COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***R. v. T.D.M.***,
2008 YKCA 16

Date: 20081023
Docket: 07-YU598

Between:

Regina

Appellant

And

T.D.M.

Respondent

Restriction on Publication: An order has been made in this case pursuant to sections 486.4 and 486.5 of the *Criminal Code*

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

E. Marcoux	Counsel for the Appellant
B.A. Beresh, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 18 September 2008
Place and Date of Judgment:	Vancouver, British Columbia 23 October 2008

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

[1] The principal issue raised by the Crown on this acquittal appeal is whether a witness at a criminal trial in Yukon has the right to testify in the official language of his or her choice. In this case, the trial judge, who was conducting a trial in English, required a Crown witness, whose mother tongue is French, to testify in English.

[2] For the reasons that follow, I have concluded that the ***Languages Act***, R.S.Y. 2002, c. 133, confers on a witness, at a criminal trial in Yukon, the right to testify in the official language of his or her choice. However, as I have also concluded that the trial judge's failure to permit the Crown's witness to testify in French had no impact on the outcome of the trial, I would dismiss the appeal.

FACTUAL BACKGROUND

[3] As a result of a report made by G.A., the police initiated an investigation which resulted in T.D.M. being charged with sexual touching and sexual assault of his infant daughter, contrary to ss. 151(1)(a) and 271 of the ***Criminal Code of Canada***, R.S.C. 1985, c. C-46. In G.A.'s statement to the police, which was in English, he said he had seen T.D.M. engaging in sexual activity with the child. G.A. was the Crown's principal witness against T.D.M.

[4] G.A., whose mother tongue is French, testified in English at the preliminary inquiry. T.D.M. was committed for trial. In dealing with a post-committal bail application, the Territorial Court judge who heard the preliminary inquiry remarked

on the fact that G.A. appeared to have "a problem understanding the more nuanced questioning of the lawyers and making himself clearly understood in his answers": 2007 YKTC 74 at para. 15.

[5] The trial was held in the Supreme Court of the Yukon Territory, before Mr. Justice Wong, sitting without a jury. At the open of the trial, Crown counsel indicated that G.A. would be testifying through an interpreter, i.e., he would be giving his evidence in French. T.D.M.'s counsel objected to this, in part, on the basis that having to cross-examine through an interpreter would impair his ability to confront the witness. Defence counsel noted that G.A. had testified in English at the preliminary inquiry without the assistance of an interpreter.

[6] The trial judge directed that G.A. testify in English (2008 YKSC 19):

> [1] Well, having been involved with the criminal law for almost 40 years now, and in multicultural cities like Vancouver, Toronto, and other cities in Canada, my practice has been that where there is some proficiency in the English language, that should be an attempt first, and if you have a translator standing by; if it appears that the witness, either because of nervousness or inability to understand the question, he or she will then have the assistance of the translator. But other than that, the attempt should be made to communicate, initially in the English language, unless the person cannot communicate in the English language.

[7] Following this ruling, the Crown asked for a short adjournment to inform G.A. that he would have to testify in English. When court reconvened Crown counsel made further submissions in support of G.A.'s right to testify in French, referring to The Language of Accused provisions of the ***Criminal Code*** (ss. 530, 530.1), and several provisions of the ***Canadian Charter of Rights and Freedoms***, Part I of the

Constitution Act, 1982, being Schedule B to the ***Canada Act 1982*** (U.K.), 1982, c. 11 (s. 14 (Interpreter), s. 16 (Official Languages of Canada), s. 19 (Proceedings in Courts Established by Parliament/Proceedings in New Brunswick Courts)). Crown counsel did not refer to the ***Languages Act***.

