



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Tayo  
Tompouba, 2024 SCC 16

**APPEAL HEARD:** October 11, 2023  
**JUDGMENT RENDERED:** May 3,  
2024  
**DOCKET:** 40332

**BETWEEN:**

**Franck Yvan Tayo Tompouba**  
Appellant

and

**His Majesty The King**  
Respondent

- and -

**Director of Public Prosecutions, Canadian Bar Association, Commissioner of  
Official Languages of Canada, Fédération des associations de juristes  
d'expression française de common law inc. and Criminal Lawyers'  
Association (Ontario)**  
Interveners

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Wagner C.J.

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and  
O'Bonsawin JJ.

**REASONS FOR  
JUDGMENT:** Wagner C.J. (Côté, Rowe, Kasirer and O'Bonsawin JJ.  
(paras. 1 to 129) concurring)

**JOINT DISSENTING** Karakatsanis and Martin JJ.

**REASONS:**

(paras. 130 to 201)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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**Franck Yvan Tayo Tompouba**

*Appellant*

v.

**His Majesty The King**

*Respondent*

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Canadian Bar Association,  
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**2024 SCC 16**

File No.: 40332.

2023: October 11; 2024: May 3.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law — Trial — Language of accused — Duty imposed on judge before whom accused first appears to ensure that accused is advised of right to be tried in official language of their choice — Francophone accused convicted of sexual assault following trial conducted in English — Accused raising breach of judge's duty on appeal — Court of Appeal dismissing appeal — Analytical framework that applies where accused appeals conviction while raising breach of judge's duty to ensure that accused was advised of right to be tried in official language of their choice, when no decision on accused's language rights was made at first instance — Whether Court of Appeal made reviewable error in declining to order new trial — Criminal Code, R.S.C. 1985, c. C-46, ss. 530(3), 686(1)(a), (b).*

T is a bilingual Francophone who was convicted of sexual assault following a trial conducted in English. During the judicial process leading to the conviction, the judge before whom T first appeared did not ensure that he was advised of his right to be tried in French, contrary to the requirements of s. 530(3) of the *Criminal Code*. Before the Court of Appeal, T asserted that he would have liked his trial to be conducted in French. While the Court of Appeal was of the view that the breach of s. 530(3) was an error of law under s. 686(1)(a)(ii) of the *Criminal Code*, it found that there was insufficient evidence to conclude that the error had caused any prejudice. It therefore applied one of the curative provisos in s. 686(1)(b).

*Held* (Karakatsanis and Martin JJ. dissenting): The appeal should be allowed, the conviction quashed and a new trial in French ordered.

*Per Wagner C.J. and Côté, Rowe, Kasirer and O’Bonsawin JJ.:* A breach of the informational duty imposed by s. 530(3) of the *Criminal Code* on the judge before whom an accused first appears is an error of law warranting appellate intervention under s. 686(1)(a)(ii) of the *Criminal Code*. The breach, once established, taints the trial court’s judgment and gives rise to a presumption that the accused’s fundamental right to be tried in the official language of their choice, guaranteed to the accused by s. 530, was violated. The Crown can then rebut this presumption for the purposes of the analysis under the curative proviso in s. 686(1)(b)(iv). In this case, T has proved that a reviewable error was made, and the Crown has failed to establish that T’s fundamental right was not in fact violated despite the breach of s. 530(3).

Institutional judicial bilingualism ensures equal access to the courts for members of Canada’s linguistic communities through various legal guarantees, including those set out in s. 530 of the *Criminal Code*. Section 530, a provision enacted to advance the equality of status or use of English and French, goes beyond the constitutional right to speak in the official language of one’s choice. It also gives every accused the right to choose the official language they wish to speak and in which they wish to be understood by the judge or the judge and jury, without the use of interpretation or translation services.

Subsections (1) and (4) of s. 530 set out two frameworks governing the exercise of the same fundamental right, that is, the right of every accused to be tried in the official language of their choice. Section 530(1) guarantees to every accused an

absolute right to equal access to the courts in the official language of their choice, provided that the accused's application is timely and that they are able to instruct counsel and follow the proceedings in the chosen language. Where an accused's application to be tried in the official language of their choice is made outside the period specified in s. 530(1), the accused's right is then subject to the judge's discretion under s. 530(4). However, because of the central importance of language rights in Canadian society, there is a presumption in the accused's favour that granting their application is in the best interests of justice. The violation of this fundamental right constitutes significant prejudice for which the appropriate remedy is normally a new trial.

To make certain that an accused is able to choose the language of their trial in a free and informed manner, Parliament has imposed an informational duty for this purpose on the judge before whom the accused first appears. Section 530(3) enshrines the accused's right to be advised of their fundamental right and of the time before which they must apply for a trial before a judge or a judge and jury, as the case may be, who speak the official language of their choice. 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. 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. Ultimately, the goal of s. 530(3) is to make sure that information about the accused's fundamental right and how it is to be exercised is conveyed to the accused in

a timely manner in order to help the accused make a free and informed choice of official language. The amendment to s. 530(3) made by Parliament in 2008 to extend the application of the judge's informational duty to all accused persons, regardless of whether they are self-represented or represented by counsel, amounts to legislative recognition of a principle of caution requiring judges to avoid presuming, without verifying in a diligent and proactive manner, that an accused has been properly informed of their right and of how it is to be exercised prior to their first appearance. The amendment also reflects the legislative intent to make 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).

Section 686 of the *Criminal Code* sets out the powers of a court of appeal hearing an appeal against a conviction. Section 686(1)(a) allows a court of appeal to intervene only if the appellant is able to show that the verdict is unreasonable (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)). A court of appeal can generally intervene only where an error was prejudicial to the accused. Unreasonable verdicts and miscarriages of justice are usually, by nature, prejudicial to the accused, while errors of law are

presumed to be prejudicial. Therefore, the primary relevance of the distinction between errors of law and the other types of errors referred to in s. 686(1)(a) lies first and foremost in the allocation of the burden of showing that the error was or was not prejudicial. Where the error is one of law, because such an error is presumed to be prejudicial to the accused, the Crown bears the onus of establishing the absence of prejudice at the stage of the analysis under one of the two curative provisos. This means that, in principle, it is less onerous for an accused to establish an error of law, because showing the existence of such an error is sufficient to give rise to a presumption of prejudice and thus to justify appellate intervention.

An error of law under s. 686(1)(a)(ii) is any error in the application of a legal rule, as long as, first, it is related to the proceedings leading to the conviction, such that it contributed to the ultimate verdict, and second, it was made by a judge, who might not be the trial judge. In such circumstances, it can be concluded that the error tainted the trial court's judgment, with the result that prejudice can be presumed and the conviction quashed. An error in the application of a legal rule may involve either a decision that is wrong in law or an unjustified failure to comply with a legal rule. The error may originate in various ways, including through a misinterpretation of the legal rule. It is not necessary that the legal rule erroneously applied be substantive in nature, because it is well settled that a procedural irregularity, whether trivial or serious, may constitute an error of law under s. 686(1)(a)(ii).



By comparison, miscarriages of justice under s. 686(1)(a)(iii) are a residual category of errors that exists to ensure that a conviction can be quashed where a trial was unfair. The question to be decided in this regard is whether the irregularity was so severe that it rendered the trial unfair or created the appearance of unfairness. This is a high bar.

A breach of s. 530(3) is an error of law under s. 686(1)(a)(ii), with the result that an accused need only disclose the breach in order to justify appellate intervention. Failure by the judge before whom the accused first appears to carry out their informational duty under s. 530(3) is an error in the application of a legal rule. By erroneously failing to apply an imperative legal rule of general application, the judge commits an improper omission. Because this irregularity is related to the proceedings leading to the conviction and is committed by a judge, it has the effect of tainting the trial court's judgment so as to provide a basis for appellate intervention under s. 686(1)(a)(ii). In keeping with the logic and structure of s. 686, this error gives rise to a presumption that the accused's fundamental right to be tried in the official language of their choice was infringed. The Crown can then rebut this presumption at the stage of the curative proviso analysis.

The curative proviso in s. 686(1)(b)(iii) allows a court of appeal to dismiss an appeal on the ground that an error or irregularity did not result in any substantial wrong or miscarriage of justice. The proviso in s. 686(1)(b)(iv) allows the same result to be reached where an error or irregularity causes a loss of jurisdiction, as long as the

accused suffered no prejudice and the trial court at least maintained jurisdiction over the class of offences. The common purpose of the two curative provisos is to permit the dismissal of an appeal where the error or irregularity shown by the accused was not prejudicial to them. A breach of s. 530(3) is an error that results in the court losing jurisdiction over the proceedings. The Crown can therefore rely on the curative proviso in s. 686(1)(b)(iv), which it can validly raise implicitly, and try to show that no prejudice was caused by the error, or in other words, that the error did not result in a violation of the accused's fundamental right to be tried in the official language of their choice. The opportunity for the Crown to rebut the presumption significantly limits the risk of language rights being instrumentalized for tactical purposes. The Crown can argue that the accused does not have sufficient proficiency in the language they were unable to choose, that the accused would in any event have chosen to be tried in the language in which their trial was conducted or that the accused chose English or French in a free and informed manner. If the Crown fails to make this showing on the balance of probabilities standard, it will be presumed that the breach of s. 530(3) resulted in a violation of the accused's fundamental right to be tried in the official language of their choice and thus caused the accused prejudice that was too significant for the conviction to be upheld.

In this case, the judge erred in law by not ensuring that T was advised of his fundamental right. The Court of Appeal then erred in law by imposing on T the burden of proving, in addition to a breach of 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.

Lastly, the Crown has not succeeded in showing that the breach of s. 530(3) nevertheless did not result in the violation of T's fundamental right to be tried in the official language of his choice. The evidence does not make it possible to conclude on a balance of probabilities that T would in any event have chosen English as the official language of his trial if he had been duly informed of his right or that he had timely knowledge of his right otherwise than through notice under s. 530(3), such that it can be concluded that he made a free and informed choice to have a trial in English. Because it is the Crown that bears the burden of satisfying the Court on a balance of probabilities, the uncertainty and doubt that remain must be resolved in T's favour and must weigh against the Crown.

*Per Karakatsanis and Martin JJ. (dissenting):* The appeal should be dismissed. 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. In order to establish a miscarriage of justice, T 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. He did not meet his burden.

A wrong decision on a question of law relating to the judgment of the trial court under s. 686(1)(a)(ii) occurs only when there is an error on a question of law contained in a decision that is attributable to the trial judge. First, there must be a question of law. If the irregularity is one of fact or of mixed fact and law, it cannot fall within s. 686(1)(a)(ii). It is a question of mixed fact and law if the appellate court must make new findings of fact based on fresh evidence to determine whether a legal error occurred. Second, the error being alleged on appeal must arise from a decision which, in the context of the trial and the circumstances in which the decision was made, represented an erroneous interpretation or application of the law. When the particular irregularity being alleged on appeal was not raised at trial and therefore the trial judge made no ruling on it, it could be said that no error of law is alleged. Third, this wrong legal decision must be attributable to the trial judge. The irregularities cannot have occurred outside the trial judge's knowledge, with no opportunity to remedy them. Errors that share these three criteria ordinarily render the verdict of the trial court unsafe and presumptively cause a miscarriage of justice such that the judgment should be set aside.

The proper classification of an irregularity that occurred during a criminal proceeding governs what an appellant must prove, what the court of appeal can do once it has been proven, and whether the court can dismiss the appeal despite it being proven. If an error is not characterized as a wrong decision on a question of law under s. 686(1)(a)(ii), which presumptively causes a miscarriage of justice unless the Crown can prove that the error was trivial or evidence was so overwhelming that a conviction

was inevitable, then the error must fall into the residual miscarriage of justice clause under s. 686(1)(a)(iii) if the court of appeal is to have any power to intervene. The appellant bears the burden of proving that the error caused their trial to be unfair or to have the appearance of unfairness such that it would undermine public confidence in the administration of justice. Therefore, where the question before the appellate court is a question of mixed fact and law, or where the irregularity was not brought to the trial judge's attention and therefore they made no decision about it, or where the wrong legal decision cannot be attributed to the trial judge, it falls to the appellant not only to prove the error but to show that it caused a miscarriage of justice under the residual ground of appeal in s. 686(1)(a)(iii). Once proven, the Crown is not able to rebut this and the court of appeal must quash the conviction and either order a new trial or enter an acquittal. Errors that deprive the accused of a chance to make a meaningful choice in the exercise of their rights, thus creating the appearance of unfairness or harming the public's perception of the administration of justice, have been found to fall within s. 686(1)(a)(iii). Such errors do not presumptively render the verdict of the trial court unsafe. The burden is on the appellant in each case to show that a miscarriage of justice occurred.

A judicial official's breach of the procedural requirement under s. 530(3) to ensure an accused is advised of their substantive language rights fails to meet the criteria that typically characterize errors of law under s. 686(1)(a)(ii). A breach of s. 530(3) does not give rise to a question of law alone, nor does it concern a decision by a trial judge. A finding of non-compliance with s. 530(3) on appeal would ordinarily

require fresh evidence and findings to determine not only whether the judicial official personally informed the accused of their language rights on the record, but also whether they did enough to ensure that the accused had been informed in some other way. Furthermore, a judicial official's failure to provide the required statutory notice at the first appearance arises outside the trial process without the trial judge making any ruling on this point. On its own, it is clearly not an error made by the trial judge.

Section 530(3) exists to make sure an accused is aware of their language rights and can bring their application for a trial in their official language of choice in a timely manner. It does not itself provide the accused with a right to a trial in their official language of choice. It provides the accused with nothing more than knowledge of the right to choose. Where a judicial official fails at the accused's first appearance to ensure that they are informed of their right to a trial in their official language of choice, it does not necessarily follow that the accused was deprived of their substantive right to choose. The accused may already know of this right in advance, or may learn of it through other means after the first appearance but within the timeframe to make an application, and the breach of s. 530(3) may have no effect at all on the accused's substantive right. Since the breach of this procedural right does not necessarily result in a breach of the substantive right, without additional evidence from the accused on this point, it does not give rise to a presumption that this error has led to a miscarriage of justice.

If the court of appeal is to have any power to intervene, non-compliance with s. 530(3) must fall within the residual category in s. 686(1)(a)(iii), in which case the appellant bears the burden of showing that the error actually caused a miscarriage of justice. In order to justify appellate intervention, an appellant must provide evidence, which may be by way of an affidavit, to establish that the breach in fact deprived them of the knowledge necessary to exercise their right to a trial in the language of their choice and that the option of a trial in that other official language was a viable choice. This burden is not onerous and is tailored to the fundamental importance of language rights and the miscarriage of justice that occurs if an appellant, who truly does not know of their language rights, is deprived of their substantive right to choose a trial in the other official language.

However, the importance of the language rights s. 530 protects does not mean that any breach, even of a procedural or notice requirement, should result in a near-automatic right to a new trial when raised for the first time on appeal. Nor should appellants be relieved of demonstrating that the lack of notice under s. 530(3) was consequential and actually deprived them of knowledge of their right to trial in the official language of their choice. Without placing some evidentiary duty on the accused, it will be difficult, if not impossible in some cases, for the Crown to prove a negative — that the accused did not know they could choose a trial in either official language. It would be equally difficult for the Crown to prove that the accused did know of their language rights as it is usually a question that only the accused can answer.

In the instant case, the justice of the peace presiding over T's first appearance violated s. 530(3). Under the ground of "miscarriage of justice" in s. 686(1)(a)(iii), T was required to establish that he did not otherwise know of his language rights in order to show that this failure had any consequence. T has brought no evidence to meet this minimal burden. The evidence in the record also strongly supports the inference that he was aware of his language rights. The trial judge had no duty under s. 530(4) to verify whether T's trial was taking place in the official language of his choice and did not err in law by failing to order on his own initiative that T be remanded for a trial in French.

### **Cases Cited**

By Wagner C.J.

**Applied:** *R. v. Beaulac*, [1999] 1 S.C.R. 768, rev'g (1997), 120 C.C.C. (3d) 16; **referred to:** *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3; *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3



S.C.R. 563; *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *R. v. Mercure*, [1988] 1 S.C.R. 234; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774; *R. v. MacKenzie*, 2004 NSCA 10, 181 C.C.C. (3d) 485; *Dhingra v. R.*, 2021 QCCA 1681, 408 C.C.C. (3d) 466; *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646; *R. v. Deveaux* (1999), 181 N.S.R. (2d) 81; *R. v. Caesar*, 2015 NWTCA 4, 588 A.R. 392; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828; *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222; *R. v. Kahsai*, 2023 SCC 20; *R. v. Brunelle*, 2022 SCC 5; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Abdullahi*, 2023 SCC 19; *R. v. Romeo*, [1991] 1 S.C.R. 86; *R. v. Tran*, [1994] 2 S.C.R. 951; *R. v. Mitchell* (1997), 36 O.R. (3d) 643; *R. v. Sciascia*, 2016 ONCA 411, 131 O.R. (3d) 375, *aff'd* 2017 SCC 57, [2017] 2 S.C.R. 539; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Bain*, [1992] 1 S.C.R. 91; *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35; *R. v. Barrow*, [1987] 2 S.C.R. 694; *R. v. D.Q.*, 2021 ONCA 827, 411 C.C.C. (3d) 292; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. White*, 2022 SCC 7; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233;

*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Olusoga*, 2019 ONCA 565, 377 C.C.C. (3d) 143; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Pétel*, [1994] 1 S.C.R. 3; *R. v. McMaster*, [1996] 1 S.C.R. 740; *R. v. Esseghaier*, 2021 SCC 9, [2021] 1 S.C.R. 101; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Samaniego*, 2022 SCC 9; *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485; *R. v. Deutsch* (2005), 204 C.C.C. (3d) 361; *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628; *R. v. Vaillancourt*, 2019 ABQB 859; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Cole*, 2021 ONCA 759, 158 O.R. (3d) 680; *R. v. Collins*, [1987] 1 S.C.R. 265; *R. v. Schwartz*, [1988] 2 S.C.R. 443.

