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SCC clarifies judges' duty to inform accused of right to trial in accused's chosen official language

By **Cristin Schmitz**

Law360 Canada (May 3, 2024, 5:28 PM EDT) -- The Supreme Court of Canada has set out the analytical framework for conviction appeals by accused who weren't informed by the first instance judge of their fundamental right to be tried in the official language of their choice, in breach of the judge's informational duties under s. 530(3) of the *Criminal Code*.

On May 3, 2024, the top court 5–2 allowed the appeal of Franck Tayo Tompouba, a bilingual Francophone who was convicted in 2019 of sexual assault, following a British Columbia Supreme Court trial in English, without his having been advised during his first appearance in court of his *Criminal Code* s. 530-guaranteed right to be tried in the official language of his choice, contrary to the informational obligations imposed on judges by s. 530(3): *R. v.Tayo Tompouba*, 2024 SCC 16.

In 2022, the B.C. Court of Appeal acknowledged a failure below to advise the accused of his right but held that the appellant did not meet the burden of showing that this breach of the s. 530(3) duty had resulted in a violation of his fundamental right to be tried in the official language of his choice. The appeal court applied the curative proviso in section 686 (1)(b)(iv) of the *Criminal Code*, which allows an appeal court to dismiss an appeal if an error or irregularity did not cause the accused any prejudice.

Chief Justice Richard Wagner

On Tayo Tompouba's appeal to the Supreme Court of Canada, Chief Justice Richard Wagner ruled for the majority that the first appearance judge's failure to ensure that the accused had been advised of his right to be tried in his official language of choice was an error of law warranting appellate intervention and ordered a new trial in French. The five-judge majority quashed the conviction, with Justices Andromache Karakatsanis and Sheilah Martin in dissent.

Chief Justice Wagner's indexed 129-paragraph judgment provides an overview of language rights, institutional judicial bilingualism and the powers of a court of appeal hearing an appeal against a conviction.

His decision also elaborates on the language rights guarantee in s. 530 of the *Criminal Code*, which protects the fundamental right to be tried in the official language of one's choice. The section also imposes the informational obligation, under s. 530(3), on the judge or justice of the peace before whom the accused first appears to ensure that the accused is advised of their fundamental right and of the deadline by which they must apply for a trial before a judge, or a judge and jury, who speak the official language of the accused's choice.

Of assistance to counsel who pursue criminal appeals against conviction, the majority also addresses the meaning of the key terms "error of law" and "miscarriage of justice." (The *Criminal Code* allows a court of appeal to intervene only if the appellant is able to show that the verdict is unreasonable or not supported by the evidence (s. 686(1)(a)(i)), that an error of law was made (s. 686(1)(a)(ii)) or that a miscarriage of justice occurred (s. 686(1)(a)(iii)).

Chief Justice Wagner emphasized that an accused's s. 530 right to be tried in the official language of their choice is "a fundamental right of vital importance. It ensures equal access to the courts for accused persons who speak one of the two official languages and thereby assists in preserving the cultural identity of English and French linguistic minorities across the country."

Chief Justice Wagner stated that s. 530(3) imposes a two-pronged informational duty on the judge before whom an accused first appears. "The judge must ensure that the accused is advised of their fundamental right and of the time limit for exercising it, and if the judge finds that the accused has not been properly informed thereof, or if they have the slightest doubt in this regard, they must take the necessary steps to ensure that the accused is informed," he wrote. "This two-pronged duty requires the judge to take the steps needed to have no doubt that the accused is well aware of their right and of how it is to be exercised."

Chief Justice Wagner held that a breach of the informational duty is an error of law warranting appellate intervention under s. 686(1)(a) of the *Code* and gives rise to a presumption that the accused's fundamental right to be tried in the official language of their choice was violated. He explained the Crown can then rebut this presumption for the purposes of the analysis under the curative proviso in s. 686(1)(b)(iv) of the *Code*, which allows a court of appeal to dismiss an appeal where an error or irregularity shown by the accused did not cause the accused any prejudice.

He concluded that Tayo Tompouba had established that an error reviewable on appeal had been made and that the Crown failed to establish that the appellant's fundamental right to opt to be tried in the official language of his choice had not, in fact, been violated despite the judge's breach of his informational duty under s. 530(3) of the *Code*.