[8] The trial judge confirmed his earlier ruling, and the Crown then called G.A. as its first witness. After G.A. had been sworn, the trial judge, at the request of Crown counsel, addressed him as follows:

> Mr. A., I have directed that you give your evidence in the English language, but the translator will be there beside you to help you if you have some difficulty. This will continue throughout in the giving of your evidence. You should take your time. There is nobody who is going to hurry. And I understand that giving evidence in court is not an easy matter, and people may be somewhat nervous. But, as I say, we have - - we'll take all the time that is required. No one is going to rush you. So just take your time, and if you have some difficulty at any given time in answering, then certainly the translator will assist you. Now, do you understand?

G.A. answered "yes".

[9] The transcript of the Crown counsel's s examination in-chief of G.A. runs approximately 30 pages. At no time during that examination did G.A. seek the assistance of the interpreter. G.A. testified that he was one of several tenants in T.D.M.'s house. He said that he came home early one day and saw T.D.M. engaging in sexual activity with his infant daughter. G.A. did not tell anyone about what he had seen, or report the alleged incident to the authorities, for several weeks.

[10] The transcript of G.A.'s cross-examination runs approximately 58 pages. Defence counsel's questioning focused on G.A.'s failure to report the incident for

several weeks, inconsistencies between his evidence and previous statements, and the fact that G.A. reported the incident after he and T.D.M. had had an argument. During cross-examination, G.A. sought the assistance of the interpreter eight times, generally to clarify a word or phrase. He did not require the interpreter's assistance during the Crown's brief re-examination.

[11] T.D.M. called a defence, but did not testify himself.

[12] The trial judge delivered oral reasons for judgment immediately upon the conclusion of counsel's closing submissions. In acquitting T.D.M., the trial judge stated that he was not prepared to accept G.A.'s testimony (2008 YKSC 11):

> [16] I must also, in assessing Mr. A.'s evidence, take into account some limitations of his ability in English, but on the whole, he is able to communicate and to make his views known. Defence counsel has suggested that Mr. A., after having some series of disputes with Mr. M. decided then, at the last minute, perhaps out of vindictiveness, to make a false allegation. Crown counsel has urged me to consider that Mr. A., being a private person perhaps not wanting earlier to personally get involved. He seemed to be concerned that he not be identified as an informant. Nevertheless, with his experience with the criminal law authorities in the past, he must have been aware that when he did report the matter on May 7th, he would be involved, in any event.
>
> [17] These are the basic matters that I have to consider. Crown counsel has made a strong argument that if Mr. A, being the private person that he is, and not wishing, generally, to get involved in other people's business, if he did not actually see what he related, he would not have reported it to the police on May 7th. However, I am concerned about the time lag in his failure to report if he was indeed shocked and his self righteous stance that this young girl needed protection. Yet I think there is some merit in Crown counsel's submission that if Mr. A. did not see what he stated he saw, he would not have become involved. It would be extreme that because of some of the differences with Mr. M., that motive would cause him to make up a false story. On the other hand, I also have to consider his omissions and the inconsistencies in much of his evidence.

> [18] In the end, I think what it comes down to is difficulty in resolving an imponderable. As echoed by Mr. Justice Tallis in a recent Saskatchewan case [*R. v. Stonefish*, [1990] S.J. No. 545 (C.A.) (QL)], in the end, does it cause, under the circumstances, some aspect of unease and disquiet, recognizing that the Crown, in the final analysis, must establish to the trier of fact the confidence that guilt has been established on a very sure basis.
>
> [19] I think that lack of confidence means I must give the benefit of the doubt to the accused.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

[13] The jurisdiction of the Yukon Legislative Assembly comes from Parliament, through the ***Yukon Act***, S.C. 2002, c. 7. That ***Act*** provides, in part:

18(1) The Legislature may make laws in relation to the following classes of subjects in respect of Yukon:	18(1) La législature a compétence pour légiférer dans les domaines suivants en ce qui touche le Yukon:
(k) the administration of justice, including the constitution, maintenance and organization of territorial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.	k) l'administration de la justice, y compris la constitution, la prise en charge financière et matérielle et l'organisation des juridictions territoriales tant civiles que criminelles, de même que la procédure civile.