By Karakatsanis and Martin JJ. (dissenting)

*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *R. v. MacKenzie*, 2004 NSCA 10, 181 C.C.C. (3d) 485; *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646; *Dhingra v. R.*, 2021 QCCA 1681, 408 C.C.C. (3d) 466; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535; *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26; *R. v. W. (G.)*, [1999] 3 S.C.R. 597; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. Abdullahi*, 2023 SCC 19; *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v.*

*Kahsai*, 2023 SCC 20; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *Adgey v. The Queen*, [1975] 2 S.C.R. 426; *R. v. Bamsey*, [1960] S.C.R. 294; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. White*, 2022 SCC 7; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *R. v. Tran*, [1994] 2 S.C.R. 951; *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Cyr-Langlois*, 2018 SCC 54, [2018] 3 S.C.R. 456; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485; *R. v. Khill*, 2021 SCC 37; *R. v. McKenna*, 2015 SCC 63, [2015] 3 S.C.R. 1087; *R. v. Rodgerston*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Dorfer*, 2011 SCC 50, [2011] 3 S.C.R. 366; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Ménard*, [1998] 2 S.C.R. 109; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Brydon*, [1995] 4 S.C.R. 253; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Romeo*, [1991] 1 S.C.R. 86; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3; *R. v. MacGillivray*, [1995] 1 S.C.R. 890; *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Smith*, 2021 SCC 16, [2021] 1 S.C.R. 530; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. D.R.S.*, 2018 ABCA 342, 368 C.C.C. (3d) 383; *R. v. Miller*, 2011 NBCA 52, 374 N.B.R. (2d) 302; *R. v. Sunshine*, 2016 SKCA 104, 484 Sask. R. 259; *Mazraani v. Industrial Alliance Insurance and*

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APPEAL from a judgment of the British Columbia Court of Appeal (Dickson, Griffin and Voith JJ.A.), 2022 BCCA 177, 414 C.C.C. (3d) 86, 509 C.R.R. (2d) 43, [2022] B.C.J. No. 909 (Lexis), 2022 CarswellBC 1321 (WL), affirming a decision of Marchand J., 2019 BCSC 1529, [2019] B.C.J. No. 1705 (Lexis), 2019 CarswellBC 2623 (WL). Appeal allowed, Karakatsanis and Martin JJ. dissenting.

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English version of the judgment of Wagner C.J. and Côté, Rowe, Kasirer  
and O'Bonsawin JJ. delivered by

THE CHIEF JUSTICE —

## TABLE OF CONTENTS

	Paragraph
I. <u>Overview</u>	1
II. <u>Procedural and Judicial History</u>	9
A. <i>Decisions of the Supreme Court of British Columbia (Marchand J.)</i>	11
(1) <u>Voir Dire Decision, 2019 BCSC 2442</u>	11
(2) <u>Decision on Guilt, 2019 BCSC 1529</u>	13
B. <i>Decision of the British Columbia Court of Appeal, 2022 BCCA 177, 414 C.C.C. (3d) 86 (Dickson, Griffin and Voith JJ.A.)</i>	15
III. <u>Issues</u>	21
IV. <u>Analysis</u>	23
A. <i>Language Rights: Purpose, Nature and Interpretation</i>	24
(1) <u>Purpose and Nature</u>	24
(2) <u>Interpretation</u>	27
B. <i>Institutional Judicial Bilingualism: An Essential Component of the Preservation and Development of Linguistic Minorities</i>	28
C. <i>Language Rights Guaranteed by Section 530 Cr. C.</i>	36
(1) <u>Fundamental Right To Be Tried in the Official Language of One’s Choice</u>	37
(2) <u>Right To Be Advised of This Fundamental Right</u>	43
D. <i>Powers of a Court of Appeal Hearing an Appeal Against a Conviction</i>	53
(1) <u>Principle Underlying Any Intervention by a Court of Appeal Under Section 686(1)(a) Cr. C.</u>	54
(2) <u>Importance of Distinguishing Errors of Law From the Other Two Types of Errors Referred to in Section 686(1)(a) Cr. C.</u>	57
(a) <i>Error of Law (Section 686(1)(a)(ii) Cr. C.)</i>	60
(i) <u>Error in the Application of a Legal Rule</u>	61
(ii) <u>Related to the Proceedings Leading to the Conviction</u>	66
(iii) <u>Made by a Judge</u>	67
(b) <i>Miscarriage of Justice (Section 686(1)(a)(iii) Cr. C.)</i>	72
(3) <u>Curative Provisos in Section 686(1)(b) Cr. C.</u>	74



E.	<i>Framework That Applies Where a Breach of Section 530(3) Cr. C. Is Raised for the First Time on Appeal</i>	78
(1)	<u>What the Accused Must Show to Justify Appellate Intervention</u>	79
(2)	<u>What the Crown Can Show to Have the Appeal Dismissed Nonetheless</u>	88
(3)	<u>This Framework Helps Prevent the Risk of Instrumentalization</u>	94
F.	<i>Application to This Case</i>	102
(1)	<u>The Curative Proviso Can Apply</u>	103
(2)	<u>The Crown Has Failed to Show That Mr. Tayo Tompouba’s Fundamental Right Was in Fact Respected</u>	110
(a)	<i>Inconclusiveness of the Evidence</i>	113
(i)	<u>Impact of a Breach of Section 530(3) Cr. C. on the Choice of Official Language</u>	113
(ii)	<u>Timely Knowledge Otherwise Than Through Notice Under Section 530(3) Cr. C.</u>	118
(b)	<i>The Inconclusiveness of the Evidence Must Benefit Mr. Tayo Tompouba</i>	125
(3)	<u>Conclusion</u>	128
V.	<u>Disposition</u>	129
I.	<u>Overview</u>	

[1] In Canada, s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), guarantees to every accused the right to be tried in the official language of their choice. This 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.

[2] To make certain that an accused is able to choose the language of their trial in a free and informed manner, Parliament has imposed an informational duty for this

purpose on the judge<sup>1</sup> before whom the accused first appears. This very important duty, set out in s. 530(3) *Cr. C.*, requires the judge to ensure that the accused is advised of their right to apply for a trial before a judge or a judge and jury, as the case may be, who speak the official language of their choice, and of the time before which the application must be made.

[3] However, there may be cases in which accused persons are not duly informed of this fundamental linguistic right and of how it is to be exercised. This appeal is an example of such a situation, and it is a reminder that Canada's linguistic minorities too often still experience difficulties in accessing justice in the official language of their choice.

[4] This appeal provides the Court with an opportunity to establish the analytical framework that applies where an accused appeals their conviction and raises, for the first time, a breach of s. 530(3) *Cr. C.* when no decision on the accused's language rights was made at first instance. Thus far, the lower courts are not in agreement on the framework to be applied. While 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

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<sup>1</sup> Throughout these reasons, when the term "judge" is used in this context, it refers to a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace.

tried in the official language of their choice. This Court is thus called upon to settle this debate.

[5] For the reasons that follow, I am of the view that a breach of s. 530(3) *Cr. C.* is an error of law warranting appellate intervention under s. 686(1)(a) *Cr. C.* According to the jurisprudence, an error of law under s. 686(1)(a)(ii) *Cr. C.* is any error in the application of a legal rule, through a decision or an improper omission, as long as the error is related to the proceedings leading to the conviction and was made by a judge. A breach of s. 530(3) *Cr. C.* corresponds precisely to this definition. 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. A breach of s. 530(3) *Cr. C.*, once established, 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. The Crown can then rebut this presumption for the purposes of the analysis under the curative proviso in s. 686(1)(b)(iv) *Cr. C.*

[6] In addition to being in harmony with the scheme for conviction appeals, this framework strikes an appropriate balance. On the one hand, it takes into account and gives effect to the purpose of s. 530 *Cr. C.*, which is to support the preservation and development of linguistic minorities across Canada by ensuring equal access to the courts in criminal proceedings. On the other, it prevents the risk that an accused who has been convicted will improperly take advantage on appeal, for an ulterior motive, of

a breach of s. 530(3) *Cr. C.* that occurred at first instance. This is because the framework laid down gives the Crown an opportunity to persuade the court of appeal that the accused's fundamental right to be tried in the official language of their choice was respected, despite the breach of s. 530(3) *Cr. C.* If the Crown succeeds, the appeal can then be dismissed. For this reason, the framework significantly limits the risk of language rights being instrumentalized on appeal — a highly objectionable practice that must be sanctioned to the greatest extent possible.

[7] In this case, I conclude that the Court of Appeal erred in law by imposing on Mr. Tayo Tompouba the burden of proving, in addition to a breach of s. 530(3) *Cr. C.*, 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) *Cr. C.*

[8] I would therefore allow the appeal, quash the conviction and order that a new trial be held in French.

## II. Procedural and Judicial History

[9] Mr. Tayo Tompouba is a bilingual Francophone who was convicted of sexual assault following a trial conducted in English in the Supreme Court of British

Columbia. It is acknowledged that, during the judicial process leading to Mr. Tayo Tompouba's conviction, the judge did not ensure that he was advised of his right to be tried in French, contrary to the requirements of s. 530(3) *Cr. C.* The parties also agree that Mr. Tayo Tompouba did not apply for a trial in French and that the trial judge did not order on his own initiative that Mr. Tayo Tompouba be tried in French, as s. 530(4) *Cr. C.* authorized him to do.

[10] Because Mr. Tayo Tompouba did not apply for a trial in French or raise the breach of his right under s. 530(3) *Cr. C.* to be advised of the right to make such an application, these matters were not decided at first instance. However, mention should be made of two judgments rendered by the Supreme Court of British Columbia in which findings concerning the appellant's linguistic abilities were made.

A. *Decisions of the Supreme Court of British Columbia (Marchand J.)*

(1) *Voir Dire* Decision, 2019 BCSC 2442

[11] At a *voir dire*, Mr. Tayo Tompouba argued that an incriminating statement made to the police shortly after his arrest was inadmissible because his right to counsel had been read to him in English and exercised in that language. The Supreme Court of British Columbia rejected his arguments and admitted the incriminating statement into evidence. Taking the entire record into account, the judge held that there had been no special circumstances imposing a duty on the police to take additional steps to ensure

that Mr. Tayo Tompouba understood his right to counsel and exercised it in the official language of his choice.

[12] The judge noted that it was obvious that Mr. Tayo Tompouba was not originally from Canada and that English was not his first language — indeed, it was sometimes difficult to understand him when he spoke English. The judge found that Mr. Tayo Tompouba nonetheless displayed a good ability to understand English and had an advanced vocabulary in English, which was consistent with the fact that he had been living in British Columbia for several years at the time of his arrest and that he worked there and attended school there in English. Lastly, the judge found that Mr. Tayo Tompouba had said that he was confident in his ability to interact with the police in English.

(2) Decision on Guilt, 2019 BCSC 1529

[13] In his reasons for judgment on guilt, the judge rejected Mr. Tayo Tompouba's arguments, including that his incriminating statement to the police had been false and that he had misunderstood the significance of such a statement because he did not have a good understanding of English.

[14] In the judge's view, although Mr. Tayo Tompouba's English was not perfect — as he sometimes struggled to find the right words to express himself and he asked for clarifications several times in order to understand the questions put to him — he displayed an excellent ability to understand and express himself in English.

Essentially, his slight linguistic difficulties were no different than those normally experienced by witnesses who speak English as a first language.

B. *Decision of the British Columbia Court of Appeal, 2022 BCCA 177, 414 C.C.C. (3d) 86 (Dickson, Griffin and Voith J.J.A.)*

[15] It was not until Mr. Tayo Tompouba was before the Court of Appeal that he asserted that he would have liked his trial to be conducted in French. On appeal from his conviction, Mr. Tayo Tompouba urged two grounds for intervention based on the violation of his language rights: the breach of s. 530(3) *Cr. C.* and, in the alternative, the trial judge's failure to proactively exercise the powers conferred on him by s. 530(4) *Cr. C.* in order to remand him to be tried by a judge who spoke French. In his opinion, these errors precluded the application of either of the curative provisos and required full new proceedings to be held.

[16] It is important to note that Mr. Tayo Tompouba did not seek to file fresh evidence on appeal. He did not try to prove that he had been unaware at first instance of his right to be tried in the official language of his choice, nor did he try to explain why he had waited before asserting this right. In his view, this was unnecessary given his position on the lower courts' breaches of his language rights. Therefore, Mr. Tayo Tompouba simply alleged that he had not been informed of his right in this regard at first instance, either by his counsel or by the various judges before whom he had appeared.

[17] In a unanimous decision, the Court of Appeal dismissed his appeal. First of all, it refused to accept the ground of appeal based on the breach of s. 530(3) *Cr. C.* While it was of the view that the breach was an error of law under s. 686(1)(a)(ii) *Cr. C.*, it found that there was insufficient evidence to conclude that the error had caused any prejudice. It therefore applied one of the curative provisos in s. 686(1)(b) *Cr. C.*

[18] The Court of Appeal explained that the success of this ground of appeal depended on factual inferences that would support a conclusion that the breach of the duty set out in s. 530(3) *Cr. C.* had resulted in a violation of the appellant's fundamental right to be tried in the official language of his choice. However, in its opinion, such inferences could not reasonably be drawn from the record. Specifically, the evidence before it did not allow a conclusion to be reached one way or the other on various key questions, including when Mr. Tayo Tompouba had learned of his fundamental right, whether he would in fact have chosen a trial in French if he had had an opportunity to do so, and whether he had not made a free and informed choice to have a trial in English. Because the onus was, in its view, on Mr. Tayo Tompouba to adduce such evidence and persuade it that his fundamental right had been violated, the Court of Appeal held that the inconclusiveness of the evidence on these questions was fatal to him.

[19] The Court of Appeal also dismissed Mr. Tayo Tompouba's alternative ground of appeal to the effect that the trial judge had erred in not remanding him to be



tried by a judge who spoke French. As a general rule, a trial judge is not obliged to inquire into an accused's official language of choice unless it becomes evident that this may be a "genuinely live issue" (C.A. reasons, at para. 127). In this case, however, several findings of fact — which, in the Court of Appeal's view, were not tainted by any palpable error — provided a basis for the trial judge to conclude that the language of the trial was not a live issue: the appellant was fluent in English, he was represented by counsel, he felt that he could interact with the police in English, he demonstrated an understanding of linguistic nuance, and he testified in English without apparent difficulty. In this context, the Court of Appeal was of the opinion that the trial judge could not be faulted for not inquiring into whether it would be in the best interests of justice to remand the appellant to be tried in French.

[20] It is clear from the Court of Appeal's reasons that it was seeking to prevent the risk that accused persons may take advantage of essentially harmless violations of their language rights that occur at first instance. It strongly emphasized the importance of adopting a framework that does not encourage accused persons to raise non-compliance with s. 530(3) *Cr. C.* in a purely tactical manner for the purposes of a conviction appeal. In its view, accused persons must not be permitted to secure a new trial as a result of a breach of s. 530(3) *Cr. C.* that does not genuinely impact their fundamental right to be tried in the official language of their choice. It held that no accused should be automatically entitled to a new trial solely on the basis of a breach of s. 530(3) *Cr. C.*

### III. Issues

[21] The questions raised by this appeal are as follows:

- (1) What framework applies where an accused appeals their conviction while raising a breach of s. 530(3) *Cr. C.*, when no decision on the accused's language rights was made at first instance?
- (2) Did the Court of Appeal make a reviewable error in declining to order a new trial?

[22] For the reasons that follow, I am of the view that the applicable framework must be based on the principles enunciated in *R. v. Beaulac*, [1999] 1 S.C.R. 768, and must also be in harmony with the logic and structure of s. 686 *Cr. C.* Simply showing that s. 530(3) *Cr. C.* was breached is sufficient to justify appellate intervention under s. 686(1)(a)(ii) *Cr. C.* A breach of s. 530(3) *Cr. C.* is an error of law and gives rise to a presumption that the accused's fundamental right to be tried in the official language of their choice was infringed. The Crown can then rebut this presumption at the stage of the curative proviso analysis. If the Court of Appeal had applied the proper framework, it would have allowed Mr. Tayo Tompouba's appeal, quashed his conviction and ordered a new trial.

