NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Schneider, 2004 NSCA 151

Date: 20041214
Docket: CAC 213742
CAC 212755
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Annie Marthe Schneider

Respondent

and Between:

Annie Marthe Schneider

Appellant

v.

Her Majesty the Queen

Respondent

Official French Translation Released Concurrently

Judge(s): Roscoe, Oland, Fichaud, JJ.A.

Appeal Heard: October 4, 2004, in Halifax, Nova Scotia

Held: Appeals in CAC 213742 and CAC 212755 allowed, per reasons of Roscoe, J.A.; Oland and Fichaud, JJ.A. concurring.

Counsel: Lloyd Lombard, for Her Majesty the Queen
Ms. Annie Schneider, on her own behalf

Reasons for judgment:

Introduction:

[1] On July 14, 2000 there was an scuffle between Annie Schneider and sheriff's officers in a courtroom of the Provincial Court in Halifax. As a result, Ms. Schneider was charged with assaulting Scott Conrad and causing a disturbance. After several appearances in Provincial Court, Ms. Schneider was tried in French before Judge Robert Prince, commencing on May 17, 2001. She was convicted of both counts. The sentences imposed were fines of $300 and court costs.

[2] Ms. Schneider appealed the convictions to the Supreme Court of Nova Scotia. The appeal was heard on February 24, 2003. In decisions dated October 27, 2003, Justice Arthur LeBlanc, acting as a summary conviction appeal court, allowed the appeal, quashed the convictions and ordered a new trial. Justice LeBlanc concluded that Ms. Schneider's language rights pursuant to s. 530 of the **Criminal Code** and s. 16 of the **Charter** had been infringed because her application on May 14, 2001 to adjourn the trial was not heard by a judge able to hear the matter in French. Justice LeBlanc's decision and supplementary reasons in 2003 NSSC 209 are reported as [2003] N.S.J. No. 446 (Q.L.) and [2003] N.S.J. No. 517 (Q.L.) and in French as [2003] N.S.J. No. 497 (Q.L.).

[3] Both Ms. Schneider and the Crown appealed the decisions of Justice LeBlanc to this Court and the appeals were heard together. Both parties filed their factums and addressed the Court mainly in French. There was simultaneous translation of the hearing from each language to the other.

[4] On its appeal the Crown submits that Justice LeBlanc erred in finding a breach of Ms. Schneider's language rights, arguing that the adjournment application was not part of the trial. Ms. Schneider submits on her appeal that the summary conviction appeal court judge erred by not dealing with all the issues she raised and by ordering a new trial instead of entering an acquittal or a stay.

Procedural history:

[5] In order to better understand the issues, it is necessary to recount some of the procedural history of the matter which is set out below. Ms. Schneider has throughout the proceeding, from the date of the charge to the hearing of this appeal, been self-represented. The adjournment applications on May 14 and May 17 are those most germane to the issues on this appeal.

July 14, 2000	incident involving Ms. Schneider and the sheriffs
July 27, 2000	information sworn
August 28, 2000	first appearance, Judge Kimball presiding, Ms. Schneider not present, Elizabeth Fry Society representative requested adjournment on her behalf, adjourned to September 25, 2000
September 25, 2000	Ms. Schneider, unrepresented, appeared before Judge Digby, was arraigned, plead not guilty, and when asked, indicated she wished to be tried in English, matter adjourned to January 16, 2001 for trial
December 22, 2000	Ms. Schneider wrote to the Administrator of the Provincial Court in relation to this matter and another matter before the Court asking for tapes of earlier proceedings including the appearance on July 14, 2000 and stating that she has been "repeatedly trying to get a trial in French for the assault trial case coming up on January 16, 2001 ... I still want a trial in French."
January 16, 2001	Ms. Schneider appeared before Judge Beach and asked for a trial in French. Matter adjourned to May 17, 2001 for a trial before a French-speaking judge.
April 5, 2001	Ms. Schneider appeared before Judge Beach and asked to have the trial scheduled for May 17th adjourned. Reason stated - too many court proceedings on-going. Motion denied.
May 8, 2001	Ms. Schneider wrote to the Clerk of the Provincial Court asking that he ask the trial judge to adjourn the trial.
May 14, 2001	Ms. Schneider appeared before Judge Beach and asked for an adjournment due to illness. Matter deferred to trial judge.
May 17, 2001	Ms. Schneider appeared before the trial judge, Judge Prince and requested an adjournment due to illness. Motion denied. Trial proceeded. At end of day, adjourned to July 19, 2001 for completion of evidence.
July 19, 2001	Matter adjourned to November 23, 2001 because judge unavailable.
November 23, 2001	Matter adjourned to December 31 at request of Ms. Schneider.
December 31, 2001	Ms. Schneider not present, matter adjourned to January 2, 2002.
January 2, 2002	Matter adjourned to March 1, 2002.
March 1, 2002	Trial concluded. Ms. Schneider found guilty and sentenced.