[14] The ***Languages Act*** provides:

s.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	s.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

steps towards implementation of the equality of status of English and French in the Yukon.	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.
s. 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.	s. 4 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.
s. 5 Either English or French may be used by any person in, or in any pleading in or any process issuing from, any court established by the Legislative Assembly.	s. 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.

[15] The Supreme Court of the Yukon Territory was established by the ***Supreme Court Act***, R.S.Y. 2002, c. 211.

[16] The wording of s. 18(1)(k) of the ***Yukon Act***, parallels that of s. 92(14) of the ***Constitution Act, 1867***, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, which confers exclusive jurisdiction on the provinces to enact laws dealing with:

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.	L'administration de la justice dans la province, y compris la création, le maintien et l'organisation de tribunaux de justice pour la province, ayant juridiction civile et criminelle, y compris la procédure en matières civiles dans ces tribunaux.

[17] Jurisdiction with respect to the criminal law is vested in Parliament, by reason of s. 91(27) of the ***Constitution Act, 1867***:

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.	La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

Note: The French version of the ***Constitution Act, 1867***, is unofficial: see R.S.C. 1985, Appendix II, No. 5.

POSITIONS OF THE PARTIES

[18] The Crown submits that a witness in a Yukon court has a statutory right to testify in either official language and that, therefore, the trial judge erred in not permitting G.A. to testify in French. The Crown advances this position on the basis of s. 5 of the ***Languages Act***. It further says that a new trial is warranted because G.A.'s credibility was the critical factor at the trial, and there is a real possibility that the verdict would not have been the same had he testified in French.

[19] T.D.M.'s position is that a witness in a criminal trial in Yukon does not have an unfettered right to testify in either official language. He submits that the trial judge's

decision struck a proper balance between his fair-trial rights as an accused and G.A.'s language rights as a witness. In the alternative, T.D.M. argues that if the trial judge did err in requiring G.A. to testify in English, then this appeal should be dismissed, because the trial judge would, in any event, have had the same reservations with respect to the G.A.'s veracity.

FRESH EVIDENCE

[20] T.D.M. applied to have two affidavits admitted as evidence on the appeal. These affidavits are offered in support of T.D.M.'s position that G.A.'s proficiency in English is such that he was not hampered by being required to testify in that language. The Crown opposed the application.

[21] In my view, this proposed "fresh evidence" is not relevant to the issues raised on this appeal and I would, accordingly, refuse to admit it: ***R. v. Palmer***, [1980] 1 S.C.R. 759 at 775. G.A.'s proficiency in English has no bearing on the question of whether he had a statutory right to testify in French. Similarly, any assessment of the degree to which he was able to express himself in English is to be determined on the basis of the transcript of his evidence.

ANALYSIS

Language Rights of a Witness

Position at Common Law

[22] The trial judge's decision directing G.A. to testify in English was based on information that G.A. was able to communicate in English, and that he had testified

in English at the preliminary inquiry. Support for this ruling can be found in the authorities which have recognized that, at common law, a witness has no right to testify in a language other than the one in which the proceedings are being conducted, and that it is for the judge to decide whether the witness's linguistic abilities are such that he or she should be permitted to testify through an interpreter: ***Ponomoroff v. Ponomoroff***, [1925] 3 W.W.R. 673 (Sask. C.A.); ***R. v. Wong On (No. 2)*** (1904), 8 C.C.C. 343 (B.C.S.C.); ***Donkin Creed Ltd. v. The Chicago Maru (No. 1)*** (1916), 22 B.C.R. 529 (Ex. Ct.); ***Radic v. Teply***, [1974] B.C.J. No. 294 (S.C.) (QL) at paras. 7, 8; ***Skorski v. St. Catharines Canadian Polish Society*** (1999), 30 C.P.C. (4th) 90 (Ont. Ct. (G.D.)) at paras**.** 8 - 10; ***Dairy Farmers Co-operative Milk Company Ltd. v. Acquilina*** (1963), 109 C.L.R. 458 (H. Ct.) at 464.