### IV. Analysis

[23] It is appropriate to begin the analysis with an overview of language rights, institutional judicial bilingualism, the rights guaranteed by s. 530 *Cr. C.* and the powers of a court of appeal hearing an appeal against a conviction.

A. *Language Rights: Purpose, Nature and Interpretation*

(1) Purpose and Nature

[24] The purpose of language rights is to “protect official language minorities in this country and to insure the equality of status of French and English” (*Beaulac*, at para. 41). These rights are “a fundamental tool” for the preservation and development of Canada’s two official language communities (*Beaulac*, at para. 25, citing *Reference re Public Schools Act (Man.)*, s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, at p. 850; see also *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261, at para. 32; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, at paras. 11 and 18). Neither “negative” nor “passive”, they are substantive rights that require positive action by the state to ensure that they are given effect (*Beaulac*, at paras. 20, 24 and 28; *Mazraani*, at para. 20; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535, at para. 38; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31, at para. 111).

[25] In the judicial context, language rights must be distinguished from guarantees related to procedural fairness. As Bastarache J. reiterated in *Beaulac*, language rights are a “particular kind of right, distinct from the principles of fundamental justice”, in that they are not meant to “enforce minimum conditions under which a trial will be considered fair” (paras. 25 and 47). Rather, their purpose is to ensure that everyone has “equal access to a public service that is responsive to [their] linguistic and cultural identity” (para. 45; see also *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460, at pp. 500-501; *Mazraani*, at paras. 20 and 46; *Bessette*, at para. 38).

[26] This distinction is especially important in criminal law cases. It means that the harm caused by a violation of an accused’s language rights during criminal proceedings can in no way be tempered by the fact that the accused was still able to make full answer and defence. In practical terms, this means that where the accused’s language rights were violated, the fact that the violation had no impact on trial fairness will not be relevant to the remedy granted (*Beaulac*, at paras. 41 and 47; *Mazraani*, at para. 46).

(2) Interpretation

[27] Since *Beaulac*, it has consistently been held that language rights, both those that are constitutional and those that are statutory in nature, must in all cases be interpreted liberally and purposively, in keeping with their purpose, which is to support the preservation and development of Canada’s two official language communities

(para. 25; see *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, [2000] 1 S.C.R. 3, at para. 27; *Charlebois v. Saint John (City)*, 2005 SCC 74, [2005] 3 S.C.R. 563, at para. 23; *DesRochers v. Canada (Industry)*, 2009 SCC 8, [2009] 1 S.C.R. 194, at para. 31; *Mazraani*, at para. 20; P. W. Hogg and W. Wright, *Constitutional Law of Canada* (5th ed. Supp.), at § 56:12).

B. *Institutional Judicial Bilingualism: An Essential Component of the Preservation and Development of Linguistic Minorities*

[28] This appeal relates to institutional judicial bilingualism, which ensures equal access to the courts for members of Canada's linguistic communities (see *Beaulac*, at para. 28; *Bessette*, at para. 20). The inextricable link between institutional judicial bilingualism and the protection of linguistic minorities, as well as the importance of these two concepts, are reflected in Canada's constitutional fabric (see *Conseil scolaire francophone de la Colombie-Britannique*, at para. 12, per Wagner C.J., and at paras. 188-89, per Brown and Rowe JJ., dissenting; J. D. Richard, "Le bilinguisme judiciaire au Canada" (2001), 42 *C. de D.* 389, at p. 395).

[29] First of all, the *Constitution Act, 1867* sets out limited positive rights that protect the use of English and French in certain federal and Quebec institutions, including judicial institutions:

**133** Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those

Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

[30] In addition, echoing s. 133 of the *Constitution Act, 1867* and strengthening the constitutional protection provided to linguistic minorities across the country, ss. 16 to 20 of the *Canadian Charter of Rights and Freedoms* set out a series of legal guarantees that ensure institutional bilingualism at the federal level. These guarantees are not subject to the notwithstanding clause in s. 33 of the *Charter* (see R. J. Sharpe and K. Roach, *The Charter of Rights and Freedoms* (7th ed. 2021), at pp. 433-34).

[31] In this case, it is ss. 16 and 19 of the *Charter* that should be focused on specifically. After stating, in the first subsection, that English and French are the official languages of Canada and that these two languages have “equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada”, s. 16 specifies, in the third subsection, that Parliament and the legislatures remain free at all times “to advance the equality of status or use of English and French”. As for s. 19, it specifically guarantees, in the first subsection, the right to use either English or French in, or in any pleading in or process issuing from, any federally established court (see Sharpe and Roach, at p. 433).

[32] The combined effect of s. 133 of the *Constitution Act, 1867* and s. 19(1) of the *Charter* is to guarantee to every person the right to speak in the official language

of their choice in judicial proceedings at the federal level and in Quebec (*Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, at pp. 574-75; *R. v. Mercure*, [1988] 1 S.C.R. 234, at p. 297-98, per Estey J., dissenting; Hogg and Wright, at § 56:9; Sharpe and Roach, at p. 433). This guarantee is a “constitutional minimum” that can be supplemented by federal and provincial legislation in order to advance the equality of status and use of English and French by conferring additional linguistic guarantees (see s. 16(1) and (3) of the *Charter*; *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, at pp. 192-93; *MacDonald*, at p. 496; *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, at pp. 222-23; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, at para. 56; Sharpe and Roach, at p. 432).

[33] The *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), is an example of federal legislation enacted for this purpose. This statute broadens [TRANSLATION] “the legal guarantees provided by section 133 of the *Constitution Act, 1867*, both through its geographic scope and through the range of services offered” (Richard, at p. 391; see also *Beaulac*, at para. 22; V. Gruben, “Le bilinguisme judiciaire”, in M. Bastarache and M. Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 301, at pp. 350-69). With respect to institutional judicial bilingualism in particular, s. 16 requires every federal court to ensure that the judge who hears proceedings is able to understand the language in which the proceedings are conducted, without the use of translation services.

[34] Section 530 *Cr. C.* is another example of a provision enacted “to advance the equality of status or use of English and French” (see *Beaulac*, at paras. 22 and 34; Gruben, at pp. 350-51 and 370-71). This section supplements the constitutional minimum guaranteed through the combined effect of s. 133 of the *Constitution Act, 1867* and s. 19(1) of the *Charter*. It goes beyond the constitutional right to speak in the official language of one’s choice by also giving every accused the right to choose the official language they wish to speak and in which they wish to be understood by the judge or the judge and jury, without the use of interpretation or translation services (see *Beaulac*, at para. 28; *Bessette*, at para. 20).

[35] I now turn to the language rights guaranteed by s. 530 *Cr. C.*

C. *Language Rights Guaranteed by Section 530 Cr. C.*

[36] The purpose of s. 530 *Cr. C.* is 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” (*Beaulac*, at para. 34; see also para. 56; *Bessette*, at para. 38). In particular, this section guarantees to every accused the fundamental right to be tried in the official language of their choice (s. 530(1) and (4) *Cr. C.*) and the right to be advised of this right (s. 530(3) *Cr. C.*), as can be seen from its wording at the time of Mr. Tayo Tompouba’s first appearance:<sup>2</sup>

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<sup>2</sup> Subsections (1) to (4) of s. 530 *Cr. C.* were amended to some extent in 2019 (see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments*



**530 (1)** On application by an accused whose language is one of the official languages of Canada, made not later than

(a) the time of the appearance of the accused at which his trial date is set, if

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or

(ii) the accused is to be tried on an indictment preferred under section 577,

(b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

(c) the time when the accused is ordered to stand trial, if the accused

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

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

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

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*to other Acts*, S.C. 2019, c. 25, s. 237). The previous version of s. 530 *Cr. C.*, at the time of Mr. Tayo Tompouba's first appearance, remains the relevant version for the purposes of the proceedings in issue.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

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

(1) Fundamental Right To Be Tried in the Official Language of One’s Choice

[37] Subsections (1) and (4) of s. 530 set out two frameworks governing the exercise of the same fundamental right, that is, the right of every accused to be tried in the official language of their choice. In *Beaulac*, this Court clarified the nature of and manner of exercising the right guaranteed to every accused under these two subsections, which until then had been interpreted inconsistently by the courts (see Gruben, at p. 373, citing R. Soublière, “Les perpétuels tiraillements des tribunaux dans l’interprétation des droits linguistiques” (2001), 4 *R.C.L.F.* 1).

[38] Discussing s. 530(1) *Cr. C.*, this Court stated that it guarantees to every accused an *absolute* right to equal access to the courts in the official language of their choice, provided that the accused’s application is timely and that they are able to

instruct counsel and follow the proceedings in the chosen language (*Beaulac*, at paras. 28, 31, 34 and 37). To exercise this absolute right, the accused need only “assert” which official language is their own language. The judge will then have to grant the accused’s application unless the Crown shows that the assertion is unfounded (para. 34). Where the Crown challenges the accused’s assertion, the judge should not inquire into specific criteria to determine a dominant cultural identity or into the personal language preferences of the accused. The judge will only verify that the requirements of s. 530(1) *Cr. C.* are met (para. 34). In short, where the accused’s application is timely and there is no evidence establishing that their proficiency in the chosen language is insufficient for them to exercise their right, the accused has an absolute right, guaranteed by s. 530(1) *Cr. C.*, to choose the official language to be used and understood by the judge or the judge and jury before whom they will be tried (para. 56).

[39] In contrast, where an accused’s application to be tried in the official language of their choice is untimely — that is, made outside the period specified in s. 530(1) *Cr. C.* — the accused’s right is then subject to the judge’s discretion. Under s. 530(4) *Cr. C.*, the judge may grant the accused’s application only if satisfied that doing so is in the best interests of justice. In *Beaulac*, this Court stated that there are, however, significant constraints on this judicial discretion. In particular, because of the central importance of language rights in Canadian society, there is a presumption in the accused’s favour that granting their application is in the best interests of justice. In

practice, therefore, granting an application under s. 530(4) *Cr. C.* should be the rule and denying it should be the exception (*Beaulac*, at paras. 42 and 56).

[40] To justify the denial of such an application, the Crown must rebut this presumption. It must show that granting the accused's application is not in the best interests of justice and, for this purpose, make arguments based on both the reasons for the delay and the difficulties caused by the lateness of the application (*Beaulac*, at paras. 37, 40, 42 and 44). With regard to the reasons for the delay, this Court specified that the later the application is made, the better the reason for the delay must be in order for the application to be accepted. That being said, there is no burden on the accused: even if the accused provides no explanation for the delay, this will not *necessarily* be fatal. At most, it will merely facilitate the Crown's task of justifying the denial of the accused's late application (paras. 43 and 56). As for the difficulties caused by the lateness of the application, the Court set out the relevant factors relating to the conduct of the trial, including

whether the accused is represented by counsel, the language in which the evidence is available, the language of witnesses, whether a jury has been empanelled, whether witnesses have already testified, whether they are still available, whether proceedings can continue in a different language without the need to start the trial afresh, the fact that there may be co-accuseds (which would indicate the need for separate trials), changes of counsel by the accused, the need for the Crown to change counsel and the language ability of the presiding judge. [para. 38]

Mere administrative inconvenience, on the other hand, is of no relevance (para. 39).

[41] The result is a framework conducive to the protection of the accused's language rights. Even where the accused decides to exercise their fundamental right to be tried in the official language of their choice late, even as late as during the trial on the merits, the presumption applies in the accused's favour. The burden of persuading the court that the accused's application must be denied falls on the Crown (*Beaulac*, at paras. 42 and 56).

[42] Finally, it should be noted that it is well settled that the violation of this fundamental right constitutes significant prejudice for which the appropriate remedy is normally a new trial. In *Beaulac*, this Court stated that the erroneous denial of an application under s. 530(1) or (4) *Cr. C.* violates the accused's right to be tried in the official language of their choice and will always cause prejudice to the accused. It follows that where this fundamental right of the accused was violated, the Crown can never successfully rely on either of the curative provisos in s. 686(1)(b) *Cr. C.*, even if the violation had no impact on trial fairness or on the accused's ability to make full answer and defence (*Beaulac*, at paras. 52-54; *Bessette*, at para. 38). Therefore, where there was an infringement of an accused's fundamental right to be tried in the official language of their choice, a new trial will generally be the fair, appropriate and proportionate remedy (see *Beaulac*; *Mazraani*, at paras. 47-48).

(2) Right To Be Advised of This Fundamental Right

[43] Section 530(3) *Cr. C.* enshrines the accused's right to be advised of their right to be tried in the official language of their choice and of the time before which an

application for this purpose must be made. Parliament’s intention was that the safeguarding of this fundamental right be ultimately entrusted to the judge before whom the accused first appears. To begin with, s. 530(3) *Cr. C.* explicitly states that the judge must ensure that the accused is advised of their fundamental right and of the time limit for exercising it. In addition, it is implicit in the language of s. 530(3) *Cr. C.* that if the first appearance judge finds that the accused has not been properly informed, or if they have the slightest doubt in this regard, they must take the necessary steps to ensure that the accused is informed of their fundamental right and of how it is to be exercised. While this last point is not clear from the language of s. 530(3) *Cr. C.*, it is nonetheless the interpretation that must be adopted in light of the legislative intent. This two-pronged duty — which requires the judge to ensure that the accused is duly informed of their fundamental right and of how it is to be exercised and, where the circumstances so require, to take the necessary steps to inform the accused thereof — is what I refer to as the judge’s “informational duty”.

[44] Section 530(3) *Cr. C.* states that the judge before whom an accused first appears “shall ensure” (“*veille*” in the French version) that the accused is “advised” (“*avisé*” in the French version) of their right and of the time limit for exercising it. The use of these terms in each language version indicates that Parliament intends judges to “make certain” that every accused is informed of their right and of how it is to be exercised so that the accused can avail themselves of the right in a timely manner (*Canadian Oxford Dictionary* (2nd ed. 2004), *sub verbo* “ensure”; *The Dictionary of Canadian Law* (5th ed. 2020), *sub verbo* “ensure”; *Le Grand Robert de la langue*

*française* (electronic version), *sub verbo* “*aviser*”; *Grand Robert & Collins* (electronic version), *sub verbo* “advise” and “*aviser*”). In other words, the judge must display [TRANSLATION] “vigilance” and “actively take care” to ensure that the accused is duly informed of their right and of how it is to be exercised (*Le Grand Robert de la langue française* (electronic version), *sub verbo* “*veiller*”). The judge cannot presume what the accused’s choice is or assume that the accused has been or will be advised of their right and of how it is to be exercised. The judge must ensure, in a proactive and systematic manner, that the accused is properly informed, irrespective of the fact that the accused seems to be a member of a linguistic minority or that the accused may have been or may be informed of this right by another person, such as their counsel. In short, the judge must 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 (*Mazraani*, at para. 34; see also paras. 25, 32, 38, 44 and 60; *R. v. MacKenzie*, 2004 NSCA 10, 181 C.C.C. (3d) 485, at para. 12; *Dhingra v. R.*, 2021 QCCA 1681, 408 C.C.C. (3d) 466, at para. 49).

[45] It should be noted here that if the judge finds that the accused has not been properly informed, or if there remains any doubt about this in their mind, the judge must ensure that the accused is informed of their right and of how it is to be exercised. While it is true that this is not explicitly stated in the provision, this interpretation is nonetheless the one most in keeping with the legislative intent as revealed by the provision’s purpose and the legislative history. I will start by looking at the purpose of s. 530(3) *Cr. C.* The primary purpose of this provision is to help protect the accused’s fundamental right to choose the official language in which they wish to be tried by

ensuring that the accused has, at the proper time, the information required to exercise this right. In the context of language rights, the jurisprudence establishes that when it comes to protecting the right to choose an official language, it is essential that this personal choice be a free and informed one (*Mazraani*, at paras. 42 and 44). Ultimately, the goal of s. 530(3) *Cr. C.* is therefore to make sure that information about the accused's fundamental right and how it is to be exercised is conveyed to the accused in a timely manner in order to help the accused make a free and informed choice of official language. This requires the first appearance judge to take the necessary steps to ensure that the accused is informed of their right and of how it is to be exercised where the judge finds that the accused has not been properly informed or where the judge has any doubt in this regard.

[46] The legislative history of s. 530(3) *Cr. C.* also shows that a principle of caution must always guide the judge who has to ensure respect for the accused's right to be advised of their language rights protected by s. 530 *Cr. C.*, such that the slightest doubt must lead the judge to take the necessary steps to ensure that the accused is duly informed. The previous version of this provision imposed an informational duty on the judge only in cases where the accused was self-represented. It was thus presumed that counsel would properly inform their clients of their language rights (see *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 33, 3rd Sess., 30th Parl., May 31, 1978, at pp. 5-6; Gruben, at p. 379). In 2008, in response to criticisms by courts and other interested institutions and bodies that this presumption was unfounded in practice, Parliament amended s. 530(3) *Cr. C.* to extend



the application of the judge's informational duty to all accused persons, regardless of whether they were self-represented or represented by counsel (see *Beaulac*, at para. 37; *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, S.C. 2008, c. 18, s. 18; House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 65, 1st Sess., 39th Parl., May 2, 2007, at pp. 2-3; Commissioner of Official Languages, *The Equitable Use of English and French Before the Courts in Canada* (1995), at pp. 102-4).

