 protected the interest of society in being able to prevent an accused person from thwarting the rights of others and of society by deliberately absenting himself from his trial. The rejected this approach, interpreting the wording restrictively. At paragraphs 39-40 the Court stated:

> ...Parliament was aware that it would be curtailing the fundamental rights of an accused person and Parliament must be taken to have been aware that such curtailment would likely have more serious consequences in the case of indictable offenses than in the case of summary conviction offenses. In those circumstances, it would not be reasonable for this Court to apply to the more restrictive words contained in s. 475 in respect of indictable offences, the same meaning as will be applied to the more expansive words in s. 803 relating to summary conviction offences. Even though the same interest is being protected, Parliament clearly intended any curtailment necessary for the protection of the interests of society, of the right of an accused to

> be present at trial, would be more limited in the case of indictable offences than in the case of summary conviction offences.
>
> **¶ 40** That conclusion is also reinforced by the differences in the action that Parliament authorizes a summary conviction court to take to take, as compared with that which Parliament authorizes the court trying indictable offences to take. In s. 475 the court may "continue the trial and proceed to judgment or verdict...". The summary conviction court on the other hand may "proceed ex parte to hear and determine the proceedings in the absence of the defendant as fully and effectually as if the defendant had appeared".

[19] It is necessary to consider the wording of section 16 of the *Charter of Rights and Freedoms* and section 530 of the *Criminal Code* determine when a trial commences for the purpose of defining when the right of the accused to have matters conducted in French begins. Courts exercising criminal jurisdiction are governed by the provisions of section 16(1) of the *Charter*. This provision mandates equality of status of the French and English languages in institutions of the Parliament and government of Canada. This is a substantive right and not merely a procedural one. Section 530 of the *Criminal Code* grants English- and French-speaking individuals the right to use French or English in the courts when accused of a criminal offence and provides a detailed procedure for exercising this right.

[20] Both section 16 and section 530 were reviewed in the leading case of *R. v. Beaulac*, [1999] 1 S.C.R. 768. Mr. Beaulac was charged with first degree murder. After a mistrial, the Court of Appeal overturned the conviction entered at his second trial, and ordered a new trial. At a chambers hearing prior to the third trial (as well as in prior proceedings), Mr. Beaulac had applied to be tried by judge and jury who spoke both official languages, pursuant to section 530. The application was dismissed and he was tried in English. The British Columbia Court of Appeal dismissed the appeal.

[21] The Chambers judge refused to grant Mr. Beaulac's request on the grounds that it was in the best interests of justice to continue the trial in English, as it appeared that his understanding of English was sufficient to complete the trial. The judge exercised his discretion and decided that no injustice would result to Mr. Beaulac, particularly where he was being held in custody and it was the general

policy to proceed with trials of people in custody as quickly as possible. An English trial would proceed earlier than one in French.

[22] The Supreme Court of Canada reversed the decision of the Court of Appeal. Bastarache J., for the majority, held that section 530 of the *Criminal Code* and section 16 of the *Charter of Rights and Freedoms* established that an accused had the right to be tried in either of the official languages of Canada. He reviewed earlier decisions of the Court and stated:

> **20** These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. 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. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees....

[23] Bastarache J. remarked that this interpretative framework was important to consider in assessing language rights, and specifically in considering the scope of section 530. He referred to the "conflicting messages" of three 1986 decisions in which the Court treated the language rights under section 133 of the *Constitution Act*, 1867 as a "limited and precise group of rights" that should be interpreted with restraint (see *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Societe des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; and *Bilodeau v. Attorney-General of Manitoba*, [1986] 1 S.C.R. 449) (para. 16). However, he suggested, this restrictive position had not persisted and succeeding cases reaffirmed "the importance of language rights as supporting official language communities and their culture" (para. 17).

[24] Nevertheless, Bastarache J. said, the 1986 trilogy had permeated the interpretation of language provisions in various statutes, including the *Criminal Code*. To demonstrate this point, he cited *Canada (Attorney-General) v. Viola*,

[1991] 1 F.C. 373 at 386-387, where the Federal Court of Appeal related the 1986 trilogy to statutory language rights:

> The 1988 Official Languages Act is not an ordinary statute. It reflects both the Constitution of the country and the social and political compromise out of which it arose. To the extent that it is the exact reflection of the recognition of the official languages contained in subsections 16(1) and (3) of the Canadian Charter of Rights and Freedoms, it follows the rules of interpretation of that Charter as they have been defined by the Supreme Court of Canada. To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 and its taking precedence over other statutes in accordance with subsection 82(1), it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it". To the extent, finally, that it is legislation regarding language rights, which have assumed the position of fundamental rights in Canada but are nonetheless the result of a delicate social and political compromise, it requires the courts to exercise caution and to "pause before they decide to act as instruments of change", as Beetz J. observed in Société des Acadiens du Nouveau-Brunswick Inc. et al. v. Association of Parents for Fairness in Education et al... [Emphasis added by Bastarache J.]