[23] Whether the trial judge's ruling would have been correct in the absence of a provision such as s. 5 of the ***Languages Act***, is not something I need to decide.

Effect of the *Languages Act*

[24] The Crown raised the issue of the applicability of the ***Languages Act*** to criminal proceedings for the first time on appeal. The history of that statute is discussed in detail by Madam Justice Huddart in ***Kilrich Industries Ltd. v. Halotier***, 2007 YKCA 12, 246 B.C.A.C. 159, and need not be repeated here. Suffice it to say, the ***Act*** resulted from a compromise reached by the governments of Canada and Yukon in 1988, which avoided the ***Official Languages Act***, S.C. 1988, c. 38, being made applicable to Yukon: paras. 28 - 32, 47. While French was not made an

official language of Yukon, its importance and status was nonetheless recognized. As Huddart J.A. stated:

> [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.
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> [Emphasis added.]

[25] To begin, it is necessary to determine the effect of s. 5 of the ***Languages Act***. To do so, regard must be had to both the English and French versions of this provision. Both versions have equal status and it is their shared, or common, meaning that governs: ***R. v. Mac***, [2002] 1 S.C.R. 856, 2002 SCC 24 at para. 5; ***Schreiber v. Canada (Attorney General)***, [2002] 3 S.C.R. 269, 2002 SCC 62 at paras. 54 - 56; ***R. v. Abel***, 2008 BCCA 54, 229 C.C.C. (3d) 465 at para. 56.

[26] The English version of s. 5 uses the expression "may be used", which could be interpreted as permissive only. However, when read together with the French version – "chacun a le droit d'employer" – it is clear that the legislature intended to confer, amongst other things, a "right" to testify in either official language. Although in ***Kilrich Industries Ltd.***, Huddart J.A. does not discuss interpreting bilingual legislation, it is evident that she concluded that s. 5 of the ***Languages Act*** confers certain rights with respect to the use of English and French: paras. 71, 72. Also of note is the fact that the words used in both versions of s. 5 are identical to those

used in s. 19 of the ***Charter***, which deals with the right to use English and French in courts established by Parliament and by New Brunswick.

[27] ***Kilrich Industries Ltd.*** deals with the application of the ***Languages Act*** to a civil action. T.D.M. argues that "language rights in a criminal trial, in terms of deciding which official language will be used at the trial, belong to the accused". In this regard he points to Part XVII of the ***Criminal Code*** – "Language of Accused" – which provides that an accused can elect to be tried by a court (including a jury) that speaks one or both official languages: ss. 530 - 533. In discussing the interpretation and application of these provisions in ***R. v. Beaulac***, [1999] 1 S.C.R. 768, Mr. Justice Bastarache stated that their "object … is to provide an absolute right to a trial in [the accused's] official language, providing the application is timely": para. 31.

[28] There is no specific constitutional head of power dealing with language rights. Rather, the power to enact language laws is ancillary to the legislative authority otherwise assigned to Parliament and the provincial legislatures by the ***Constitution Act, 1867***: ***Beaulac*** at para. 14. In ***Devine v. Quebec (Attorney General)***, [1988] 2 S.C.R. 790 at 808, the Court stated that "in order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction".

[29] In enacting s. 18 of the ***Yukon Act***, Parliament delegated to the Legislative Assembly law-making powers akin to the provincial heads of power enumerated in s. 92 of the ***Constitution Act, 1867***. In this case, the validity of s. 5 of the

Languages Act has not been challenged. Accordingly, its applicability to federal criminal proceedings is to be determined on the basis that it is within the legislative competence of the Legislative Assembly to provide that any person has the right to use either of Canada's official languages in a Yukon court. This being so, the question becomes whether a territorial (or provincial) law dealing with language rights in a court established by a territorial (or provincial) legislature, can apply to proceedings relating to an offence enacted by Parliament in the exercise of its jurisdiction under s. 91(27) of the ***Constitution Act, 1867***, i.e., the Criminal Law head of power.