New Evidence Applications:

[6] The Crown applied pursuant to s. 683 (1) (a) of the **Code** to have the transcripts of the three hearings before Judge Beach produced as part of the record on the appeal along with a copy of the above mentioned letter dated May 8, 2001 from Ms Schneider and the enclosed doctor's note. As well, Ms. Schneider presented the Court with copies of letters she wanted to include on the record of the appeal: a letter she wrote to the administrator of the Provincial Court on December 22, 2000 and a letter dated December 15, 2003 from Mr. Muise, Crown counsel who acted on the appeal before Justice LeBlanc.

[7] The panel received the proposed evidence and reserved decision as to its admissibility pending the hearing of the appeal. This is the procedural approach set out in **R. v. Stolar**, [1988] 1 S.C.R. 480 and **R. v. Palmer**, [1980] 1 S.C.R. 759. The panel also advised the parties, that if it decided to admit the transcripts of the hearings before Judge Beach as part of the record on appeal, it should also be provided with the transcripts of the hearings of August 28 and September 25, 2000 so that the entire record of proceedings before the Provincial Court was before it. Those transcripts were subsequently provided to the Court by the Crown.

[8] The documents submitted as "new" evidence in this case are not the usual type of evidence sought to be admitted pursuant to s. 683 to be governed by the test in **R. v. Palmer**. As noted by Pugsley, J.A. in **R. v. Cole (D.)** (1996), 152 N.S.R. (2d) 321, adopting the reasoning of Doherty, J. A., in **R. v. W.(W.)** (1995), 100 C.C.C. (3d) 225, at 232 (Ont. C.A.), the **Palmer** criteria reflect the balancing of competing considerations relevant to the interest of justice when fresh evidence is offered to attack a determination made at trial. The same criteria cannot necessarily be applied where, as in this case, the trial process is in issue.

[9] In my view, all of the proposed new evidence should be admitted for the purposes of completing the record. Some of the issues here are whether Ms. Schneider's requests for adjournment were properly considered, whether the discretion exercised by the trial judge was exercised judicially and whether Ms. Schneider was properly accorded her language rights pursuant to s. 530 of the **Criminal Code**. In order to thoroughly consider these issues, the entire pretrial record should be before us. This is not unlike a situation where excessive pretrial delay is alleged. In these cases, the transcript of each court appearance is required, not just the transcript of the evidence presented at the trial. The letters written by Ms. Schneider are also relevant to whether her requests to adjourn were treated fairly in the circumstances and should also be admitted. Lastly the letter from Mr. Muise is relevant to the issue of whether it is in the interests of justice that a new trial be ordered.

Decision under review:

[10] The summary conviction appeal court judge, Justice LeBlanc, allowed Ms. Schneider's appeal on the basis of one ground, which she stated as:

> 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.

[11] Justice LeBlanc set out the procedural history of the matter in Provincial Court and succinctly summarized the reasons stated by Judge Prince in denying the request by Ms. Schneider for an adjournment of the trial as follows:

> [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.
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> [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 on any earlier date.

[12] Justice LeBlanc approached the issue by dividing it into two parts: first, whether Ms. Schneider's right to be tried in French pursuant to s. 530 of the **Code** and s. 16 of the **Charter** included the right to address the court in French on pretrial motions for adjournment, and second whether Judge Prince acted judicially in denying the application for adjournment. He indicated that the essential question

to determine the first issue was whether a “trial”, for the purposes of s. 530, includes preliminary pretrial motions. Referring to **R. v. Beaulac**, [1999] 1 S.C.R. 768 for principles of interpretation he indicated that the language rights of s. 530 should be interpreted liberally and purposively, with the result that it should extend to the right to have pretrial motions heard in the language of one’s choice. His conclusion on the first part of the issue is as follows:

> [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.

[13] On the question of whether Judge Prince properly exercised his discretion in denying Ms. Schneider’s application to adjourn the trial, Justice LeBlanc summarized the discussion between Ms. Schneider and trial judge in the following passage:

> [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.