[25] Bastarache J. continued:

> **22** The Official Languages Act of 1988 and s. 530.1 of the Criminal Code, which was adopted as a related amendment by s. 94 of the same Official Languages Act, constitute an example of the advancement of language rights through legislative means provided for in s. 16(3) of the Charter... . The principle of advancement does not however exhaust s. 16 which formally recognizes the principle of equality of the two official languages of Canada. It does not limit the scope of s. 2 of the Official Languages Act. Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada. Parliament and the provincial legislatures

> were well aware of this when they reacted to the trilogy ... and accepted that the 1988 provisions would be promulgated through transitional mechanisms and accompanied by financial assistance directed at providing the required institutional services.

[26] Bastarache J. added that when section 530 became law, "the scope of the language rights of the accused was not meant to be determined restrictively" (para. 23). At para. 25 he said:

> 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....

[27] Interpreting section 530 of the *Criminal Code*, Bastarache J. said at para 28:

> **Section 530(1) creates an absolute right of the accused to equal access to designated courts in the official language that he or she considers to be his or her own. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada. In my view, this is a substantive right and not a procedural one that can be interfered with.** The interpretation given here accords with the interpretative background discussed earlier. It is also an important factor in the interpretation of s. 530(4) because that subsection

> simply provides for the application of the same right in situations where a delay has prevented the application of the absolute right in subs. (1). One of the main questions facing this Court is the interpretation of this scheme when it interacts with the requirement of a new trial. In reading s. 530, I am left with the impression that the drafters of the section did not consider the particular situation of the retried accused. This leaves the courts with a very unsatisfactory set of rules to apply in such a case. **Nevertheless, we must endeavor to provide a solution that will not only respect as much as possible the words of the provision, but most importantly its spirit.** [Emphasis added.]

[28] Bastarache J. considered the issue of limited resources in the context of s.530(4); however, it is important to apply his statement against the background of affording an opportunity for pre-trial motions such as adjournment applications to be heard in French. As he stated at para. 39:

> [M]ere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis. As mentioned earlier, in the context of institutional bilingualism, an application for service in the language of the official minority language group must not be treated as though there was one primary official language and a duty to accommodate with regard to the use of the other official language. The governing principle is that of the equality of both official languages

[29] Commenting on *Beaulac*, Paul J. in *R. v. Stadnick*, [2001] Q.J. No. 5226 (Que. Sup. Ct.) stated that section 530 “is not a provision to protect an accused[‘s]

right to a fair trial. It is a linguistic equality guarantee, to be distinguished from the fundamental rights of the applicants" (para. 14).

[30] In the decision of this Court in *R. v. Deveau*, [1999] N.S.J. No. 477, Edwards J. ordered a new trial where the trial judge had failed to offer the accused the opportunity to have his trial in French when it was obvious that his mother tongue was French. He found this failure was a breach of the accused's right under sections 15, 16 and 19 of the *Charter*. Further, a violation of section 530 constituted a substantial wrong precluding the appeal court from dismissing the appeal for procedural irregularity pursuant to section 686 of the *Criminal Code* (para. 17).

[31] The Crown submits that the rights contained in section 16 of the *Charter* and in section 530 of the *Criminal Code* should be interpreted restrictively because other provisions in the *Code* specifically include pre-trial procedures within the meaning of "trial". Should I accede to that point of view, I would be ignoring the direction in *Beaulac* that section 530 is to be interpreted liberally and a purposively.

[32] It is evident from the record that Judge Beach understood that Mrs. Schneider had the right to apply for an adjournment in French. This is why she directed her to apply to Judge Prince. However, the result of this decision was that Ms. Schneider was only able to apply for an adjournment on the date of trial.

[33] It is not sufficient to state that an accused, though he has a right to have his trial in French must make other applications in English. The fact that Ms. Schneider made her first application for an adjournment in English was not a waiver of her right to conduct her trial or pre-trial motions in French. In order to comply with the letter and the spirit of section 530 of the *Criminal Code* and section 16 of the *Charter*, the accused must be afforded an opportunity to do so and in ample time so that such a request will be responded to both adequately and in a timely manner.

[34] I find that her inability to address the Court in French on May 14 resulted in a breach of her constitutional and statutory rights. Given the expansive approach to the right to be tried in French provided by section 530, and the interest being protected by the section as it was interpreted in *Beaulac*, it seems necessary that the

"trial" for the purpose of that section must encompass such essential pre-trial motions as an application for an adjournment.

The exercise of discretion by the trial judge

[35] Having found that Ms. Schneider's rights have been infringed, I turn to the issue of whether Judge Prince's discretion was exercised judicially when he considered Ms. Schneider's request for an adjournment. The discretion available to a summary conviction trial judge is described in s. 803(1) of the *Criminal Code*:

> **803 (1)** The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.