[30] The answer to this question is found in ***Jones v. Attorney General of New Brunswick,*** [1975] 2 S.C.R. 182. That case involved a reference taken to the New Brunswick Supreme Court, Appeal Division, on questions relating to the validity and effect of language rights legislation enacted by Parliament and by the New Brunswick Legislature. The federal legislation in issue was then ss. 11(1), (3) and (4) of the ***Official Languages Act***, R.S.C. 1970, c. O-2, which provided, amongst other things, that a witness in a criminal matter had the right to testify in either French or English. Those provisions read:

> 11(1) Every judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada has, in any proceedings brought or taken before it, and every court in Canada has, in exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard he will not be placed at a disadvantage by not being or being unable to be heard in the other official language.
>
> . . .

> (3) In exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, any court in Canada may in its discretion, at the request of the accused or any of them if there is more than one accused, and if it appears to the court that the proceedings can effectively be conducted and the evidence can effectively be given and taken wholly or mainly in one of the official languages as specified in the request, order that, subject to subsection (1), the proceedings be conducted and the evidence be given and taken in that language.
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> (4) Subsections (1) and (3) do not apply to any court in which, under and by virtue of section 133 of the British North America Act, 1867, either of the official languages may be used by any person, and subsection (3) does not apply to the courts of any province until such time as a discretion in those courts or in the judges thereof is provided for by law as to the language in which, for general purposes in that province, proceedings may be conducted in civil causes or matters.

[31] Also in issue in ***Jones*** were two provincial statutes dealing with the use of language in New Brunswick courts. The first was s. 23C of the ***Evidence Act***, R.S.N.B. 1952, c. 74, as enacted by S.N.B. 1967, c. 37, which vested a discretion in judges to direct the language of the proceedings in certain circumstances:

> In any proceeding in any court in the Province, at the request of any party, and if all the parties to the action or proceedings and their counsel have sufficient knowledge of any language, the Judge may order that the proceedings be conducted and the evidence given and taken in that language.

[32] The second provincial statute in issue was s. 14 of the ***Official Languages Act of New Brunswick***, S.N.B. 1969, c. 14, which, like s. 5 of the Yukon ***Languages Act***, allowed a witness the choice of testifying in English or French:

> 14(1) Subject to section 16, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.

> (2) Subject to subsection (1), where
>
> > (a) requested by any party, and
> >
> > (b) the court agrees that the proceedings can effectively be thus conducted;
>
> the court may order that the proceedings be conducted totally or partially in one of the official languages.

Section 16 empowered the Lieutenant Governor in Council to make regulations with respect to the application of s. 14(1).

[33] In ***Jones***, the Supreme Court upheld the validity of both the federal and the provincial legislation. In so doing, Chief Justice Laskin opined that both Parliament and the provincial legislatures have authority to legislate with respect to the language of criminal proceedings, subject to the doctrine of federal paramountcy: at: 191. In answering the questions dealing with the validity of the provincial enactments, the Chief Justice stated (at 197):

> Question 2, respecting the validity of s. 23C of the provincial *Evidence Act* should also be answered in the affirmative. In my view, in the absence of federal legislation competently dealing with the language of proceedings or matters before provincial Courts which fall within exclusive federal legislative authority, it was open to the Legislature of New Brunswick to legislate respecting the languages in which proceedings in Courts established by that Legislature might be conducted. This includes the languages in which evidence in those Courts may be given. Section 92(14) of the *British North America Act,* 1867 is ample authority for such legislation. For the same reason, I would answer question 3, respecting the validity of s. 14 of the *Official Languages of New Brunswick Act,* in the affirmative.
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> [Emphasis added.]