[14] Justice LeBlanc did not actually specify whether, in his view, Judge Prince exercised his discretion judicially. He concluded the analysis of that part of the issue, and the decision as follows:

> [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.

[15] In supplemental reasons, Justice LeBlanc dealt briefly with the equality and language rights guaranteed by the **Charter** and concluded:

> [9] ... I conclude that any attempt to derogate from rights provided by section 16 of the **Charter** or section 530 of the **Criminal Code** would likely be the basis for a challenge under section 15 of the **Charter**.
>
> [11] The proclamation of section 530 with respect to summary offences, it appears to me, constituted an extension of rights of the kind contemplated by subsection 16(3) to proceedings before the Provincial Court.
> Issues:

[16] The grounds of appeal raised by the Crown and Ms. Schneider can be addressed as follows:

1. Was there a breach of Ms. Schneider's constitutional language rights?
2. Was there a breach of s. 530 of the **Criminal Code**?
3. Did Judge Prince properly exercise his discretion to dismiss the application to adjourn the trial in the circumstances of this case?
4. Did Justice LeBlanc err by not dealing with all the issues raised by Ms. Schneider on the summary conviction appeal?
5. Should a new trial be ordered?

1. Sections 15 and 16 of the **Charter**:

[17] The relevant parts of Section 16 of the **Charter** state:

> 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.
> ...

> Advancement of status and use
>
> (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

[18] In paragraph 34 of the decision under appeal, quoted above, the summary conviction appeal court judge found that Ms. Schneider's constitutional language rights were violated. With respect, in my opinion he erred in coming to that conclusion. This issue was clearly determined by this Court in a decision released a few months after the date of the decision under appeal. In **R. v. MacKenzie**, 2004 NSCA 10; [2004] N.S.J. No. 23 (Q.L.), Justice Fichaud for the Court thoroughly analyzed s. 530 of the **Code** and s.16 of the **Charter** and their implications in the context of summary conviction matters in the Provincial Court.

[19] The conclusion reached in **MacKenzie** was that a breach of s. 530 of the **Code** did not violate either s. 15 or s. 16 of the **Charter**. Language is neither a listed category nor an analogous ground of discrimination in Section 15. Section 16 only applies to "institutions of the Parliament and government of Canada" which does not include the Provincial Court of Nova Scotia. The language guarantees of s. 16(1) of the **Charter** do not apply to proceedings in the Provincial Court and s. 16(3) has not constitutionalized s. 530 of the **Code**. It is not necessary to repeat the analysis here. For the reasons given in **MacKenzie**, this ground of the Crown's appeal is allowed. There was no breach of Ms. Schneider's constitutional rights.

2. s. 530 - **Criminal Code**

[20] Justice LeBlanc found that Ms. Schneider's right to be tried in French pursuant to s. 530 was breached because she was not able to present a pretrial application for an adjournment in French. Essentially, he found that "trial" as used in s. 530 includes pretrial motions.

[21] The Crown, on appeal, argues that at the times when Ms. Schneider appeared before Judge Beach, the trial had not yet begun and that therefore s. 530 was not operable. A summary conviction trial begins when the judge assigned to hear the case calls upon the Crown to present evidence. As well, it is submitted that Ms. Schneider had, in the previous court appearances and in her letters to the court, demonstrated an ability to understand and speak English, so she could have addressed Judge Beach in English to make her applications to adjourn. Furthermore, it submits that Ms. Schneider suffered no prejudice because she was able to renew her application to adjourn before the trial judge in French a few days later.

[22] The relevant parts of sections 530 and 530.1 are as follows:

> 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 ...
> 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.
>
> ...
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> (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.
>
> ...
>
> (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.
>
> 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 ...
> (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.

[23] As noted by Justice Fichaud in **MacKenzie**, at ¶ 15, these sections provide that everyone has the right to a trial in either English or French, or if the circumstances warrant, a bilingual trial. (The parts of the sections dealing with accused who speak neither official language are not relevant here.) An accused has the right to decide which of the two official languages is her own language for trial. The only linguistic prerequisite is that she is able to instruct counsel in the chosen language. An unrepresented accused must be notified of her right to be tried in either French or English.

[24] As observed by Justice LeBlanc, the Supreme Court of Canada provided interpretative guidance of these sections in **Beaulac**. With respect to the Crown's assertion here that Ms. Schneider could have spoken English to Judge Beach, Justice Bastarache's statement at ¶ 45 would seem to refute that notion as being relevant to the issue:

> 45 In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada

> 1996 Census), are the first persons that the section was designed to assist.

