

Appeal court maps out bilingual trial requirements

By Luis Millan

The Lawyers Weekly

**Vol. 33, No. 26
(November 8, 2013)**

2013

A failure to respect language rights has prompted the Quebec Court of Appeal to order a new trial for six Eastern Township residents accused of running a marijuana drug racket that generated gross annual profits of \$30 million.

In a series of three related judgments that provides guidance over the scope of bilingual trials and necessary prerequisites of bilingual jurors, the appeal court reversed guilty verdicts in a lengthy drug-trafficking trial held two years ago because the judge of first instance did not sufficiently test jurors to determine if they were bilingual enough to follow proceedings without simultaneous interpretation.

"It certainly is an important ruling," remarked Vanessa Gruben, a law professor at the University of Ottawa who was quoted in the rulings. "While there has been some discussion in Ontario courts about the features in bilingual proceedings, the Quebec Court of Appeal rulings provide further guidance and give important guidance as to what constitutes a bilingual jury, the characteristics of that jury and how those requirements should be met."

There has always been some debate over the legitimacy of bilingual joint proceedings. But at a time when mega-trials are becoming a staple of the justice system, the appeal court rulings clearly settle the matter by plainly stating that s. 530 of the Criminal Code provides the statutory framework to proceed with bilingual trials when circumstances warrant it. A bilingual trial, as defined by the appeal court, is one that respects "as much as possible" the right of the accused to be tried in their official language.

"If the circumstances of the matter warrant it, an accused who requests his trial to be held in English only cannot validly be opposed to a bilingual trial," held the panel of three judges in *Gagnon c. R.* [2013] J.Q. No. 13377. "In the two cases (a trial in the official language of the accused or a bilingual trial), his language rights are respected."

The appeal court's interpretation of s. 530 of the Criminal Code is pragmatic and reasonable, said

Stéphane Beaulac, a law professor at the Université de Montréal. The appeal court sought to balance the rights of the accused to be tried in his official language with the need to have joint proceedings in order to ensure a "certain efficiency" with the administration of justice, added Beaulac, who teaches international human rights law, public international law and statutory interpretation.

"Ideally a trial should be held in the official language of the accused," said Beaulac, "but there are considerations other than the individual interests of the accused that come into play. It is in the interest of society to have a certain efficiency in the administration of justice. A bilingual trial, while not an ideal solution, appears to be reasonable."

However, Louis Belleau, a Montreal lawyer who successfully pleaded the case before the appeal court, wonders about the practical impact of the judgment. The ruling, points out Belleau, does not provide guidance over what proportion of a bilingual trial should be conducted in the official language of the accused. "A trial could therefore be held 80 per cent of the time in a language that is not the official language of the accused, yet it is still deemed to be a bilingual trial," noted Belleau. "That in my opinion affects the right of the accused."

The appeal court did establish a set of norms that should be used by judges to determine whether a candidate for a bilingual jury is competent in both languages, even though it acknowledges that it is "difficult to establish with precision" the degree of bilingualism that is required by law to qualify as a bilingual juror. Unlike what the trial judge did, it is not necessary to have a jury composed of half English-speaking jurors and the other half French-speaking. "That adds little to the character of a bilingual trial," pointed out the appeal court.

A bilingual jury should, however, be composed of individuals who can easily evaluate the weight of the evidence, regardless of whether it is presented in French or English and without the use of an interpreter. The bilingual juror should also be "sensitive" to the subtleties of the two official languages, and be capable of understanding a lawyer's questions or objections, testimony by witnesses, and directives issued by the judge. A bilingual juror should also be able to deliberate in both official languages, and able to express themselves or understand without difficulty the language used by other members of the jury.

"What I take away from this decision is that a bilingual jury is certainly more than an ability to deliberate in either of the official languages?--?it is much more than that," said Gruben.

That did not take place at the long drug trafficking trial involving Werner Kyling, a 71-year-old Quebecer alleged to be one of the province's most prolific marijuana smugglers. (In April 2011, a jury found Kyling and five others, including his daughter, guilty on drug-trafficking or similar charges). The trial judge left it up to members to the jury to determine their own linguistic abilities. He also failed to conduct a "rigorous verification process" to ensure that jury members had at least "a rudimentary knowledge" of the two official languages in order to "recognize the complexity of the case and the technical nature of much of the evidence as well as the nuances of the language," found the appeal court.

"The linguistic rights of the appellants demanded that jury members devote their attention exclusively to the direct evidence (without the use of simultaneous interpretation) so that they could grasp its contents and appreciate its nuances," said the appeal court. The appeal court found that since the rights of the accused conferred by s. 530 of the Criminal Code were breached, the only "efficient" remedy was to order a new trial.

Following the ruling, it is plainly evident that judges and lawyers will be paying much more attention to the language abilities of jury candidates, said Ronald Prigent, a Montreal lawyer who also successfully pleaded the case before the appeal court.

"It's very clear that judges will have to carry out a minimum amount of dialogue with each candidate to determine whether they are bilingual," noted Prigent. "It's also evident that lawyers will be much more sensitive to this issue, and will no doubt be much more demanding than was the case before."