[34] The Chief Justice's treatment of ***R. v. Murphy, ex parte Belisle and Morneau*** (1968), 69 D.L.R. (2d) 530 (N.B.S.C. (A.D.)), in ***Jones*** is particularly germane. In that case, the Appeal Division held that s. 23C of the ***Evidence Act*** (N.B.) could not apply to federal criminal proceedings, as the use of language in the courts is a matter of procedure, and exclusive jurisdiction over criminal procedure rests with Parliament. In disagreeing with this reasoning, Laskin C.J. held that, subject to the paramountcy doctrine, it is open to a provincial legislature to enact laws dealing with the language of criminal proceedings (at 197):

> In *Regina v. Murphy, ex parte Belisle and Moreau*, the New Brunswick Supreme Court, Appeal Division, held that s. 23C could not have any application to criminal proceedings in a provincial Court, in the absence of federal legislation making it applicable. The holding was that it could not apply of its own force despite its general wording ("In any proceeding in any Court in the Province"), and was not made applicable by s. 36 of the *Canada Evidence Act,* R.S.C. 1952, c. 307 because it was not a law of evidence within that provision. What the New Brunswick Supreme Court, Appeal Division, did in effect was to limit the scope of s. 23C to civil and penal matters within provincial legislative jurisdiction, in accordance with the principle expressed by this Court in *McKay v. The Queen* [[1965] S.C.R. 798]. I do not think that there is the same antinomy in the present case as existed in the *McKay* case; rather, the situation here is one for the application of a doctrine of concurrency of legislative authority subject to the paramountcy of federal legislation.

[35] In my view, ***Jones*** stands for the proposition that, subject to the paramountcy doctrine, the authority to enact legislation with respect to the "administration of justice" vested by s. 92(14) of the ***Constitution Act, 1867***, confers on the provinces the power to enact legislation giving a witness the right to use either French or English in a criminal proceeding. This proposition also holds true for language rights

legislation enacted by Yukon in the exercise of the authority delegated to it by Parliament through s. 18(1)(k) of the ***Yukon Act***.

[36] As recently discussed in ***Canadian Western Bank v. Alberta***, [2007] 2 S.C.R. 3, 2007 SCC 22, under the paramountcy doctrine, "when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility": para. 69. Further, for the doctrine to apply, "the onus is on the party relying on the doctrine of federal paramountcy to demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law": para. 75.

[37] Part XVII of the ***Code*** is the only federal statute dealing with language rights in the context of criminal proceedings before provincial and territorial courts. As T.D.M. did not invoke those provisions, they did not apply at his trial. Accordingly, there is no conflict or incompatibility in this case between the language rights conferred by Part XVII and those conferred by s. 5 of the ***Languages Act***. However, even if Part XVII had applied to T.D.M.'s trial, the paramountcy doctrine would not have rendered s. 5 inoperative.

[38] Part XVII of the ***Code*** focuses on the language rights of an accused. Nothing in these provisions restricts the language rights of witnesses. I cannot find any operational incompatibility between federal legislation permitting an accused to choose the official language of criminal proceedings and territorial (or provincial)

legislation permitting a witness in such proceedings to choose the language in which he or she will testify. The witness's choice can be respected without interfering with the accused's choice. If the accused or others are unable to understand the official language chosen by a witness then, as occurs whenever a witness testifies in a language different from that in which proceedings are being conducted, an interpreter can be used. It is not a matter of one provision saying "yes" while the other says no", or that "compliance with one is defiance of the other": ***Canadian Western Bank*** at para. 99, quoting from ***Multiple Access Ltd. v. McCutcheon***, [1982] 2 S.C.R. 161.