[47] This amendment is important. It amounts to legislative recognition of a principle of caution requiring judges to avoid presuming, without verifying in a diligent and proactive manner, that an accused has been duly informed of their right and of how it is to be exercised prior to their first appearance. While this principle of caution applies in relation to accused persons who are represented by counsel, notwithstanding the fact that counsel generally have an ethical duty to inform their clients of their fundamental right to be tried in the language of their choice, I am of the view that the principle applies with even greater force in relation to accused persons who are not represented by counsel and to those who were purportedly informed of their right by another person or in another way prior to their first appearance.

[48] The amendment also reflects the legislative intent to make 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. By imposing a duty on the judge to play

an active role in ensuring respect for this fundamental right, this legislative amendment enshrines the principle of active offer when it comes to language rights (see *Debates of the Senate*, vol. 144, No. 14, 2nd Sess., 39th Parl., November 21, 2007, at pp. 274-75). It recognizes that in a context as intimidating as that of a criminal trial, where the accused's freedom is at stake, it is important that it be the person in a position of authority, namely the judge, who protects the accused's language rights under s. 530 *Cr. C.* by being vigilant, cautious and proactive, particularly to alleviate any fear associated with the exercise of these rights and to help ensure that the choice is a free and informed one (see *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 691, at para. 62; see also Office of the French Language Services Commissioner of Ontario, *Active Offer of Services in French: The Cornerstone for Achieving the Objectives of Ontario's French Language Services Act* (2016), at pp. 10-11).

[49] It follows from the foregoing that 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 informational duty. Such a failure by the judge constitutes a breach of s. 530(3) *Cr. C.* and violates the accused's right.

[50] Finally, I note that the consequences of a breach of s. 530(3) *Cr. C.* will differ depending on when the breach is raised. When it is raised at first instance outside the periods specified in s. 530(1) *Cr. C.*, the accused can file a late application under

s. 530(4) *Cr. C.* The judge's failure to comply with s. 530(3) *Cr. C.* will then be a relevant factor in the accused's favour that the judge hearing the application must consider when assessing the diligence displayed by the accused in exercising their fundamental right. As Mainville J.A. of the Quebec Court of Appeal wrote: "Should the duty under s. 530(3) . . . *Cr.C.* not have been satisfied, it would be more difficult to refuse a late application" (*Dhingra*, at para. 51).

[51] Where the breach of s. 530(3) *Cr. C.* is raised for the first time on appeal, as in this case, the consequences of the breach are a subject of disagreement among the courts, with respect to both the applicable framework and the appropriate remedy. Some appellate courts find that a breach of s. 530(3) *Cr. C.* in itself causes very significant prejudice to the accused, which requires that a new trial be held (see *MacKenzie*, at paras. 3, 11, 69 and 82-83; *R. v. Deveaux* (1999), 181 N.S.R. (2d) 81 (S.C.)). Others, including the Court of Appeal in this case, instead take the view that such a breach cannot justify a new trial on its own in the absence of evidence in the record from which it can be concluded that the breach resulted in a violation of the accused's fundamental right to be tried in the official language of their choice or other significant prejudice (paras. 106 and 125-26; see also *R. v. Caesar*, 2015 NWTCA 4, 588 A.R. 392, at paras. 8-10).

[52] Below I will endeavour to clarify the applicable framework and the appropriate remedy where a breach of s. 530(3) *Cr. C.* is raised for the first time on

appeal. Before that, however, a few words should be said about the powers of a court of appeal hearing an appeal against a conviction under s. 686 *Cr. C.*

D. *Powers of a Court of Appeal Hearing an Appeal Against a Conviction*

[53] Section 686 *Cr. C.* sets out the powers of a court of appeal hearing an appeal against a conviction. The relevant portions of this section read as follows:

**686 (1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where:

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(1) Principle Underlying Any Intervention by a Court of Appeal Under Section 686(1)(a) Cr. C.

[54] Section 686(1)(a) *Cr. C.* allows a court of appeal to intervene only if the appellant is able to show that the verdict is unreasonable, that an error of law was made or that a miscarriage of justice occurred. These three grounds for intervention have the same underlying principle: a court of appeal can generally intervene only where the error was prejudicial to the accused. Otherwise, it is an error without legal consequence, except in cases where the error, without causing direct prejudice to the accused, is so serious that it shakes public confidence in the administration of justice (see *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 51, quoting *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89; *R. v. Kahsai*, 2023 SCC 20, at paras. 67-68).

[55] Section 686(1)(a)(i) *Cr. C.* is concerned with situations that are inherently prejudicial to the accused, that is, situations in which the accused's conviction is unreasonable in the sense that the guilty verdict cannot reasonably be supported by the evidence or is vitiated by illogical or irrational reasoning (*R. v. Brunelle*, 2022 SCC 5, at para. 7, citing *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, and *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; see also *Sinclair*, at para. 76, per Charron J., concurring, quoting *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 219). For its part, s. 686(1)(a)(ii), when read along with the curative provisos in s. 686(1)(b)(iii) and (iv), presumes that an error of law is prejudicial to the accused unless the Crown can show the contrary with the requisite degree of certainty (see *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 16; *Sinclair*, at para. 76, quoting

*Morrissey*, at p. 219; S. Coughlan, *Criminal Procedure* (4th ed. 2020), at pp. 566-67, 574, 578 and 581-82). Finally, s. 686(1)(a)(iii) *Cr. C.* permits a court of appeal to intervene in any other situation that causes prejudice giving rise to a miscarriage of justice. This will be the case where the accused was convicted following a trial that was unfair in fact or in appearance, for example where the accused entered a guilty plea without being aware of a collateral consequence of the plea that, if it had been known, would have induced the accused to act differently (*Davey*, at para. 51, quoting *Wolkins*, at para. 89; *Kahsai*, at para. 67, citing *Khan*, at paras. 69 and 73; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at paras. 5, 25 and 39, per Moldaver, Gascon and Brown JJ., and at paras. 44, 79 and 85, per Wagner J., dissenting).

[56] In short, as a general rule, a court of appeal may intervene only if the error was prejudicial to the accused. Unreasonable verdicts (s. 686(1)(a)(i) *Cr. C.*) and miscarriages of justice (s. 686(1)(a)(iii) *Cr. C.*) are usually, by nature, prejudicial to the accused, while errors of law (s. 686(1)(a)(ii) *Cr. C.*) are *presumed* to be prejudicial (see *Khan*, at para. 16; Coughlan, at pp. 574-75 and 582).

(2) Importance of Distinguishing Errors of Law From the Other Two Types of Errors Referred to in Section 686(1)(a) *Cr. C.*

[57] Therefore, the primary relevance of the distinction between errors of law and the other types of errors referred to in s. 686(1)(a) *Cr. C.* lies first and foremost in the allocation of the burden of showing that the error was or was not prejudicial. Where the error is one of law, because such an error is presumed to be prejudicial to the

accused, the Crown bears the onus of establishing the absence of prejudice at the stage of the analysis under one of the two curative provisos. Where the error is of another type, the onus of showing that it was prejudicial rests on the accused appealing their conviction (see *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at para. 38; *Morrissey*, at p. 219; Coughlan, at p. 574).

[58] This means that, in principle, it is less onerous for an accused to establish an error of law than to establish the other two types of errors referred to in s. 686(1)(a) *Cr. C.* In the former case, showing the existence of an error or irregularity is sufficient to give rise to a presumption of prejudice and thus to justify appellate intervention. The onus then falls on the Crown, for the purposes of the analysis under one of the curative provisos in s. 686(1)(b) *Cr. C.*, to rebut this presumption, if it so wishes, by showing that the error of law in question did not in fact cause any prejudice to the accused (see *Khan*, at para. 23; Coughlan, at pp. 574-75 and 582; M. Vauclair, T. Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at No. 51.238). In the latter case, simply showing the existence of an error or irregularity is not sufficient. The accused must also show that it was prejudicial to them.

[59] Here, no one is arguing that the breach of s. 530(3) *Cr. C.* in issue resulted in an unreasonable verdict (s. 686(1)(a)(i) *Cr. C.*). Rather, it is the distinction between an error of law (s. 686(1)(a)(ii) *Cr. C.*) and a miscarriage of justice (s. 686(1)(a)(iii) *Cr. C.*) that lies at the heart of this case. It is therefore important to focus the analysis on these two types of errors, starting with an error of law.

(a) *Error of Law (Section 686(1)(a)(ii) Cr. C.)*

[60] Section 686(1)(a)(ii) *Cr. C.* has been interpreted very broadly by the courts. An examination of the jurisprudence leads to the conclusion that an error of law under this provision is any error in the application of a legal rule, as long as the error is related to the proceedings leading to the conviction and was made by a judge. In such circumstances, the trial court's judgment constitutes "a wrong decision on a question of law" under s. 686(1)(a)(ii) *Cr. C.*, which allows prejudice to be presumed and may justify quashing the conviction.

(i) Error in the Application of a Legal Rule

[61] To begin with, an error of law under s. 686(1)(a)(ii) *Cr. C.* involves an error in the application of a legal rule. In this regard, three clarifications must be made.

[62] First, an error in the application of a legal rule may originate in various ways, including through a misinterpretation of the legal rule (*Khan*, at para. 22; *Arradi*, at para. 39; *Coughlan*, at pp. 574-75; T. Desjardins, *L'appel en droit criminel et pénal* (2nd ed. 2012), at pp. 147-49).

[63] Second, the application error may occur through a decision or an improper omission, that is, an unjustified failure to apply a legal rule. While it is true that the expression "a wrong decision on a question of law" in s. 686(1)(a)(ii) *Cr. C.*, coupled with what the majority stated in *Khan* (see paras. 7, 17 and 22), may at first glance



support the idea that an error of law is confined to a *decision* that is wrong in law, it is clear from this Court’s jurisprudence that such an error may also involve an improper omission. More specifically, failing to apply a legal rule — for instance, by not complying with it — may constitute an error of law. This will be the case where, for example, a judge fails to give an instruction to a jury despite being required to do so (see *R. v. Chambers*, [1990] 2 S.C.R. 1293, at p. 1318; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 32-34; *R. v. Abdullahi*, 2023 SCC 19, at paras. 48-49; Coughlan, at p. 575); to correct prejudicial remarks made by Crown counsel concerning a defence witness (*R. v. Romeo*, [1991] 1 S.C.R. 86, at p. 95); to appoint an interpreter when it is apparent that the accused is having difficulty expressing themselves or understanding the proceedings for language reasons, such that the failure infringes the accused’s constitutional right protected by s. 14 of the *Charter* (*R. v. Tran*, [1994] 2 S.C.R. 951, at pp. 980-81 and 1008-9); to comply with a procedural rule (see *R. v. Mitchell* (1997), 36 O.R. (3d) 643 (C.A.); *R. v. Sciascia*, 2016 ONCA 411, 131 O.R. (3d) 375, at paras. 82-83 and 86, *aff’d* on other grounds, 2017 SCC 57, [2017] 2 S.C.R. 539, at paras. 7 and 45; Coughlan, at p. 566; *Khan*, at para. 16); or to provide sufficient reasons in support of a decision (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 108, per Brown and Rowe JJ., concurring, citing, *inter alia*, *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 25 and 28). In short, the jurisprudence indicates that an error in the application of a legal rule may involve either a decision that is wrong in law or an unjustified failure to comply with a legal rule. Indeed, this surely explains why Arbour J. stated in *Khan* that an error of law under s. 686(1)(a)(ii) *Cr. C.* “can be” — but is not limited to being — “any decision” (para. 22).

[64] Third, for a presumption of prejudice to arise, it is not necessary that the legal rule erroneously applied be substantive in nature. This is because it is well settled that a procedural irregularity, whether trivial or serious, may constitute an error of law under s. 686(1)(a)(ii) *Cr. C.* and trigger the application of the curative provisos in s. 686(1)(b) *Cr. C.* (*Khan*, at para. 16; *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 134-35, per Gonthier J., dissenting, quoting *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35 (Ont. C.A.), at pp. 46 and 48). In short, the prejudice presumed as a result of an error of law under s. 686(1)(a)(ii) *Cr. C.*, which makes it possible to quash the conviction, may arise from a breach of either a substantive or a procedural right (see *Coughlan*, at p. 576).

[65] Next, to constitute an error of law under s. 686(1)(a)(ii) *Cr. C.*, the erroneous application of a legal rule must be related to the proceedings leading to the conviction and must be attributable to a judge. Only where these two criteria are met can it be concluded that the error tainted the trial court's judgment, with the result that prejudice can be presumed and the conviction quashed.

(ii) Related to the Proceedings Leading to the Conviction

[66] To taint the trial judgment in this manner, the error in the application of the legal rule does not have to be "linked to the final verdict" or be an error or irregularity on which the verdict "was or could have been based so as to prejudice the accused" (*Khan*, at paras. 20 and 22). The error must nevertheless be related to the proceedings leading to the conviction, such that the error "contributed to the ultimate verdict as they all do" (*Khan*, at para. 22; see also *Vauclair, Desjardins and Lachance*, at No. 51.236).

(iii) Made by a Judge

[67] Furthermore, to taint the trial judgment in this manner, the error in the application of a legal rule must have been made by a judge. In the majority of situations, it will be the trial judge who commits the error or irregularity. This will be the case, for example, where the trial judge fails to give an instruction to the jury despite being required to do so (see *Chambers*, at p. 1318; *Van*, at paras. 32-34; *Abdullahi*, at paras. 48-49; *Coughlan*, at p. 575); convicts an accused of contempt of court *instanter* when it is neither urgent nor imperative to do so, thereby unfairly depriving the accused of the procedural guarantees to which they are entitled (see *Arradi*, at paras. 36 and 40); violates a *Charter* right, like the right to an interpreter, through a wrong decision or an improper omission (see *Tran*); wrongly decides to dismiss a party's application for an order for a new trial (see *Khan*); excludes the accused from their trial in contravention of s. 650 *Cr. C.* (see *R. v. Barrow*, [1987] 2 S.C.R. 694; *R. v. D.Q.*, 2021 ONCA 827, 411 C.C.C. (3d) 292); or wrongly decides not to rectify a division and severance order made by a judge who was not the trial judge (see *R. v. Litchfield*, [1993] 4 S.C.R. 333).

[68] However, this will not always be the case. The error in the application of a legal rule may sometimes be made by a judge who is not the trial judge. For example, this will be the case where a judge who is not the trial judge makes a wrong decision on an accused's fundamental right to be tried in the official language of their choice. This wrong decision may constitute an error of law under s. 686(1)(a)(ii) *Cr. C.*, even

if it is not brought to the trial judge's attention (*Beaulac*, at paras. 11 and 53-55, rev'g (1997), 120 C.C.C. (3d) 16 (B.C.C.A.), at paras. 1, 54 and 57-58). This will also be the case where an irregularity that amounts to an error of law, and that can therefore be remedied under s. 686(1)(b)(iv) *Cr. C.*, occurs prior to trial (see *Khan*, at paras. 16 and 18; Coughlan, at pp. 566-67). The example of a justice of the peace who fails to read the charges to an accused or who does not properly "put the accused" to an election as to the mode of trial, in violation of s. 536(2) *Cr. C.*, is a good illustration of this situation (see *Mitchell*).

[69] In light of this three-part definition, it is easy to understand why preference should generally be given to the framework for miscarriages of justice under s. 686(1)(a)(iii) *Cr. C.* in cases where an accused raises on appeal, for the first time, the ineffective assistance of their counsel (*Khan*, at para. 17; see also *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. White*, 2022 SCC 7) or the invalidity of their guilty plea in the circumstances described in *Wong*. In such situations, it is not appropriate to analyze the ground of appeal from the standpoint of an error of law under s. 686(1)(a)(ii) *Cr. C.*, because both of these cases usually involve no error by a judge in the application of a legal rule. The same is true where, for example, what is being alleged is a violation of a legal rule by a person other than a judge, such as the Crown (see *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777; *Davey*). Similarly, this explains why the miscarriage of justice framework applies in cases where it is alleged that a judge wrongly exercised a highly discretionary power (*Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at pp. 238-39; *Kahsai*, at paras. 72 and 74). While the exercise of a highly

discretionary power might technically fall within the definition of an erroneous “application” of a legal rule, this exercise is so dependent “on the facts and circumstances in each case” that this Court preferred rather to specify that it “will not be determined by the simple application of a fixed rule of law” (*Fanjoy*, at pp. 238-39).