[36] The trial judge has the discretion to grant or refuse an adjournment provided he exercises this discretion reasonably and judicially. The extent of this discretion is stated in *R v. Barrette,* [1977] 2 S.C.R. 121, where Pigeon J., speaking for the majority, stated that the appeal court can only review the trial judge's exercise of discretion on an adjournment application "if it is based on reasons which are not well founded in law." The right of review is "especially wide when the consequence of the exercise of discretion is that someone is deprived of his rights, whether in criminal or in civil proceedings" (p. 125).

[37] In *R. v. Carosella,* [1997] 1 S.C.R. 80 Sopinka J., for the majority, confirmed that an appeal court cannot exercise a discretion which belongs to the trial judge. However, if the trial judge has given insufficient weight, or no weight at all, to relevant factors, then the appeal court is entitled to interfere with the exercise of discretion by the trial judge (paras. 48-50).

[38] According to the trial record, Ms. Schneider made the following statements: she was ill and suffering from a cold, as well as from stress resulting from her frequent appearances in the proceeding and in another unrelated proceeding; she was mixing several cases up; and she claimed the police were harassing her. She added that she had been in court for five days within the preceding four weeks and had not had enough time to prepare for this trial. She also explained to Judge Prince that she had appeared before Judge Beach three days earlier and Judge Beach had informed her that she must seek an adjournment from a French-speaking judge. She claimed that her rights under the *Charter* had been infringed when she appeared before Judge Beach. She claimed that her right to seek an adjournment had been denied as Judge Beach was unable to speak French.

[39] In weighing the factors described by the appellant, the trial judge did not dismiss any of the reasons she advanced. He did not comment on whether she had a *bona fide* basis for claiming she was ill or that she was confused and that she spent four to five days in court defending herself on other charges. Nor did he take into account that Ms. Schneider, who was self-represented, had not been able to seek an adjournment before Judge Beach on May 14, 2001, and that the day of the trial was her first opportunity to present such a motion before a French-speaking judge.

[40] Judge Prince noted on several occasions that, as the matter had been set down for trial in January 2001, the defendant had more than four months to seek an adjournment. Ms. Schneider claimed that her illness had only come within the four weeks prior to trial and therefore, the previous three months had not been utilized.

[41] Judge Prince added that there was a witness for the Crown who had traveled from Calgary, and this would be a waste of resources if the matter could not proceed as scheduled. Judge Prince informed Ms. Schneider that in considering an adjournment, the judge was exercising a discretion and advised that it was not a

matter of respecting any “right” she had. In other words, the Court had to consider the factors for and against the adjournment.

[42] Unfortunately portions of the transcript are inaudible, particularly the portions dealing with the reasons Judge Prince was relying on (see pp. 16 and 17 of the trial transcript). It is accordingly most difficult to determine whether Judge Prince considered all of the factors mentioned by Ms. Schneider.

[43] Ms. Schneider made allegations against the police and against the Crown prosecutor which apparently had no basis in fact. Judge Prince was correct in dismissing these claims as a basis for granting an adjournment.

[44] The Crown submits that it is likely that Judge Prince took factors into account that he did not specifically mention, such as Ms. Schneider not having had the opportunity to present her application for adjournment prior to May 17, 2001. In the exercise of discretion, the fact that Judge Beach had directed Ms. Schneider to appear before Judge Prince to seek an adjournment, and that this was her first opportunity to seek an adjournment in French, ought to have been given strong consideration. It ought to have carried at least as much weight as the fact that one

of the Crown witnesses was from Calgary and that expenses had been incurred for travel from Calgary to Halifax.

[45] The issue to me is rather obvious: should an accused, having elected to be tried in French, be in an inferior position to that of an English speaking accused? Ms. Schneider did not have the same opportunity to be heard as an English-speaking individual would have had. The fact that an English-speaking individual would have been able to have an adjournment application considered without the need to consider the cost of the witness traveling from Calgary might have tipped the discretion in favor of the adjournment. This, of course, is taking the view that the Calgary witness would have been rescheduled to a later date at minimal cost. On a review of the transcript, there is no indication that an adjournment granted on May 14 would not have addressed the issue of the expenses of the Calgary witness. I am prepared to agree that Judge Prince could weigh the factor of expenses to the Crown in deciding the issue of an adjournment.

DISPOSITION

[46] Once Ms. Schneider elected to be tried in French, it was incumbent on the Provincial Court to arrange for her to appear in person or through an on-the-record

telephone contact with the trial judge prior to the actual trial date. To state that an accused has a right to be tried in French without giving the accused the opportunity to make pre-trial applications in French would infringe the fundamental rights of the accused.

[47] As a result, I am quashing the convictions on the two counts and ordering a new trial.

J.