Chief Justice Wagner emphasized that Parliament has made "the judge the ultimate guardian of the fundamental right of every accused to be tried in the official language of their choice, and thus the ultimate guardian of the free and informed nature of the accused's choice of official language."

"A first appearance judge who fails to actively ensure that the accused has been informed of their fundamental right and of how it is to be exercised, or who fails to ensure, where the circumstances so require, that the accused is informed thereof, contravenes the judge's duty and infringes the accused's right under s. 530(3)," he wrote.

With respect to the proper analysis where an accused appeals their conviction and raises, for the first time, a breach of s. 530(3) of the *Criminal Code* when no decision on the accused's language rights was made at first instance, "some appellate courts find that such a breach in itself warrants a new trial, others, including the Court of Appeal in this case, instead take the view that the evidence in the

record must make it possible to conclude that the breach in fact resulted in a violation of the accused's fundamental right to be tried in the official language of their choice," Chief Justice Wagner remarked. "This court is thus called upon to settle this debate."

He held a breach of s. 530(3) is an error of law warranting appellate intervention under s. 686(1)(a)of the *Code*.

"It involves a failure by a judge to comply with a legal rule, and this omission is related to the proceedings leading to the conviction," Chief Justice Wagner explained. Once established, a breach of s. 530(3) "has the effect of tainting the trial court's judgment. It gives rise to a presumption that the accused's fundamental right to be tried in the official language of their choice was violated, which opens the door to appellate intervention."

In this case, the Supreme Court's majority concluded the evidence was such that the possibility that Tayo Tompouba would have chosen a trial in French if he had been duly informed of his fundamental right to do so "cannot be excluded on a balance of probabilities."

Chief Justice Wagner said the appeal court below erred in law by imposing on Tayo Tompouba the burden of proving, in addition to a breach of the informational duty under s. 530(3), that his fundamental right to be tried in the official language of his choice had, in fact, been violated at first instance. "If the Court of Appeal had applied the proper legal framework, it would have found that Mr. Tayo Tompouba had proved that a reviewable error had been made and that the Crown had failed to establish that the appellant's fundamental right was not in fact violated despite the breach of s. 530(3)."

In their joint dissenting opinion arguing that the defence appeal should be dismissed, Justices Karakatsanis and Martin contended that a breach of the procedural requirement under s. 530(3) of the *Criminal Code* to ensure an accused is advised of their substantive language rights is not a "ground of a wrong decision on a question of law" to set aside the judgment of the trial court under s. 686(1)(a)(ii) of the *Criminal Code*.

"The failure to give notice under s. 530(3) falls within the residual category under s. 686(1)(a)(iii), meaning an appellant must establish a miscarriage of justice before a remedy can be granted," they reasoned. "In order to establish a miscarriage of justice, Tayo Tompouba was required to show that the lack of notice required by s. 530(3) had some effect on the exercise of his right, that is, he was unaware of his right to be tried in the official language of his choice," they wrote.

Although the JP who presided over the accused's first appearance violated s. 530(3), under the ground of "miscarriage of justice" the appellant "was required to establish that he did not otherwise know of his language rights in order to show that this failure had any consequence."

However, the appellant "brought no evidence to meet this minimal burden," Justices Karakatsanis and Martin wrote. "The evidence in the record also strongly supports the inference that he was aware of his language rights."

The dissenters ruled also that the trial judge had no duty under s. 530(4) to verify whether the accused's trial was taking place in the official language of his choice and that he did not err in law by failing to order, on his own initiative, that the accused be remanded for a trial in French.

Jonathan Laxer, Power Law

Jonathan Laxer of Power Law, who — with Caroline Magnan and Darius Bossé — represented Tayo Tompouba at the top court, said the practical effect of the Supreme Court's judgment "should be that courts take much greater care to ensure that individuals are truly informed of their rights."

"I also expect that the Crown will take steps to ensure that this mandatory provision of the Criminal Code is complied with going forward," he told Law360 Canada. "This will have a meaningful impact on all members of minority official language communities in Canada."

Laxer called the majority decision "a landmark judgment on access to justice in both official languages in Canada."

"It ensures that individuals have a meaningful right to a trial in the official language of their choice," he remarked. "The court has provided a useful framework that ensures that this right is complied with going forward. This case affirms the importance of institutional bilingualism in the Canadian justice system."