[25] Although the summary conviction appeal court judge and the Crown address the issue in terms of when the trial started, and whether s. 530 applies to pretrial motions, it is more constructive to determine whether a motion for adjournment should be heard by the trial judge. Section 530 does not indicate that once a language preference is stated, all future appearances for whatever reason must be conducted in that language. The section grants the accused a right to a trial judge who understands the official language of her choice. The right granted is the right "to be tried before" a judge who speaks the specified language. So the question here becomes, is a request for an adjournment a matter which must be heard by the trial judge?

[26] The answer, found in sections 803(1) and 669.1(1) and (2) of the **Criminal Code**, is no. Those sections state:

> 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.
>
> 669.1 (1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication.
>
> (2) Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings.

[27] The effect of these sections is that, any judge of the Provincial Court has jurisdiction to try a matter and any judge, clerk or proper officer of the court is able to adjourn the proceedings. The application for an adjournment does not have to heard by the judge who will hear or has commenced to hear the evidence.

[28] In my view, since the application for an adjournment can be heard by any judge, or even the clerk of the court, it was not a breach of Ms. Schneider's rights granted by s. 530 that the person who heard the applications could not

communicate with her in her language of choice. Her right "to be tried before" a judge who understands French was not infringed. With respect, the summary conviction appeal court judge erred in finding that there was a breach of Ms. Schneider's s. 530 rights and the Crown's second ground of appeal should be allowed.

[29] However, a purposive interpretation of s. 530, as compelled by **Beaulac**, would require that an accused not be prejudiced as a result of administrative failure to assign the trial judge, or another judge who speaks the language of the accused, to hear pre-trial motions. This will be addressed further in ¶ 36 herein.

3. Did the trial judge properly exercise his discretion?

[30] One of Ms. Schneider's arguments on the appeal is that on her application to adjourn the trial on May, 17, 2001, Judge Prince did not exercise his discretion properly. The principles governing the discretionary power of a trial judge to grant or refuse an adjournment and the scope of appellate review of the exercise of such a discretion are set out by Hallett, J.A. in **R. v. Beals** (1993), 126 N.S.R. (2d) 130 (C.A.) commencing at ¶ 12. Although **Beals** concerned an accused who had not diligently pursued his right to counsel and was found to have done so for the purpose of delaying the trial, Justice Hallett examined general principles applicable to all adjournment applications, beginning with **Barrette v. R**., [1977] 2 S.C.R. 121 where Pigeon, J., stated:

> It is true that a decision on an application for adjournment is in the judge's discretion. It is, however, a judicial discretion so that his decision may be reviewed on appeal if it is based on reasons which are not well founded in law. This 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.

[31] On appeal from a refusal to grant an adjournment, the burden is on the appellant to prove the trial judge failed to exercise his or her discretion in a judicial manner. (**R. v. Manhas**, [1980] 1 S.C.R. 591, **Beals**, ¶ 16).

[32] At ¶ 17 of **Beals**, Justice Hallett described what is meant by the judicial exercise of a discretionary power by adopting a statement of Lord Halsbury in **Sharp v. Wakefield et al.**, [1891] A.C. 173:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: **Rooke's Case** (1); according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

[33] In this case, as well as exercising the standard discretion to grant or refuse the adjournment judicially, it was incumbent upon Judge Prince to exercise the discretion in a manner consistent with the spirit and intent of Ms. Schneider's language rights.

[34] When Ms. Schneider appeared before Judge Prince on May 17, 2001, she requested an adjournment of the trial stating that she was sick, she was suffering from stress because there had been too many court appearances with respect to this case and another matter, that the two matters were getting mixed up, that because she had been sick she did not have time to prepare properly, that she had not waited for the last minute to present the request, and she had tried to make her application on two previous occasions but not been able to present her position in the French language any earlier. When Judge Prince indicated that a witness had come from Calgary, Ms. Schneider stated again that she had tried to make the adjournment application at the earliest date and to present the request to the trial judge at an earlier time. Again she stated that she was not ready to proceed.