[70] I recognize that, in the past, certain errors or irregularities corresponding to the definition of errors of law under s. 686(1)(a)(ii) *Cr. C.* were analyzed on the basis of the framework for miscarriages of justice and then characterized as such. The issue of judicial bias springs to mind: the error of a judge who dismisses a recusal motion or who fails to recuse themselves when there is a reasonable apprehension of bias has historically been analyzed under the miscarriage of justice framework (J. Sopinka, M. A. Gelowitz and W. D. Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal* (5th ed. 2022), at p. 295). But in such a case the characterization of the error under s. 686(1)(a) *Cr. C.* has no impact on the appellant’s burden of proof or on the outcome, such that “the same conclusion would be reached no matter which route was followed” (Coughlan, at p. 577). Indeed, regardless of whether an error of law or a miscarriage of justice is involved, an appellant who alleges that the trial judge was biased as a ground for quashing their conviction must establish a reasonable apprehension of bias, which will “inexorably” lead the court of appeal to order a new trial (*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 5). The distinction between a miscarriage of justice and an error of law that cannot be cured by the application of the curative provisos because of the prejudice it caused is a theoretical one in this type of

situation (Coughlan, at pp. 574 and 577; see also, e.g., *Beaulac*, at paras. 53-54, and *Tran*, at pp. 1008-9).

[71] To summarize, an error of law under s. 686(1)(a)(ii) *Cr. C.* is any error in the application of a legal rule, as long as it is related to the proceedings leading to the conviction and was made by a judge. In addition, the error may have been made through a decision or an improper omission. It may also concern either a procedural or a substantive legal rule. This definition is consistent not only with the language and inherent mechanics of s. 686 *Cr. C.* but also with the manner in which this provision has been interpreted by the courts over time. It also has the advantage of being accessible, intelligible, clear and predictable (*R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, at para. 68). It results in a wide range of errors being classifiable as errors of law under s. 686(1)(a)(ii) *Cr. C.*, which in fact explains why “[m]ost errors that are not based on the unreasonableness of a verdict will relate to an error of law” (Coughlan, at p. 574; see also *Khan*, at para. 25).

(b) *Miscarriage of Justice (Section 686(1)(a)(iii) Cr. C.)*

[72] By comparison, miscarriages of justice under s. 686(1)(a)(iii) *Cr. C.* are a residual category of errors that exists to ensure that a conviction [TRANSLATION] “can be quashed where a trial was unfair, regardless of whether the error was procedural or substantive in nature” (Vauclair, Desjardins and Lachance, at No. 51.250; see also *Khan*, at paras. 18 and 27). The question to be decided in this regard is whether the irregularity was so severe that it rendered the trial unfair or created the appearance of

unfairness (*Khan*, at para. 69, per Lebel J., concurring; see also *Fanjoy*, at pp. 238-40; *Davey*, at paras. 50-51; *Kahsai*, at paras. 67-69). The miscarriage of justice standard is “a high bar”, which “is even higher when claimed based on perceived unfairness instead of actual prejudice” (*Kahsai*, at para. 68).

[73] Courts have found a miscarriage of justice in a wide range of circumstances (see A. Stylios, J. Casgrain and M.-É. O’Brien, *Procédure pénale* (2023), at paras. 18-87 to 18-81). Examples of a miscarriage of justice include the ineffective assistance of counsel (see *White*), a breach of solicitor-client privilege by defence counsel (*Kahsai*, at para. 69, citing *R. v. Olusoga*, 2019 ONCA 565, 377 C.C.C. (3d) 143) and a misapprehension of the evidence that, though not making the verdict unreasonable, nonetheless constitutes a denial of justice (*R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 1; Coughlan, at pp. 576-77). Unfairness resulting from the exercise of a “highly discretionary” power, related to proceedings leading to a conviction and attributable to a judge will also generally be analyzed under the miscarriage of justice framework (*Fanjoy*, at pp. 238-39; *Kahsai*, at paras. 72 and 74).

### (3) Curative Provisos in Section 686(1)(b) Cr. C.

[74] Section 686(1)(b) *Cr. C.* contains two curative provisos that can be relied upon by the Crown (*R. v. Pétel*, [1994] 1 S.C.R. 3, at p. 17; *R. v. McMaster*, [1996] 1 S.C.R. 740, at para. 37). The proviso in s. 686(1)(b)(iii) *Cr. C.* allows a court of appeal to dismiss an appeal on the ground that an error or irregularity did not result in any

substantial wrong or miscarriage of justice (*Khan*, at paras. 16 and 18). The second proviso, set out in s. 686(1)(b)(iv) *Cr. C.*, allows the same result to be reached where an error or irregularity causes a loss of jurisdiction, as long as the accused suffered no prejudice and the trial court at least maintained jurisdiction over the class of offences (*Khan*, at paras. 11, 16 and 18, citing *Cloutier* with approval; *R. v. Esseghaier*, 2021 SCC 9, [2021] 1 S.C.R. 101, at para. 2; *Vauclair, Desjardins and Lachance*, at No. 51.245).

[75] The common purpose of the two curative provisos is to permit the dismissal of an appeal where the error or irregularity shown by the accused was not prejudicial to them (see *Khan*, at paras. 23 and 30; E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (3rd ed. (loose-leaf)), at § 31:1376.50; *Vauclair, Desjardins and Lachance*, at No. 51.238; *Coughlan*, at pp. 574-75 and 582). Ultimately, the provisos attempt “to prevent the annulment of criminal verdicts or mistrials for reasons that relate essentially to technicalities of the law, which have no real bearing on the fundamental legality or fairness of a trial” (*Khan*, at para. 98, per LeBel J., concurring).

[76] The curative proviso in s. 686(1)(b)(iii) *Cr. C.* generally applies where there is no reasonable possibility that the verdict would have been different in the absence of the error. This occurs in two cases: (1) where the error or irregularity in question is minor or harmless, such that it had no impact on the verdict; or (2) where the error or irregularity, despite being serious enough to warrant a new trial, caused no substantial wrong or miscarriage of justice because the evidence against the appellant is so overwhelming that a trier of fact would inevitably convict (see *Tran*, at pp. 1008-9;



*Khan*, at paras. 28-31; *Van*, at paras. 34-36; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 85; *R. v. Samaniego*, 2022 SCC 9, at para. 65; *Vauclair, Desjardins and Lachance*, at Nos. 51.237-51.238). As for the curative proviso in s. 686(1)(b)(iv) *Cr. C.*, the question of prejudice has thus far been analyzed on the basis of the principles of s. 686(1)(b)(iii) (see *Khan*, at paras. 16 and 18; *Esseghaier*, at paras. 51-53; *Vauclair, Desjardins and Lachance*, at No. 51.245). As a result, “section 686(1)(b)(iv) is largely parallel to section 686(1)(b)(iii), but applies only to a narrow range of procedural irregularities which create a jurisdictional error that could not be classified as a pure error of law” (Coughlan, at p. 582).

[77] Against this backdrop, what must now be considered is the framework that applies where an accused appeals their conviction and raises, for the first time, a breach of s. 530(3) *Cr. C.* when no decision on the accused’s language rights was made at first instance.

E. *Framework That Applies Where a Breach of Section 530(3) Cr. C. Is Raised for the First Time on Appeal*

[78] The proper framework must be based on the principles enunciated in *Beaulac* — which, as explained above, further the protection of accused persons’ language rights — and must also be in harmony with the scheme for conviction appeals, and particularly with the logic and structure of s. 686 *Cr. C.*

(1) What the Accused Must Show to Justify Appellate Intervention

[79] The question of what an accused in the same situation as Mr. Tayo Tompouba must show to justify appellate intervention under s. 686(1)(a) *Cr. C.* has a decisive impact on the outcome of the appeal. The answer to this question depends on how a breach of s. 530(3) *Cr. C.* is characterized, that is, as an error of law (s. 686(1)(a)(ii) *Cr. C.*) or as a miscarriage of justice (s. 686(1)(a)(iii) *Cr. C.*).

[80] If a breach of s. 530(3) *Cr. C.* is an error of law under s. 686(1)(a)(ii) *Cr. C.*, as Mr. Tayo Tompouba suggests, simply showing that the breach occurred will be sufficient to justify appellate intervention. Showing this will give rise to a presumption that the breach of s. 530(3) *Cr. C.* caused prejudice, a presumption that the Crown can then rebut at the stage of the curative proviso analysis (see *Khan*, at para. 23; *Coughlan*, at pp. 574-75 and 582; *Vauclair, Desjardins and Lachance*, at No. 51.238). In the context of the language rights protected by s. 530 *Cr. C.*, the prejudice in question is, of course, related not to the fairness of the trial or the reliability of the verdict, but rather to the violation of the accused's fundamental right to be tried in the official language of their choice (*Beaulac*, at para. 53).

[81] On the other hand, if a breach of s. 530(3) *Cr. C.* cannot be characterized as an error of law, it is the miscarriage of justice framework that must apply, as the Crown and two of my colleagues maintain. The onus will then be on the accused to show that the breach of s. 530(3) *Cr. C.* caused them prejudice that gave rise to a miscarriage of justice (see *Wong*, at paras. 5 and 39, per Moldaver, Gascon and Brown JJ., and at paras. 44, 79 and 85, per Wagner J., dissenting; *Coughlan*, at

pp. 574-77). In such a case, no presumption will apply in the accused's favour. In other words, the accused will have to prove not only a breach of s. 530(3) *Cr. C.* but also a violation of their fundamental right to be tried in the official language of their choice.

[82] In my opinion, a breach of s. 530(3) *Cr. C.* is an error of law under s. 686(1)(a)(ii) *Cr. C.*, with the result that an accused need only disclose the breach in order to justify appellate intervention under s. 686(1)(a) *Cr. C.* The question of whether the error of law was prejudicial to the accused and, if so, to what extent, is important. But this question arises in connection with the application of the curative proviso, and the onus is then on the Crown to persuade the court of appeal that the error was not prejudicial to the accused (*Khan*, at para. 23; *Coughlan*, at pp. 574-75; *Vauclair, Desjardins and Lachance*, at No. 51.238). Before broaching this aspect of the analysis, I will explain why a breach of s. 530(3) *Cr. C.* constitutes an error of law under s. 686(1)(a)(ii) *Cr. C.* and not, as the Crown and two of my colleagues suggest, a miscarriage of justice.

[83] As I explained above, the jurisprudence establishes that an error of law under s. 686(1)(a)(ii) *Cr. C.* is any error in the application of a legal rule, as long as it is related to the proceedings leading to the conviction and was made by a judge — whether the trial judge, another judge or a justice of the peace. In addition, the error in the application of a legal rule may result from either a decision that is wrong in law or an improper omission. It may also concern a procedural or a substantive legal rule. When these three elements are present, the trial court's judgment is tainted by an error

of law under s. 686(1)(a)(ii) *Cr. C.*, which allows prejudice to be presumed and may justify quashing the conviction.

[84] Failure by the judge before whom the accused first appears to carry out their informational duty under s. 530(3) is an error in the application of a legal rule (*Arradi*, at para. 39; *Khan*, at para. 22; *Coughlan*, at pp. 574-75). By erroneously failing to apply an imperative legal rule of general application, the judge commits what I have termed an “improper omission”. In addition, because this irregularity is related to the proceedings leading to the conviction and is committed by a judge, it has the effect of tainting the trial court’s judgment so as to provide a basis for appellate intervention under s. 686(1)(a)(ii) *Cr. C.*

[85] Finally, although this is not determinative, I think it helpful to note that my conclusion is echoed in the jurisprudence on language rights, in which this Court has stated that a judge’s failure to take a litigant’s language rights into account constitutes an error of law (see *Mazraani*, at para. 48).

[86] This conclusion is also supported by the purpose of s. 530, as interpreted and applied in *Beaulac*. In that case, as I said earlier, this Court reduced the onus on an accused who seeks to exercise their fundamental right to be tried in the official language of their choice late by stating that a presumption applies in the accused’s favour, and also specified that the Crown bears the burden of rebutting this presumption (paras. 42 and 56). Similarly, characterizing a breach of s. 530(3) *Cr. C.* as an error of law reduces the onus on the appellant by triggering a presumption in their favour once

the breach has been established, while also giving the Crown an opportunity to rebut the presumption by showing that the appellant's fundamental right to be tried in the official language of their choice was not violated.

[87] The Court of Appeal was therefore correct to characterize a breach of s. 530(3) *Cr. C.* as an error of law. However, it erred in stating that, to succeed on appeal, an accused in the same situation as Mr. Tayo Tompouba must show not only that the breach occurred but also that their fundamental right to be tried in the official language of their choice was violated.

(2) What the Crown Can Show to Have the Appeal Dismissed Nonetheless

[88] Contrary to what Mr. Tayo Tompouba argues, there is nothing that precludes the application of one of the curative provisos in s. 686(1)(b) *Cr. C.*, provided that the Crown shows that the accused's fundamental right to be tried in the official language of their choice was not violated.

[89] A breach of s. 530(3) *Cr. C.* is an error that results in the court losing jurisdiction over the proceedings (*Bessette*, at para. 27; *Munkonda*, at paras. 131-33). The Crown can therefore rely on the curative proviso in s. 686(1)(b)(iv) *Cr. C.* and try to show that no prejudice was caused by the error (*Khan*, at para. 16; *Vauclair, Desjardins and Lachance*, at No. 51.246). Thus, once a breach of s. 530(3) *Cr. C.* has been established, the Crown can argue that, notwithstanding this error of law, the appeal should nonetheless be dismissed on the ground that it did not in fact cause

prejudice to the accused — in other words, that the error did not result in a violation of the accused’s fundamental right to be tried in the official language of their choice. If the Crown succeeds, the presumption that the error of law caused prejudice to the accused is rebutted and the court of appeal hearing the case can apply the curative proviso (see *Khan*, at para. 16; Coughlan, at pp. 574-75 and 582).

[90] It is useful to note three routes that the Crown can take to show that the accused’s fundamental right was not violated and that it is therefore appropriate to dismiss the appeal on the ground that the appellant did not suffer any prejudice as a result of the breach of s. 530(3) *Cr. C.* First, the Crown can argue that the appellant does not have sufficient proficiency in the official language they were unable to choose at first instance — in other words, that the appellant does not have the ability to instruct counsel and follow legal proceedings in that language — such that they cannot avail themselves of their fundamental right (*Beaulac*, at para. 34). Second, the Crown can show that, even if the appellant had been duly informed of their right and had sufficient proficiency in the language they were unable to choose, they would in any event have chosen to be tried in the language in which their trial was conducted. Lastly, the Crown can show that the appellant had timely knowledge of their fundamental right otherwise than through notice under s. 530(3) *Cr. C.*, such that it can be concluded that the appellant chose English or French in a free and informed manner. In each case, the applicable standard of proof is that of the balance of probabilities (see *R. v. O’Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at para. 34, per Binnie J., dissenting; *Esseghaier*, at para. 54).

[91] To discharge its burden, the Crown can rely on the evidence already in the record or seek leave to adduce fresh evidence. For example, the Crown might seek leave from a court of appeal to file in evidence transcripts from other criminal cases against an English-speaking accused who was tried in English, where the transcripts indicate that the accused does not have sufficient proficiency in French (see *R. v. Deutsch* (2005), 204 C.C.C. (3d) 361 (Ont. C.A.), at paras. 45-47).

[92] In this regard, I note that the cardinal principle governing the admissibility of fresh evidence is that of the interests of justice (see s. 683(1) *Cr. C.*; *R. v. Hay*, 2013 SCC 61, [2013] 3 S.C.R. 694, at para. 63, quoting *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 28). According to *Palmer*, the discretion to admit fresh evidence is ordinarily exercised by weighing various factors, namely due diligence, relevance, credibility and the impact on the result (see p. 775; *Hay*, at para. 63; *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628, at para. 7). In the rare cases where an accused appeals their conviction and raises a breach of s. 530(3) *Cr. C.* for the first time, when no decision on the accused's language rights was made at first instance, it stands to reason that it will generally be in the interests of justice to admit any evidence that makes it possible to determine whether the accused's fundamental right was in fact violated.

[93] If the Crown fails to show that the accused does not have sufficient proficiency in the language they were unable to choose, that the accused would in any event have chosen to be tried in the language in which their trial was conducted or that

the accused chose that official language in a free and informed manner, it will be presumed that the breach of s. 530(3) *Cr. C.* resulted in a violation of the accused's fundamental right to be tried in the official language of their choice and thus caused the accused prejudice that was too significant for the conviction to be upheld. As Vauclair, Desjardins and Lachance have noted, in cases where an error results in a violation of the [TRANSLATION] "fundamental right . . . to be tried by a court that understands the language of the accused", the Crown will not be able to cure the violation "through the application of subparagraph 686(1)(b)(iv) of the Code" (No. 51.246). Indeed, in *Beaulac*, this Court established that a conviction entered following a hearing in which this fundamental right was breached can never be saved by the application of a curative proviso (see paras. 53-54). The Court of Appeal therefore erred in law in stating that the onus was on Mr. Tayo Tompouba to establish a violation of his fundamental right to be tried in the official language of his choice at the stage of the curative proviso analysis, rather than on the Crown to prove the contrary.