[39] Nor can it be said that permitting a witness to testify in the official language of his or her choice would frustrate Parliament's purpose in enacting Part XVII of the ***Code***. As discussed by Bastarache J. in ***Beaulac*** (at para. 34), Part XVII was enacted "to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity". This is because "the language of an accused is very personal in nature; [and] is an important part of his or her cultural identity". Providing a witness with the right to choose in which official language to testify only serves to strengthen this purpose, as it increases the number of persons able to assert which official language is their own in the context of a criminal proceeding. Choice of language is as important to the cultural identity of a witness, as it is to the cultural identity of an accused.

[40] Indeed, Parliament has accepted that when an accused has elected to have criminal proceedings in one official language, a witness is entitled to testify in the other. Section 530.1(c) of the ***Code*** provides:

> any witness may give evidence in either official language during the preliminary inquiry or trial.

Once again, when regard is had to the French version, it is apparent that what is being conferred is a right to use either official language:

> les témoins ont le droit de témoigner dans l'une ou l'autre langue officielle à l'enquête préliminaire et au process.

[41] Further, Parliament has acknowledged that the provinces and territories have authority to legislate with respect to language rights in criminal proceedings, provided those laws are not inconsistent with federal legislation. This can be seen in s. 532 of the ***Code***, which reads:

> Nothing in this Part or the *Official Languages Act* derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

"Province" includes Yukon: ***Interpretation Act***, R.S.C. 1985, c. I-21, s. 35.

[42] Lastly, although not relevant to this appeal, I note that several amendments to Part XVII of the ***Code*** recently came into force: see ***An Act to amend the Criminal Code (criminal procedure, language of accused, sentencing and other amendments)***, S.C. 2008, c. 18, ss. 18 - 21, proclaimed in force, October 1, 2008,

by SI/2008-71***, Canada Gazette Part II***, Vol. 142, No. 13, p. 1621. I do not see anything in these changes that would render s. 5 of the ***Languages Act*** incompatible with Part XVII.

[43] To summarize, I have reached the following conclusions:

(a) s. 5 of the ***Languages Act*** gives a witness a right to testify in either English or French in federal criminal proceedings before Yukon courts;

(b) there is no conflict or incompatibility between s. 5 and Part XVII of the ***Criminal Code***; and

(c) the trial judge erred in denying G.A. his statutory right to testify in French.

Should There Be A New Trial?

[44] As the trial judge erred in law in directing G.A. to testify in English, it must now be decided whether a new trial should be ordered pursuant to s. 686(4)(b)(i) of the ***Criminal Code***. The Crown accepts that the standard it must meet to obtain a new trial is that set out by Chief Justice McLachlin in ***R. v. Sutton***, [2000] 2 S.C.R. 595, 2000 SCC 50:

> 2 The parties agree that acquittals are not lightly overturned. The test as set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not occurred. In *R. v. Morin*, [1988] 2 S.C.R. 345, this Court emphasized that "the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty" (p. 374).

[45] The Crown submits that in this case the credibility of G.A. was the critical issue, as he was the only eye-witness to the alleged offences. It says that the fact that G.A. was not permitted to testify in the language of his choice adversely affected his ability to express himself fully. The Crown further says that "because there is a strong connection between the language of expression of a witness and findings of credibility … there is a real possibility that the verdict would not have been the same if G.A. had the opportunity to testify in French".

[46] I am unable to accept the Crown's submission. In reviewing the transcript I did not find anything that suggests that G.A. had any linguistic difficulty in describing the incident he said he witnessed. Further, and more significantly, I did not find anything to support the contention that G.A. had any linguistic difficulty in answering questions put to him in cross-examination with respect to inconsistencies in his evidence, or regarding why he did not tell anyone about the alleged incident for several weeks. The trial judge's concerns with respect to G.A.'s veracity were grounded in the substance of his testimony. In light of the completeness of G.A.'s evidence, these concerns would have existed even if G.A. had testified in French. In other words, the outcome of the trial was not affected by the fact that G.A. was directed to testify in English.

CONCLUSION

[47] I would dismiss both T.D.M.'s application to introduce fresh evidence, and the Crown's appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Levine"