[35] Judge Prince dismissed the application for adjournment because the application should have been made earlier, there was a witness there from Calgary, and that Ms. Schneider had several months to prepare for the trial. He did not make any comment or finding about Ms. Schneider's two prime grounds for the request, that she was suffering from stress and her earlier physical illness had prevented her from preparing for trial so that she was not ready to proceed. He did not address the illness and stress issue. It does not appear that the trial judge gave any weight to the fact that she had attempted three times before May 17th to have the trial adjourned, or that she had been denied the opportunity to present her arguments to a French speaking judge any earlier. In the letter sent on May 8th which was shown

to Judge Prince by the Crown, Ms. Schneider specifically asked that her request for adjournment be directed to the trial judge. Although the waste of institutional resources involved in bringing the witness from Calgary was of concern, the lack of equality of court services for a French-speaking, self-represented person was not factored into the decision.

[36] With respect, the denial of the request was, in my opinion, not exercised judicially. It was not based on reasons well founded in law (**Barrette**) or rules of reason and justice (**Sharp v. Wakefield**). The decision was not responsive to the grounds for the request. Although the main concern seemed to be the cost and inconvenience of the attendance of the Calgary witness, there was no acknowledgment of the fact that had Ms. Schneider's earlier attempts to address the adjournment been dealt with on the merits, those expenses might have been avoided. As mentioned in ¶ 29 above, the inability to address the court in one's language of choice on a pre-trial motion should not prejudice the accused. Had she been able to address the trial judge in French on the May 14 adjournment application, the adjournment would have been considered before the Crown's witness traveled from Calgary. In the overall circumstances of this case, given the difficulties presented to the accused by not being able to be heard in her language of choice on her earlier requests for adjournment, the request to the trial judge should have been considered in light of her language rights as characterized in **Beaulac**:

> 20 ... Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. ...
>
> 22. ... 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. ...
>
> 25 Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada; ... 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. ....

[37] In conclusion on this issue, although I disagree with the summary conviction appeal court judge's reasons for allowing Ms. Schneider's appeal and ordering a new trial, I would agree that her appeal from conviction should be allowed because the trial judge erred by not judicially considering her request for an adjournment.

4. Did the summary conviction appeal court judge err by not dealing with Ms. Schneider's other grounds of appeal?

[38] Ms. Schneider submits that Justice LeBlanc erred by not dealing with all of her grounds of appeal. I would dismiss this ground of appeal. It is common practice in situations where one ground of appeal is sufficient to dispose of a case to omit analysis of the other grounds. (See for example, **R. v. Reid and Stratton**, 2003 NSCA 104, **R. v. Timmons**, 2003 NSCA 107 and **R. v. S.H.P-P**., 2003 NSCA 53) This is especially so when the additional grounds allege errors of a factual nature and a new trial is being ordered. Many of Ms. Schneider's other grounds, such as allegations of error in assessing credibility, would be dealt with by the new trial judge and therefore the less said by the appeal judge about the credibility of witnesses, the better. None of the additional issues, even if resolved in favor of Ms. Schneider, would have resulted in an order for acquittal. I would dismiss this ground of appeal.

5. Should a new trial be ordered?

[39] Ms. Schneider submits that Justice LeBlanc erred by ordering a new trial. She argues that an acquittal should have been ordered and that it is an abuse of process to be subjected to a new trial with respect to an incident that occurred more than four years ago. The appeal heard by Justice LeBlanc was pursuant to s. 813 of the **Criminal Code**. The powers of a summary conviction appeal court judge on such an appeal are set out in s. 822 which in turn incorporates the powers of an appeal court on an indictable offence appeal set out in s. 686(1) and (2). Section 686(2) provides:

> 686 (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial.

[40] The principles involved when considering the choice between a new trial and an acquittal were discussed by this Court in **R. v. S. (D.C.)**, 2000 NSCA 61:

> [45] The appellant submits that the totality of the evidence cannot reasonably support a conviction, and that this court should therefore exercise its discretion by entering an acquittal. ...
>
> [46] In their text, **The Conduct of an Appeal**, Butterworths 1993, the late Justice John Sopinka and Mr. Mark A. Gelowitz, indicate at p. 116, that the discretion given the court of appeal pursuant to s. 686(2) should be exercised as follows:
>
> > ... In circumstances in which the admissible evidence was such that a properly instructed trier of fact could reasonably have convicted the accused, it is appropriate to order a new trial. Where, however, the court of appeal concludes that there was no evidence upon which a properly instructed trier of fact could have convicted, the appropriate course is to direct a verdict of acquittal.
>
> [47] Although the authority cited by Sopinka and Gelowitz for this test is **R. v. Salajko**, [1970] 1 C.C.C. 352 (Ont. C.A.), which has, in effect, been overturned because of its statements regarding aiding and abetting, (see for example, **R. v. Kirkness**, [1990] 3 S.C.R. 74 ...), the test otherwise appears to still be valid.
>
> [48] In this court, a similar test was adopted by Chipman, J.A., for the majority in **R v. M.H.M.** (1994), 132 N.S.R. (2d) 196 ... at para. 30:
>
> > [30] By virtue of s. 686 of the **Code**, where this court allows an appeal on the ground of a wrong decision on a question of law, it may either direct a judgment of acquittal or order a new trial. The exercise of the discretion thus conferred was discussed by Bird, J.A., in **R. v. More et al.** (1959), 124 C.C.C. 140 (B.C.C.A.), at pp. 149- 150:
> >
> > > "I think it further appears from these judgments that broadly speaking where a conviction is quashed because of some mistake in the conduct of the trial the court will direct a new trial where there was legal evidence upon which the jury might have convicted on a proper trial. But where the court concludes there is no reasonable evidence of an essential element in the crime

> charged it will direct a judgment of acquittal to be entered for it is repugnant to our conception of justice that the accused prisoner be again placed in jeopardy after the Crown has failed to prove his guilt in order to give the Crown another opportunity to convict him."
>
> [49] The Newfoundland Court of Appeal as well, in **R. v. Green**, [1995] N.J. No. 93, 128 Nfld. & P.E.I. R. 312, (application for leave to appeal to Supreme Court of Canada dismissed) discussed the options available pursuant to s. 686(2), after a finding of an unreasonable verdict, as follows at para. 82:
>
> > [82] From that vantage point, it is apparent that the trial judge's disregard of important evidence in this case is attributable to errors of law. These errors do not afford bases of acquittals, however, since, if they had not been made, the possibility still exists that a properly instructed trier of fact might still, but not necessarily, convict. In such a situation it is the duty of a Court of Appeal, in setting aside verdicts under s. 686(1)(a)(ii), to order a new trial.
>
> [50] In this case, while I find that there is an unreasonable verdict using the criteria established in **Biniaris,** supra, as a result of the cumulative effect of the misapprehension of the evidence as found on the first ground of appeal, and the use of the improper burden of proof, I do not agree with the appellant's submission that an acquittal should be entered by this court. In this case, the possibility exists that on the evidence, a properly instructed trier of fact, might convict. It is, therefore, not appropriate to enter acquittals or to further discuss the weaknesses of the evidence at the first trial.

[41] Since the evidence presented at the trial of this case was such that a properly instructed trier of fact could reasonably have convicted Ms. Schneider, it was appropriate for Justice LeBlanc to order a new trial.

[42] Ms. Schneider also appears to argue that Justice LeBlanc should have stayed proceedings and submits that this Court should enter a stay of proceedings because there has been an abuse of process. In **MacKenzie**, Justice Fichaud thoroughly reviewed the relevant jurisprudence respecting judicial stays, commencing at ¶ 69. The conclusion was that where there was no proof of a **Charter** breach, there must be “overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interest of justice”. (¶ 79, **MacKenzie**) In this

case there is no evidence of any **Charter** breach or unfairness to the extent required to consider the imposition of a stay. I would therefore dismiss this ground of Ms. Schneider's appeal.

Conclusion

[43] To summarize, I would:

1. allow the Crown's appeal, having found that there was no breach of Ms. Schneider's language rights pursuant to either s. 16 of the **Charter** or s. 530 of the **Criminal Code**;
2. allow Ms. Schneider's appeal, on the ground that Judge Prince did not exercise his discretion to dismiss the adjournment application judicially;
3. dismiss the Crown's other grounds of appeal,
4. dismiss Ms. Schneider's other grounds of appeal;
5. confirm the order of Justice LeBlanc ordering a new trial.

[44] In extraordinary cases, after setting aside a conviction, appellate courts have entered an acquittal instead of ordering a new trial because the accused has already had more than one trial and has served his sentence, and it is not found to be in the interests of justice to proceed to a third trial. See for example: **R. v. Dunlop**, [1979] 2 S.C.R. 881 or **R. v. Sophonow** (No. 2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.). Although I understand Ms. Schneider's frustration at the length of time this case has taken and her belief based on the letter she received from Mr. Muise that there would not be another trial, I am not prepared to enter an acquittal. However, in the circumstances, the Crown may in its discretion determine that it might not be in the interests of justice to have another trial.

Roscoe, J.A.

Concurring:

Oland, J.A.

Fichaud, J.A.