(3) This Framework Helps Prevent the Risk of Instrumentalization

[94] It is apparent from the Court of Appeal's reasons that it was particularly concerned about the risk of instrumentalization that might arise from a framework that reduces the onus on an appellant in the same situation as Mr. Tayo Tompouba. Similarly, the Crown opposes any framework under which it would bear the burden of showing that the accused's fundamental right was not violated in cases where the issue



of language rights was not argued at first instance. The Crown submits that, in such cases, there is little if any evidence in the record concerning the appellant's language proficiency and the reasons for the delay in their application. The Crown might therefore have difficulty persuading a court of appeal that it would be appropriate to apply the curative proviso. The Crown notes that it is possible that several pieces of evidence that may be relevant to showing that there was no violation of the accused's fundamental right to be tried in the official language of their choice will be known only to the accused and will accordingly be out of its reach, notably as a result of solicitor-client privilege. In short, the Crown argues that if it is required to make this showing for the purposes of the curative proviso analysis, accused persons who were not given notice under s. 530(3) *Cr. C.* will gain an undue tactical advantage by raising their language right for the first time on appeal.

[95] In this regard, like the Court of Appeal, I stress the importance of preventing language rights violations from being instrumentalized on appeal. As this Court stated in *Mazraani*, it is entirely improper for a party to try to take advantage of a violation of their language rights for purely tactical purposes (paras. 38-39 and 52). Such a practice is objectionable and must be sanctioned as far as possible. That being said, I am of the view that the applicable framework strikes an appropriate balance between the constitutional importance of language rights in Canada and the risk of these rights being instrumentalized on appeal.

[96] First, while a breach of s. 530(3) does not *ipso facto* entail a violation of the accused's fundamental right to be tried in the official language of their choice, the proposed framework does create a presumption in the accused's favour that this right was violated if s. 530(3) *Cr. C.* was breached. As this Court stated in *Mazraani*, a person's choice with regard to their language rights must be free and informed (paras. 42, 44 and 73). Where the judge, the ultimate guardian of language rights, fails to comply with the mechanism established by Parliament to ensure that this choice is free and informed — that is, the informational duty set out in s. 530(3) *Cr. C.* — it is entirely legitimate and fair to presume, in the absence of evidence to the contrary, that this purpose has not been achieved.

[97] Next, the framework laid down permits the Crown, at the stage of the curative proviso analysis, to rebut the presumption that the accused's fundamental right to be tried in the official language of their choice was violated as a result of the breach of s. 530(3) *Cr. C.* If the Crown does so, the appeal can then be dismissed. This significantly limits the risk of language rights being instrumentalized for tactical purposes, because the framework makes it possible for the Crown to impede accused persons seeking to use a breach of s. 530(3) *Cr. C.* for purely tactical purposes on appeal. The Crown can oppose, for example, accused persons who do not have sufficient proficiency in the official language they were unable to choose; bilingual accused persons who would in any event have chosen to be tried in the language in which their trial was conducted; and accused persons who had timely knowledge, otherwise than through notice under s. 530(3) *Cr. C.*, of their right to be tried in the

official language of their choice, such that it can be concluded that they chose the language of their trial in a free and informed manner.

[98] It is, of course, not possible to prevent *all* risks of abuse. Even given the Crown's ability to adduce fresh evidence, it is impossible to completely avoid appeals in which the Crown will have difficulty showing that the accused's fundamental right was not in fact violated by the breach of s. 530(3) *Cr. C.* In such circumstances, it is possible that accused persons may take advantage on appeal, for purely tactical purposes, of a violation of their language rights that occurred at first instance. Upon reflection, however, these risks and difficulties are tempered by three considerations.

[99] First, the difficulties encountered by the Crown arise only in cases in which the judge did not carry out their informational duty under s. 530(3) *Cr. C.* Where the judge did carry out that duty, the accused remains free to raise on appeal, for the first time, the violation of their right to be tried in the official language of their choice. The onus will then be on the accused to prove that violation so as to justify appellate intervention at the stage of the analysis under s. 686(1)(a) *Cr. C.* No presumption will apply in the accused's favour in the absence of a breach of s. 530(3) *Cr. C.*

[100] Second, this type of situation can easily be prevented, including by introducing systematic practices to ensure that the informational duty under s. 530(3) *Cr. C.* is fulfilled in every case, as some provinces have already done (see *R. v. Vaillancourt*, 2019 ABQB 859, at para. 6ee) (CanLII)). Similarly, the Crown can play an active role in preventing this type of situation by reminding the judge, at the

accused's first appearance, to perform the duty imposed by s. 530(3) *Cr. C.*, as the Nova Scotia Court of Appeal properly noted in *MacKenzie*, at para. 15(6).

[101] Finally, the burden imposed on the Crown and the challenges encountered by the Crown in discharging it are no different than those taken on by the Crown at first instance under the *Beaulac* framework. Where an accused files a late application under s. 530(4) *Cr. C.* at first instance, a presumption arises in the accused's favour that the application should be granted (*Beaulac*, at paras. 42 and 56). The Crown bears the burden of rebutting this presumption (paras. 42, 44 and 56). The Crown then faces the same problem described above, namely that several pieces of evidence that may be useful to it are out of its reach, notably as a result of solicitor-client privilege.

#### F. *Application to This Case*

[102] It is acknowledged that the judge did not ensure that Mr. Tayo Tompouba was advised of his right to be tried in French, contrary to the duty set out in s. 530(3) *Cr. C.* (A.F., at paras. 1 and 9; R.F., at para. 1; C.A. reasons, at para. 13). This constitutes an error of law under s. 686(1)(a)(ii) *Cr. C.* The outcome of the appeal therefore rests on the Crown's ability to show that the breach of s. 530(3) *Cr. C.* did not result in a violation of Mr. Tayo Tompouba's fundamental right to be tried in the official language of his choice.

#### (1) The Curative Proviso Can Apply

[103] Mr. Tayo Tompouba argues that the Crown faces an insurmountable obstacle: it expressly informed the Court of Appeal that it was not invoking the curative provisos, which means that the provisos cannot be applied without violating the rule prohibiting a court of appeal from applying them *proprio motu*. He contends that this fact alone requires the Court to allow his appeal. I disagree.

[104] As a general rule, a curative proviso is available on appeal only if raised by the Crown, since a court of appeal may not apply such a proviso of its own motion (*Pétel*, at p. 17). This is a judge-made rule whose purpose is, on the one hand, to prevent the accused from being prejudiced by being deprived of the right to make submissions on the applicability of such a proviso and, on the other, to respect the Crown's exercise of prosecutorial discretion, to which the courts typically show deference (see *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at paras. 46-47; *Samaniego*, at para. 66; *R. v. Cole*, 2021 ONCA 759, 158 O.R. (3d) 680, at paras. 154-60).

[105] As far as the application of this rule is concerned, it is now well established that the Crown can validly raise the curative proviso implicitly. This is the case, for example, where its submissions in essence amount to arguing that the identified error or irregularity did not in fact cause any prejudice to the accused, as can be seen from the following remarks made by this Court with respect to s. 686(1)(b)(iii) *Cr. C.*:

Appellate courts may apply the curative proviso if the Crown has implicitly raised it by arguing, in essence, that no substantial wrong or miscarriage of justice occurred or that the evidence of guilt is so overwhelming such that the verdict would have been the same (*R. v. Ajise*, 2018 SCC 51, [2018] 3 S.C.R. 301, at para. 1, *aff'g* 2018 ONCA 494, 361 C.C.C. (3d) 384, at

para. 32; *R. v. Cole*, 2021 ONCA 759, at paras. 155-58 (CanLII); *R. v. Hudson*, 2020 ONCA 507, 391 C.C.C. (3d) 208, at para. 49).

(*Samaniego*, at para. 66)

[106] That is precisely the situation in this case. The Crown has always argued that the appellant suffered no prejudice as a result of the breach of s. 530(3) *Cr. C.* because there is no evidence in the record from which it can be concluded that his fundamental right to be tried in the official language of his choice was violated. It follows that the question of prejudice, which is at the heart of the analysis on the applicability of the curative proviso, has always been a central question in the appeal, both in the Court of Appeal and in this Court (see *Cole*, at paras. 156-58, cited in *Samaniego*, at para. 66). Indeed, I note that the appellant made written submissions to the Court of Appeal on the inapplicability of the curative provisos in this case (A.F. in the C.A., at paras. 49 and 67, reproduced in R.R., at pp. 22 and 26).

[107] It is true that the Crown expressly stated that it was not invoking the curative provisos before the Court of Appeal (A.R., vol. III, at p. 155). However, this does not preclude their application. The Crown's statement must be placed in its context. Not invoking the curative provisos before the Court of Appeal was the logical consequence of the arguments that the Crown made on appeal. The Crown maintained that the burden was on the appellant to prove the violation of his fundamental right to be tried in the official language of his choice — and not only the breach of s. 530(3) *Cr. C.* — in order to establish the existence of an error warranting appellate intervention under s. 686(1)(a) *Cr. C.* That position has the consequence of preventing

the application of the curative provisos in s. 686(1)(b) *Cr. C.*, pursuant to *Beaulac* (para. 54).

[108] In this context, no breach of procedural fairness results from the application of the curative proviso. Mr. Tayo Tompouba's failure to adduce fresh evidence in response to the Crown's arguments about the absence of prejudice caused by the breach of s. 530(3) *Cr. C.* cannot be interpreted otherwise than as a deliberate tactical choice.

[109] In any event, the Crown now expressly asks in its written arguments that the curative proviso be applied (see, e.g., R.F., at para. 112). It follows that any prejudice suffered by Mr. Tayo Tompouba — *if* there was prejudice — is cured. Moreover, Mr. Tayo Tompouba has made written and oral submissions to this Court to the effect that the curative provisos cannot apply in light of *Beaulac* or that, even if they apply, the Crown has failed to show an absence of prejudice (A.F., at paras. 46-54 and 80-84).

(2) The Crown Has Failed to Show That Mr. Tayo Tompouba's Fundamental Right Was in Fact Respected

[110] Since I have concluded that the curative proviso can be applied, what must now be decided is whether the Crown has succeeded in showing that the breach of s. 530(3) *Cr. C.* nevertheless did not result in the violation of Mr. Tayo Tompouba's fundamental right to be tried in the official language of his choice.

[111] It is common ground that Mr. Tayo Tompouba's first language is French and that his linguistic abilities in French are therefore sufficient for him to choose to be tried in that language. To have the curative proviso applied and the appeal dismissed, the Crown accordingly cannot argue that the accused is not proficient in French. Rather, it can try to show either that Mr. Tayo Tompouba would in any event have chosen English as the official language of his trial if he had been duly informed of his right or that he had timely knowledge of his right otherwise than through notice under s. 530(3) *Cr. C.*, such that it can be concluded that he made a free and informed choice to have a trial in English.

[112] However, the evidence is, at best, inconclusive on these questions, which is to say that it does not allow a conclusion to be reached one way or the other on a balance of probabilities. The uncertainty or doubt that remains must be resolved in Mr. Tayo Tompouba's favour and must weigh against the Crown.

(a) *Inconclusiveness of the Evidence*

(i) Impact of a Breach of Section 530(3) *Cr. C.* on the Choice of Official Language

[113] It cannot be concluded on a balance of probabilities that, even if he had been duly informed of his fundamental right, Mr. Tayo Tompouba would still have chosen a trial in English. It is true that he communicated in English with various actors in the system, including a bilingual Francophone police officer and his counsel, and



that his ability to understand and express himself in English is advanced, such that he did not require interpretation services at first instance. That being said, it cannot be inferred from this that he would have chosen a trial in English if he had been duly informed of his right to have a trial in French, his first language.

[114] First of all, the fact that a bilingual person speaks in the majority language does not necessarily reflect a preference for that language. As this Court explained in *Mazraani*, “[i]ndividuals who are unaware of their language rights could think that they are required to speak in the other official language” (para. 44). It should be noted that this was Mr. Tayo Tompouba’s first time being arrested, and he stated that he did not know he was in a position to request anything from the police (see A.R., vol. II, at pp. 109 and 122). It is therefore not surprising that he spoke with the bilingual Francophone police officer in English, given the fact that the officer, by his own admission, dealt with him exclusively in English (e.g., *voir dire* reasons, at para. 12(2), reproduced in A.R., vol. I, at p. 8; see A.R., vol. II, at pp. 74 and 80). Similarly, the fact that Mr. Tayo Tompouba spoke with his counsel in English also does not support an inference that he would have chosen English if he had known that it was possible for his trial to be held in French, particularly in light of his testimony that he was not able to speak with his counsel in French (see A.R., vol. II, at p. 122).

[115] Next, the fact that Mr. Tayo Tompouba is bilingual is of only limited assistance in determining whether he would have chosen a trial in English if he had been duly informed of his right. Indeed, attaching too much weight to this factor would

be contrary to *Beaulac*, in which the Court cautioned against any analysis tending to restrict the language rights of bilingual Canadians, especially given that official language minorities in fact have the highest incidence of bilingualism (paras. 45-46; see also *Mazraani*, at para. 20).

[116] Finally, I note that the appellant stated at the *voir dire* that he would have preferred to speak with a French-speaking lawyer if given the opportunity (A.R., vol. II, at pp. 109 and 116) and that he had asked to be represented by a French-speaking lawyer but had been told by a legal aid representative that it would be difficult to find one in Kamloops (pp. 109 and 116). These statements were not contradicted by the findings of fact made by the Supreme Court of British Columbia. The trial judge simply found that, because of Mr. Tayo Tompouba's level of knowledge of English and the confidence he displayed in that language when he was arrested, there had been no special circumstances imposing an additional duty on the police to ensure that he had an opportunity to exercise his rights in French (*voir dire* reasons, at paras. 11 and 13).

[117] Accordingly, the possibility that Mr. 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.

- (ii) Timely Knowledge Otherwise Than Through Notice Under Section 530(3) Cr. C.

[118] It also cannot be concluded on a balance of probabilities that Mr. Tayo Tompouba had timely knowledge of his fundamental right otherwise than through notice under s. 530(3) *Cr. C.* and that he therefore chose English as the official language of his trial in a free and informed manner.

[119] In this regard, the Crown emphasizes the fact that, prior to his first appearance, Mr. Tayo Tompouba signed an undertaking and a promise to appear that provided notice in writing of his right to a trial in the official language of his choice. However, like the British Columbia Court of Appeal, I am of the view that it cannot be inferred from Mr. Tayo Tompouba's signature on those documents that he had timely knowledge of his fundamental right and that he therefore chose English in a free and informed manner (paras. 9-10 and 125).

[120] The circumstances in which those two documents were signed do not make it possible to conclude that Mr. Tayo Tompouba had time to read the language rights notices or that he was in a state of mind to do so. This observation is based on a number of contextual factors: the documents were signed in the presence of at least one police officer while he was under arrest and as a precondition to being released; his language rights were not explained to him at the time the documents were signed (R.R., at pp. 70-71); the undertaking contained only a small notice exclusively in English under the appellant's signature (p. 3); the promise to appear had no notice on the page signed by the appellant, as the bilingual notice in question was on the back of the document (pp. 1-2); and the appellant's signature was affixed to those two documents not to

indicate that he understood his language rights guaranteed in s. 530 *Cr. C.* but rather to indicate that he understood, first, his undertakings and the sanctions that could be imposed on him if he failed to comply with them and, second, the fact that failure to appear without lawful excuse was a criminal offence.

[121] In any case, even if it were to be found that Mr. Tayo Tompouba read the notices at the time he signed the undertaking and the promise to appear, the same circumstances make it impossible to infer that this gave him a sufficient understanding of the nature and scope of his right. As a result, this Court cannot conclude that Mr. Tayo Tompouba had knowledge of his fundamental right otherwise than through notice under s. 530(3) *Cr. C.* and that his silence at first instance essentially amounts to a free and informed choice to have a trial in English.

[122] Furthermore, the fact that Mr. Tayo Tompouba was represented by counsel also provides no basis for concluding that he had timely knowledge of his fundamental right. First of all, with regard to the specific circumstances of this case, the assurance given to the court by Mr. Tayo Tompouba's counsel that he would make sure his client was advised that his undertakings were still in effect (C.A. reasons, at para. 12) is of no assistance. As I mentioned earlier, those undertakings, like the appellant's signature on the document setting them out, are unrelated to his language rights.