Shannon Gunn Emery of Gunn Law Group in Edmonton, who — with Elsy Gagné — represented the intervener Fédération des associations de juristes d'expression française de common law inc., said Chief Justice Wagner's explanations of the terms "error of law" and "miscarriage of justice" and where the burden lies in showing that an error was or was not prejudicial, in the context of the limited s. 686 Criminal Code power of appeal courts to set aside convictions, are "very helpful" for appellate counsel.

Shannon Gunn Emery, Gunn Law Group

"Those comments have very broad application for anyone who does appellate work, because often ... we start arguing about 'what is an error of law?'" she remarked. "One of the things the court said is an error of law can be found in a decision [below], of course, but it can also be found in an omission. And they highlighted, almost like a laundry list, all the errors of omission that could end up becoming an error of law."

From the perspective of access to justice for minority-language communities, the Supreme Court's emphasis on the importance of an accused's fundamental right to be tried in the official language of their choice is "wonderful," she said, noting the court's repeated description of the right as "absolute."

The majority's judgment "opens the door very clearly to seeing this is not just a procedural right," Gunn Emery said. "It is very, very clear that they're saying this is not a trivial breach when someone is not informed of their right to have their trial in the official language of their choice. [It indicates] you can't ever start quibbling about this as 'minor' and 'inconsequential,' [that] it wasn't super prejudicial [because the accused] spoke English well enough."

Connor Bildfell of McCarthy Tétrault LLP in Vancouver, B.C., who — with Michael Feder and Lindsay Frame — represented the intervener Canadian Bar Association (CBA), said, "Overall, the court's decision provides a strong endorsement of the importance of official language rights and having access to justice in both official languages."

"The majority clarified the legal framework for addressing alleged breaches of an accused person's official language rights in Canadian criminal proceedings," Bildfell said. "The majority held that if the first appearance judge failed to ensure that the accused person was advised of that right, that is enough to constitute an error of law that presumptively warrants appellate intervention. The Crown then bears the burden of showing that the error did not prejudice the accused person."

Connor Bildfell, McCarthy Tétrault LLP

Bildfell added, "In our view, this framework — which puts the burden on the Crown to show that the judge's failure to ensure the accused person had been properly advised of their official language rights caused no prejudice — reflects the vital importance of official language rights in Canada."

The CBA intervened in the case, in part, to protect solicitor-client privilege. The association asked the Supreme Court to clarify, and give trial judges and lawyers principled and practical guidance on, how to determine the language of the accused person — including whether the accused person is able to instruct counsel and follow the proceedings in the chosen language — without intruding on solicitor-client privilege.

"We are pleased to see the majority provide additional clarity on how judges must ensure that the accused person has been advised of their official language rights," Bildfell said. "However, we believe that the majority missed an opportunity to reinforce that judges should not make inquiries that could trench on solicitor-client privilege."

He noted that solicitor-client privilege applies to all communications between a client and their counsel for the purpose of giving or receiving legal advice, including important "strategic" decisions about the language of trial and other matters related to an accused person's official language rights.

"We would have liked to see the majority reinforce the importance of protecting solicitor-client privilege and provide guidance on how judges can ensure that both official language rights and solicitor-client privilege are fully protected in Canadian criminal proceedings," Bildfell said.

Raymond Théberge, the federal Commissioner of Official Languages, who was an intervener, said the top court's judgment "will have a significant impact on language rights and access to justice in both official languages for Canadians from coast to coast to coast."

"My intervention was intended to recognize the fundamental right of every person to have a trial in the official language of their choice in Canada," he said in a statement. "It also aimed to confirm that every accused person has the right to be informed proactively that they have the fundamental right to be tried in the official language of their choice."

"In this decision the court recognized this fundamental right once and for all," Théberge remarked. "It ensures that lower courts will take the appropriate measures to fully respect their obligations."

At press time, the B.C. Prosecution Service had not yet responded to questions posed by email to the respondent B.C. Crown.

A 2019 study commissioned by the Association des juristes d'expression française de la Colombie-Britannique, titled *Impediments to the Effective Implementation of* Criminal Code *Section 530 in British Columbia*, examines how the provision has been applied in the province.

Photo of Chief Justice Richard Wagner: SCC Collection

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