[123] Next, while it is true, generally speaking, that the presumption of competence of counsel normally makes it possible to assume, in the absence of evidence to the contrary, that counsel complied with their obligations, the legislative

intent stands in the way of this presumption when it comes to the language rights provided for in s. 530 *Cr. C.* For one thing, the 2008 legislative amendments show that Parliament intended to exclude the presumption of competence of counsel. Until that time, a judge was required to inform accused persons of their language rights only if they were not represented by counsel. In 2008, Parliament extended the judge's informational duty so that it applied to all accused persons. If a breach of this duty were remedied by the mere presence of counsel, the duty would virtually cease to be compulsory. In addition, Parliament chose not to implicitly incorporate the presumption of competence of counsel into the scheme of s. 530 *Cr. C.*, unlike what it did with respect to guilty pleas. Section 606(1.2) *Cr. C.* provides that a court's failure to "fully inquire" whether certain conditions relating to a guilty plea are met "does not affect the validity of the plea". If such a failure has no effect on the validity of a guilty plea, it is not because the court's duty is unimportant, but because Parliament believed that the court could legitimately rely on the presumption of competence of counsel. Section 530 *Cr. C.* contains no provision comparable to s. 606(1.2) *Cr. C.* that would implicitly incorporate the presumption of competence of counsel. Accordingly, while the fact that an accused was not represented by counsel can ground an inference that the accused was not informed of their language rights under s. 530 *Cr. C.*, the reverse is not true (see *Mazraani*, at paras. 32 and 52). The legislative intent therefore precludes the court from drawing an inference from the fact that the accused was represented by counsel.

[124] In summary, the evidence in the record does not make it possible to conclude on a balance of probabilities that the breach of s. 530(3) *Cr. C.* did not result in a violation of Mr. Tayo Tompouba's fundamental right to be tried in the official language of his choice. Moreover, the accused's silence on its own cannot support a contrary conclusion here. Although I seriously doubt that this is the case, the evidence in the record also cannot serve to *completely* rule out the possibility that Mr. Tayo Tompouba is now using the breach of s. 530(3) *Cr. C.* for tactical purposes on appeal. It is simply not possible to reach a conclusion one way or the other on this question on a balance of probabilities. It is therefore necessary to determine in whose favour the remaining uncertainty and doubt must be resolved.

(b) *The Inconclusiveness of the Evidence Must Benefit Mr. Tayo Tompouba*

[125] In my opinion, the finding that the evidence is inconclusive must weigh against the Crown, because it is the Crown that bears the burden of satisfying the Court on a balance of probabilities that the breach of s. 530(3) *Cr. C.* did not, however, result in a violation of Mr. Tayo Tompouba's fundamental right (see *O'Brien*, at para. 34; *Esseghaier*, at para. 54; S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶5.66).

[126] The fact that the uncertainty and doubt must be resolved in Mr. Tayo Tompouba's favour and must weigh against the Crown is based on the general principles of the law of evidence in cases where the "standard of persuasion" to be met by the party bearing the persuasive burden "is only the civil standard of the balance of

probabilities” (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277; see also *R. v. Schwartz*, [1988] 2 S.C.R. 443, at pp. 466-67; on the two possible standards of proof, see D. Watt, *Watt’s Manual of Criminal Evidence* (2023), at p. 214; Lederman, Fuerst and Stewart, at ¶¶3.16 and 5.64). As P. Roberts states in his book *Roberts & Zuckerman’s Criminal Evidence* (3rd ed. 2022):

The fact-finder in an adversarial trial is typically invited to select between the competing contentions or narratives advanced by the parties . . . . However, it is conceivable that the fact-finder might regard neither contention as more likely than not; perhaps neither party’s case is at all plausible. When this “none of the above” conclusion occasionally arises in practice the party bearing the [persuasive] burden inevitably loses his case. [p. 246, fn. 28]

[127] The fact that the remaining uncertainty and doubt must weigh against the party bearing the persuasive burden when the evidence is inconclusive on a question to be decided on the balance of probabilities standard is also clear from the treatise on evidence of Lederman, Fuerst and Stewart:

. . . the persuasive burden does not play a part in the decision-making process if the trier of fact can come to a determinate conclusion on the evidence. If, however, the evidence leaves the trier of fact in a state of uncertainty, the persuasive burden is applied to determine the outcome. [¶3.16; footnote omitted.]

(See also R. P. Mosteller, *McCormick on Evidence* (8th ed. 2020), at § 336.)

(3) Conclusion

[128] I am of the view that a breach of s. 530(3) *Cr. C.* is an error of law under s. 686(1)(a)(ii) *Cr. C.* Mr. Tayo Tompouba has therefore succeeded in establishing a ground for appellate intervention under s. 686(1)(a) *Cr. C.* In keeping with the logic and structure of s. 686 *Cr. C.*, this breach is presumed to have resulted in a violation of his fundamental right to be tried in the official language of his choice. The burden was on the Crown to rebut this presumption by showing that the breach of s. 530(3) *Cr. C.* did not in fact cause such prejudice to Mr. Tayo Tompouba. However, the Crown has failed in this regard: the evidence on the question is, at best, inconclusive. In light of the uncertainty and doubt that remain, this Court has no choice but to conclude that the breach of s. 530(3) *Cr. C.* is an error of law that caused significant prejudice to Mr. Tayo Tompouba. Given this conclusion, it is unnecessary to decide the alternative ground of appeal based on a breach of s. 530(4) *Cr. C.*

## V. Disposition

[129] For all these reasons, the appeal is allowed, the conviction is quashed and it is ordered that a new trial be held in French.

The following are the reasons delivered by

KARAKATSANIS AND MARTIN JJ. —

### I. Overview



[130] Language rights are of central importance to Canadian society and have a special place in criminal proceedings. Together, the various parts of s. 530 of the *Criminal Code*, R.S.C. 1985, c. C-46, secure a substantive right to a trial in the official language of the accused's choice — one that, if requested before trial, is absolute (s. 530(1)). Section 530(3) obliges judges, provincial court judges, judges of the Nunavut Court of Justice or justices of the peace (“judicial officials”) to ensure that accused persons are advised of their right to a trial in French or English when they first appear in court. This informational duty is designed to give the accused timely and necessary information to facilitate the choice of a trial in either official language. No such notice was provided to the appellant, and the main issue before us is what legal consequences flow from non-compliance with s. 530(3) when that breach is asserted for the first time on appeal.

[131] We agree that every accused person should be given the full opportunity to exercise their substantive right to a trial in the official language of their choice. We also agree with the Chief Justice's review of the fundamental importance of language rights, that they engender positive obligations, that avoiding a breach of s. 530(3) is not difficult, and that courts should implement practices that ensure accused persons are properly informed of their language rights. We differ though in how we classify the irregularity that occurs when s. 530(3) is not followed.

[132] On this question, the timing of the appellant's argument has crucial implications for the framework for analysis and the remedies available. The accused

was convicted after a trial in English and first raised the breach of s. 530(3) on appeal. If alleged earlier in the proceedings, other approaches may have been possible. At this late juncture, however, the powers of a court of appeal are constrained by the three avenues of review outlined in s. 686 of the *Criminal Code*. There is no claim of unreasonable verdict here. Two different grounds of appeal are at issue. Section 686(1)(a)(ii) provides that “the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law”, and s. 686(1)(a)(iii) offers a residual category within the grounds set out in s. 686(1)(a) for allowing an appeal based on any other “miscarriage of justice”. These two categories have their own requirements and burdens of proof. Thus, characterizing the failure to provide the s. 530(3) notice as either a “wrong decision on a question of law” or a “miscarriage of justice” on appeal provides different routes to different results.

[133] The appellant seeks a new trial simply because a judicial official did not tell him about his right to a trial in the language of his choice. He offered no evidence, either in the court below or in this Court, to show that he was not otherwise aware of his right to a trial in French, and indeed other evidence strongly supports the inference that he had actual notice of this right from other sources. The Chief Justice finds that the mere failure to comply with s. 530(3) is a wrong decision on a question of law under s. 686(1)(a)(ii). He concludes that once the appellant shows that the judicial official did not give the required notice, nothing further is required for a new trial, unless the Crown can invoke the curative proviso and show that the appellant suffered no prejudice resulting from the absence of the notice.

[134] We take a different view. A breach of the procedural requirement under s. 530(3) 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). This Court’s jurisprudence supports the view that “a wrong decision on a question of law” occurs only when there is an error on a question of law contained in a decision that is attributable to the trial judge. Such an incorrect legal decision presumptively causes a miscarriage of justice because it would ordinarily affect the “judgment of the trial court”. While most errors on appeal fall into this category, it does not apply to a breach of s. 530(3) when the claimed irregularity is that a judicial official has failed to provide the required statutory notice to the accused at their first appearance. Rather, that failure is an error that precedes the trial, does not logically undermine the correctness of the judgment itself, and falls outside s. 686(1)(a)(ii).

[135] For the reasons that follow, we conclude that the failure to give notice under s. 530(3) falls within the residual category under s. 686(1)(a)(iii), meaning the appellant must establish a miscarriage of justice before a remedy can be granted. Like the British Columbia Court of Appeal, we conclude that in order to establish a miscarriage of justice the appellant 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, that he was unaware of his right to be tried in the official language of his choice. In order to make out a breach of their substantive language rights on appeal, an appellant must provide evidence, which may be by way of an affidavit, stating that they were unaware of the

right to choose to be tried in the other official language and that the option of a trial in that language was a viable choice.

[136] Appellants who raise a breach of s. 530(3) for the first time on appeal must demonstrate that the breach in fact deprived them of the knowledge necessary to exercise their right to a trial in the language of their choice. If they cannot — or will not — do so, they will have failed to demonstrate that a miscarriage of justice occurred. In our view, it would undermine public confidence in the administration of justice if an appellant who knew of their language rights, but waited until after they were convicted to raise non-compliance with the s. 530(3) notice, nevertheless received a new trial on this basis.

[137] Accordingly, we would dismiss the appeal.

## II. Analysis

[138] We first describe the language rights regime in s. 530 and the appellate powers in s. 686 of the *Criminal Code*, before turning to the key issues: (1) whether a failure to comply with s. 530(3) breaches a substantive or procedural right; (2) whether that breach is a “wrong decision on a question of law” or a “miscarriage of justice”; and (3) the burden on the appellant when raising a s. 530(3) violation for the first time on appeal. Finally, we address the appellant’s alternative argument based on an alleged breach of s. 530(4).

A. *Section 530 of the Criminal Code*

[139] Language plays an “essential role . . . in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us” (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 744). As both a tool for communication and as a marker of our cultural identity, language lets us form, embrace, and inhabit communities, and describe, delineate, and fulfill the rights and duties we hold toward one another in society (see L. Green, “Are Language Rights Fundamental?” (1987), 25 *Osgoode Hall L.J.* 639, at p. 659).

[140] The relationship between the two official languages of Canada, French and English, is of central and particular significance to Canadian history, culture, and law. This Court has recognized that language rights “are not negative rights, or passive rights; they can only be enjoyed if the means are provided” (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20). Where the state proceeds against an individual with charges of a criminal offence, Part XVII of the *Criminal Code* provides such means. It offers a comprehensive system whereby an accused may apply for and receive a trial in which all facets of the proceedings are conducted in the official language of their choice.

[141] Section 530 is the aspect of this system at issue in this appeal. At the time of the appellant’s first appearance, the relevant parts of this provision read:

**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 . . .

(b) the time of the accused's election . . . or

(c) the time when the accused is ordered to stand trial . . .

a justice of the peace, . . . or judge . . . 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.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

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

[142] Subsection (1) grants an accused the substantive right to a trial in their official language of choice. Provided the application is made within the stipulated timeframe, this right is absolute: the judicial official *must* grant the order (*Beaulac*, at paras. 31 and 37). This subsection places a positive obligation on the state to be institutionally bilingual in all criminal matters, and to facilitate the exercise of the accused's substantive right to be tried in either French or English by a judge, jury, and prosecutor who speak that language (paras. 20, 34 and 56; see also M. Vauclair, T.

Desjardins and P. Lachance, *Traité général de preuve et de procédure pénales 2023* (30th ed. 2023), at No. 9.73).

[143] Even when an application is not made in a timely manner, s. 530(4) allows a judicial official the discretion to remand the accused to be tried in the official language of their choice if they are “satisfied that it is in the best interests of justice” to do so. Crucially for our purposes, in *Beaulac*, this Court directed that, when considering whether it would be in the best interests of justice to make this order, the reasons for the delay are a relevant factor: i.e. when the accused learned of their language rights, whether they waived the right and later changed their mind, and why they may have changed their mind. Other relevant factors that relate to the conduct of the trial include whether the accused were represented by counsel who could have advised them of their language rights, and whether a trial that may have begun would need to start afresh (paras. 37-38). The fairness of the trial is not a factor (para. 41).

[144] For its part, subsection (3) exists to make sure an accused is aware of their language rights and can bring their application for a trial in their official language of choice in a timely manner (see *Vauclair*, Desjardins and Lachance, at No. 9.73). This provision does not require the accused to present themselves as a speaker of a different official language or to take any initiative to insist that their language rights be respected, instead placing the duty upon the judicial official to make sure they are advised of their rights (see *R. v. MacKenzie*, 2004 NSCA 10, 181 C.C.C. (3d) 485, at para. 12; *R. v.*

*Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646, at para. 62; *Dhingra v. R.*, 2021 QCCA 1681, 408 C.C.C. (3d) 466, at para. 49).

[145] Section 530 thus functions as an integrated system, with the ultimate object being to facilitate the accused's substantive right to a trial in their official language (see *Beaulac*, at para. 31; see also *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, [2019] 2 S.C.R. 535, at para. 38). Yet, as we explain, each aspect of this system performs a distinct function — and a failure to abide by each has distinct consequences on appeal.

#### B. *Section 686 of the Criminal Code*

[146] The powers available on an appeal from conviction are purely statutory. A court of appeal may only allow an appeal based on irregularities that fit within the grounds set out exhaustively in s. 686 of the *Criminal Code*, no matter how injurious they may have been (*R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 29; see also *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 8).

[147] The relevant portions of s. 686 state:

**686 (1)** On the hearing of an appeal against a conviction . . . , the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,



(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . . .

[148] The proper classification of an irregularity that occurred during a criminal proceeding thus governs what the appellant must prove, what the court of appeal can do once it has been proven, and whether the court could dismiss the appeal despite it being proven. That said, it can sometimes be difficult to determine whether an error should fall into one category or another (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 63, per LeBel J., concurring; see also paras. 6-7, per Arbour J.; *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at paras. 38-39; S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 574). It may arise that an error in the proceedings leads to neither an unreasonable verdict, nor a wrong decision on a question of law, nor a miscarriage of justice — in which case it would remain an error, “but one without legal effect” (*Jaw*, at para. 29).

[149] In most cases, there is no need to debate the characterization of an error because the jurisprudence has settled the question. Legal scholars often simply define the categories by reference to examples of errors that have been identified as falling under s. 686(1)(a)(ii) or (iii) (see, e.g., Coughlan, at pp. 574-77; S. Penney, V.

Rondinelli and J. Stribopoulos, *Criminal Procedure in Canada* (3rd ed. 2022), at ¶18.10; J. Sopinka, M. A. Gelowitz and W. D. Rankin, *Sopinka, Gelowitz and Rankin on the Conduct of an Appeal* (5th ed. 2022), at pp. 289-96). But where the question is not settled, as in this case, we must turn to first principles.

[150] The language and structure of s. 686(1) indicate that appeals against conviction are fundamentally concerned with preventing miscarriages of justice. This is the “common purpose” animating the three grounds on which a court may allow the appeal and quash the conviction (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at para. 76, per Charron J., concurring, citing *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 219; see also Coughlan, at pp. 567 and 574; Sopinka, Gelowitz and Rankin, at p. 289; T. Desjardins, *L’appel en droit criminel et pénal* (2nd ed. 2012), at No. 419). Simply put, “[a] conviction which is the product of a miscarriage of justice cannot stand” (*Sinclair* (2011), at para. 76, quoting *Morrissey*, at p. 219). A “miscarriage of justice” under s. 686(1)(a)(iii) necessarily falls into this category, as does an unreasonable verdict under s. 686(1)(a)(i). A “wrong decision on a question of law” presumptively falls into this category — unless the Crown can prove otherwise through the application of the curative proviso in s. 686(1)(b)(iii) (*Morrissey*, at p. 219; Coughlan, at p. 574).

[151] When read as a whole, s. 686(1) makes it clear that the specific ground under which a conviction can be set aside dictates the applicable burden of proof and what the appellant or Crown is required to establish. When a particular error is

characterized under s. 686(1)(a)(i) or (iii), the appellant bears the burden of establishing that it resulted in an unreasonable verdict or a “miscarriage of justice” and, once proven, the Crown is not able to rebut this and the court of appeal must quash the conviction and either order a new trial or enter an acquittal. However, where the error is characterized as a “wrong decision on a question of law” under s. 686(1)(a)(ii), this raises a presumption that this caused a miscarriage of justice which the Crown can only rebut by satisfying its burden under s. 686(1)(b)(iii) to show that “no substantial wrong or miscarriage of justice has occurred”, because the error was trivial or the evidence was so overwhelming that a conviction was inevitable (*Khan*, at paras. 28-31; *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25; *R. v. Abdullahi*, 2023 SCC 19, at para. 33).

[152] Apart from appeals based on an allegation of an unreasonable verdict, “most matters that are brought as grounds of appeal against conviction in criminal cases are characterized as errors of law within the meaning of s. 686(1)(a)(ii)” (*Khan*, at para. 25). Once again, this is clear from s. 686(1) itself: since all wrong decisions on a question of law presumptively cause a miscarriage of justice, the distinct classification of a “miscarriage of justice” in s. 686(1)(a)(iii) must function as a residual category to catch errors not caught by the previous two subparagraphs (*Khan*, at paras. 17-18, per Arbour J., and at para. 61, per LeBel J.; *Arradi*, at para. 38; *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at pp. 238-40; *Coughlan*, at pp. 574-77; *Desjardins*, at No. 419). In both cases the appellant bears the burden of proving the error; but if an error is not a “wrong decision on a question of law”, which presumptively causes a miscarriage of justice

unless the Crown can prove otherwise, then the error must fall into the residual “miscarriage of justice” clause and the appellant bears the burden of proving that the error caused their trial to be unfair or to have the appearance of unfairness such that it would undermine public confidence in the administration of justice (*R. v. Kahsai*, 2023 SCC 20, at paras. 5 and 67-68; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at paras. 50-51; see also Coughlan, at p. 574).

[153] We turn first to s. 686(1)(a)(ii), which is the most common ground of appeal. Based on the explicit wording of s. 686(1), and this Court’s jurisprudence, in our view, a “wrong decision on a question of law” relating to “the judgment of the trial court” occurs when there is an error: (1) on a question of law; (2) in a decision; (3) that is attributable to the trial court. Errors that share these three criteria ordinarily render the verdict of the trial court unsafe and presumptively cause a miscarriage of justice such that the judgment should be set aside (*Khan*, at paras. 22, 27 and 88; Penney, Rondinelli and Stribopoulos, at ¶18.9; Coughlan, at p. 574). These components are reflected in the jurisprudence and the text of s. 686(1)(a)(ii): “the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law . . . .”

[154] First, there must be a “question of law”. As noted in *Khan* (at para. 17) and *Fanjoy* (at pp. 238-40), if the irregularity alleged is one of fact or of mixed fact and law, it cannot fall within s. 686(1)(a)(ii) (see also *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 47; Coughlan, at p. 577; Penney, Rondinelli and Stribopoulos, at ¶18.14; Desjardins, at Nos. 396 and 419). Although the difference between a *pure*

question of law and a question of mixed law and fact is admittedly “far from self-evident” (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 19; see also *R. v. Yeves*, [1987] 2 S.C.R. 168, at p. 181; Sopinka, Gelowitz and Rankin, at pp. 227-28), it is a question of mixed fact and law if the appellate court must make new findings of fact based on fresh evidence to determine whether a legal error occurred. Three examples are reflected in the case law: the assessment of whether a guilty plea was voluntary, unequivocal, and informed (see, e.g., *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *Adgey v. The Queen*, [1975] 2 S.C.R. 426; *R. v. Bamsey*, [1960] S.C.R. 294); the determination of whether the accused’s defence counsel at trial offered ineffective assistance (see, e.g., *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520); and when raised for the first time on appeal, whether an accused’s election as to the mode of trial was uninformed (see, e.g., *R. v. White*, 2022 SCC 7). If the facts needed to decide the appeal are not within the record, and the court of appeal cannot simply determine if an error of law occurred from the facts as found by the trial judge but must act as a court of first instance for the issue, then the question before the appellate court is a question of mixed fact and law and cannot fall under s. 686(1)(a)(ii).

[155] Second, there must be a wrong “decision”. As noted in *Khan*, the error being alleged on appeal must arise from a decision of the trial judge which, in the context of the trial and the circumstances in which the decision was made, represented “an erroneous interpretation or application of the law” (para. 22; see also paras. 7 and 17; Coughlan, at pp. 575-76; Penney, Rondinelli and Stribopoulos, at ¶18.9). While this component is very broad and can include “any decision” at trial (*Khan*, at para.

22), there must be *some* decision; where there is *no* decision, “it could be said that no error of law is alleged” (para. 17). In such cases the trial record would contain no application of a legal standard to findings of fact. Therefore, rather than having a decision to review for error, the appellate court must assess whether there was a miscarriage of justice — in other words, whether the accused’s trial was unfair or had the appearance of unfairness — in light of the *absence* of any decision on the matter.

[156] For example, where a jury is improperly provided with unedited transcripts of the trial, the trial judge’s decision regarding whether to order a mistrial would be a “decision” capable of falling under s. 686(1)(a)(ii); but where the irregularity was not brought to the trial judge’s attention and therefore they made no decision about it, the court of appeal must consider the facts of the trial in light of the relevant legal principles and decide for itself whether the accused’s trial was unfair such that a miscarriage of justice occurred (*Khan*, at paras. 7 and 17). In the same way, where the accused asserts for the first time on appeal that their guilty plea was invalid or their counsel was ineffective, the court of appeal cannot assess whether the trial judge’s decision was based on the correct legal principles when no decision was made, but must instead make the decision itself (see, e.g., *Wong*; *G.D.B.*). The absence of any decision at trial on the particular irregularity being alleged on appeal means that it cannot be assessed as a wrong “decision” under s. 686(1)(a)(ii). Rather, it would fall to the appellant to show a miscarriage of justice under the residual ground of appeal in s. 686(1)(a)(iii).

[157] Third, this wrong legal decision must be attributable to the trial judge — as it is the “judgment of the trial court” that must be set aside. Where the trial judge had the opportunity to avoid or remedy the error through the correct application of the relevant legal principles, but failed to do so through their own erroneous understanding or interpretation of the law, this error may fall under s. 686(1)(a)(ii) (see *Khan*, at paras. 7 and 22; *Coughlan*, at pp. 574-76; *Penney, Rondinelli and Stribopoulos*, at ¶18.9; *Desjardins*, at No. 405). When this occurs, there is a logical connection between the trial judge’s “wrong decision on a question of law” and the “judgment of the trial court” such that it “should be set aside” because the error would ordinarily render the verdict unsafe. The erroneous legal decision in such circumstances has “obviously . . . contributed to the ultimate verdict” so as to give rise to this presumption (*Khan*, at para. 22; see also *Morrissey*, at p. 219; *Coughlan*, at pp. 574-76). The burden would then shift to the Crown to prove that, on the particular facts of the case, the error did not result in a miscarriage of justice by showing that the error did not affect the ultimate verdict or that, notwithstanding the error, the conviction was inevitable because the evidence was overwhelming (see *Khan*, at paras. 28-31; *Sarrazin*, at para. 25; *Abdullahi*, at para. 33).

[158] For example, in *Khan*, the trial judge had the chance to order a mistrial after the issue of the unedited transcripts was brought to her attention, so any errors in her decision on this matter could be attributable to her even though the irregularity originated outside the trial (para. 17). Similarly, in *R. v. Litchfield*, [1993] 4 S.C.R. 333, an erroneous pre-trial division and severance order had been made before the trial by a

preliminary hearing judge, but because the trial judge was aware of this error and had the opportunity to fix it, the wrong legal decision *not* to strike the order could be attributed to the trial judge and thus fall under s. 686(1)(a)(ii) (pp. 349-50). It would be the same where a trial judge had the chance to remedy an erroneous pre-trial evidentiary ruling, but made the wrong legal decision to proceed as if they were bound by the order (see *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 83).

[159] Conversely, where irregularities have occurred outside the trial judge's knowledge, with no opportunity to remedy them, any ensuing prejudice must instead be assessed under s. 686(1)(a)(iii) (see, e.g., *Khan*, at para. 17; *Davey*, at paras. 5-6; *R. v. Yumnu*, 2012 SCC 73, [2012] 3 S.C.R. 777, at paras. 5 and 14-15). Where the wrong legal decision cannot be attributed to the trial judge, there is no logical connection between this decision and the "judgment of the trial court", and no presumption that a miscarriage of justice has occurred. In such a case, the appellant must present evidence as to the effect of the error on the fairness of the trial.

[160] Previous errors that this Court has characterized as being "wrong decision[s] on a question of law" demonstrate how these three components must be satisfied for an appeal to fall under s. 686(1)(a)(ii). These include breaches of the accused's constitutional rights, such as where the trial judge fails to allow the accused their right to an interpreter (*R. v. Tran*, [1994] 2 S.C.R. 951); cases where the trial judge has erroneously included or excluded evidence, or otherwise limited its effect based on a wrong legal principle (see, e.g., *Wildman v. The Queen*, [1984] 2 S.C.R. 311; *R. v.*



*Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751; *R. v. Cyr-Langlois*, 2018 SCC 54, [2018] 3 S.C.R. 456; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. O’Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485); errors in jury instructions (see, e.g., *Abdullahi*; *R. v. Khill*, 2021 SCC 37; *R. v. McKenna*, 2015 SCC 63, [2015] 3 S.C.R. 1087; *R. v. Rodgeron*, 2015 SCC 38, [2015] 2 S.C.R. 760; *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3; *R. v. Dorfer*, 2011 SCC 50, [2011] 3 S.C.R. 366; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144; *R. v. Ménard*, [1998] 2 S.C.R. 109; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362; *R. v. Hebert*, [1996] 2 S.C.R. 272; *R. v. Brydon*, [1995] 4 S.C.R. 253; *R. v. Bevan*, [1993] 2 S.C.R. 599; *R. v. Romeo*, [1991] 1 S.C.R. 86; *R. v. Morin*, [1988] 2 S.C.R. 345); and errors made by the trial judge in incorrectly instructing themselves about an element of the offence or defence at issue (*R. v. Zora*, 2020 SCC 14, [2020] 2 S.C.R. 3; *R. v. MacGillivray*, [1995] 1 S.C.R. 890).

[161] In each of these cases, there is a direct logical connection between the “wrong decision” by the trial judge “on a question of law”, and the “judgment of the trial court”. Such errors of law cast doubt on the fairness of the trial, the integrity of the administration of justice, or both — raising a presumption that a miscarriage of justice resulted unless the Crown can prove otherwise. Where an error does not amount to a “wrong decision on a question of law” by the trial judge, there is no presumption that a miscarriage of justice arose, unless additional evidence is offered by the appellant to show that this was the effect of the error. If the court of appeal is to have any power to intervene, the error must fall within the residual category of s. 686(1)(a)(iii) as a

“miscarriage of justice”, where the burden of proof is on the appellant not only to prove the error but to show that it caused a miscarriage of justice.

[162] It is clear from the wording of s. 686(1)(a)(iii) that it is a residual category, meant to include “any ground” that results in a miscarriage of justice. Generally, courts have grouped miscarriages of justice under two categories: the irregularity either renders the trial unfair, or creates the appearance of unfairness such that the integrity of the administration of justice is at risk (*Davey*, at para. 51, quoting *R. v. Wolkins*, 2005 NSCA 2, 229 N.S.R. (2d) 222, at para. 89; *Kahsai*, at paras. 67-69; *Khan*, at para. 69; *Fanjoy*, at p. 240; Sopinka, Gelowitz and Rankin, at p. 293; S. Coughlan and A. Gorlewski, *The Anatomy of Criminal Procedure: A Visual Guide to the Law* (2019), at p. 331; Penney, Rondinelli and Stribopoulos, at ¶18.14).

[163] Though not an exhaustive list, this Court has recognized a number of miscarriages of justice falling under s. 686(1)(a)(iii). These include matters such as misapprehensions of evidence (see, e.g., *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 1; *R. v. Smith*, 2021 SCC 16, [2021] 1 S.C.R. 530, at para. 2; see also Coughlan, at pp. 576-77), and reasonable apprehension of bias (see, e.g., *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; see also Sopinka, Gelowitz and Rankin, at p. 295). However, a miscarriage of justice can also include matters entirely outside of the trial judge’s awareness, including irregularities involving the jury where the trial judge made no decision on the matter (*Khan*, at para. 7; *Davey*; *Yumnu*), and allegations of ineffective assistance of counsel (see, e.g., *G.D.B.*). Where

a self-represented accused alleges that they received inadequate assistance from the trial judge, the appellant must show that the lack of assistance caused their trial to be unfair or to have the appearance of unfairness (see, e.g., *Kahsai*; see also *R. v. D.R.S.*, 2018 ABCA 342, 368 C.C.C. (3d) 383).

[164] Significantly, errors that deprive the accused of a chance to make a meaningful choice in the exercise of their rights, thus creating the appearance of unfairness or harming the public's perception of the administration of justice, have been found to fall within s. 686(1)(a)(iii) (see Sopinka, Gelowitz and Rankin, at pp. 295-96). As discussed above, these issues can involve questions of mixed fact and law. Where the trial judge fails in their mandatory obligation to ensure that an accused's guilty plea is informed, pursuant to s. 606(1.1), it may be a miscarriage of justice under s. 686(1)(a)(iii) if the appellant presents evidence of subjective prejudice (see, e.g., *Wong*, at para. 6; *R. v. Miller*, 2011 NBCA 52, 374 N.B.R. (2d) 302, at paras. 6-7; *R. v. Sunshine*, 2016 SKCA 104, 484 Sask. R. 259, at para. 15). Whether an accused is deprived of the chance to make a meaningful election as to their mode of trial is also a question of mixed fact and law, and thus must be resolved under s. 686(1)(a)(iii) as opposed to s. 686(1)(a)(ii) (*White*, at paras. 2 and 4-5). Where an accused had the right to peremptory challenges in jury selection, but was deprived of the chance to meaningfully exercise that right due to irregularities with the jury panel outside the trial judge's knowledge, this error cannot be attributed to the trial judge (see *Davey*, at para. 64; *Yumnu*, at para. 17). Crucially, since such errors do not presumptively render the

verdict of the trial court unsafe, the burden is on the *appellant* in each case to show that a miscarriage of justice occurred.

[165] We stress, again, that s. 686(1)(a)(iii) is a residual category by design. Despite involving a substantial range of legal situations and subject matter, *all* of the cases discussed above were resolved under s. 686(1)(a)(iii) because they do not fit within the far narrower parameters of s. 686(1)(a)(ii), which requires a “wrong decision on a question of law” made by the trial judge. In turn, if the appellant is unable to show that an alleged error fits under subparas. (i), (ii) or (iii), this may indeed be an error, but it is one without legal effect — a court of appeal cannot remedy an error that had no consequence.

[166] With these principles in mind, we turn now to the specific error alleged in this case: non-compliance with s. 530(3) of the *Criminal Code*.

### C. *Characterizing the Right in Section 530(3)*

[167] The distinction between irregularities that are characterized as “wrong decision[s] on a question of law” and those that fall within the residual category of “miscarriage[s] of justice” is fundamental (*Arradi*, at para. 38). It is equally important to properly characterize the right (and the legal provision) that was allegedly breached. Not all legal protections are treated the same, and the breach of one may be far more likely to cause a miscarriage of justice than another, thus triggering the presumption at the heart of “a wrong decision on a question of law”.

[168] As we noted above, s. 530(1) provides an absolute statutory right to a trial in one's official language if requested within the appropriate timeframe (*Beaulac*, at para. 31; *Bessette*, at para. 38). This Court has held that a right to a trial in the accused's official language is "a substantive right and not a procedural one that can be interfered with" (*Beaulac*, at para. 28; see also *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, [2018] 3 S.C.R. 261, at para. 20).

[169] By contrast, s. 530(3) does not itself provide the accused with a right to a trial in their official language of choice. Section 530 functions as an integrated system that, *as a whole*, facilitates the exercise of that right: ss. 530(1) and 530(4) secure the right in either absolute or discretionary terms, depending on the timing of the application, while s. 530(3) ensures the accused *has the knowledge* they require to make such an application if they wish. On its own, however, s. 530(3) provides the accused with nothing more than knowledge of the right to choose — knowledge that the accused may obtain from sources other than the judicial official at their first appearance. In other words, while a trial in the accused's official language of choice is "the en[d] which the administration of justice seeks to attain", notice as to the availability of such a trial is simply "the vehicle providing the means and instruments" by which that end is attained (*R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at para. 94, quoting *Sutt v. Sutt*, [1969] 1 O.R. 169 (C.A.), at p. 175; see also *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, at p. 265).

[170] This distinction between the substantive right to a trial in one's official language and the procedural right to be informed of that option is important when properly characterizing the error that arises when a judicial official fails to fulfill their obligation under s. 530(3). A trial judge who improperly refuses an application under s. 530(1), or improperly denies a late application under s. 530(4), makes a wrong decision on a question of law that breaches the accused's substantive right to be tried in the official language of their choice, harming the administration of justice — and presumptively resulting in a miscarriage of justice (*Beaulac*, at para. 54). Such errors would properly fall within s. 686(1)(a)(ii) on appeal (para. 53). On the other hand, where a judicial official fails to ensure that the accused is *informed* of their right to a trial in their official language of choice, it does not necessarily follow that the accused was deprived of their substantive right to choose. The accused may already know of this right in advance, or may learn of it through other means after the first appearance but within the timeframe to make an application, and the breach of s. 530(3) may have no effect *at all* on the accused's substantive right.

[171] Moreover, since the breach of this procedural right does not necessarily result in a breach of the substantive right, without additional evidence from the accused on this point, it does not give rise to a presumption that this error has led to a miscarriage of justice. We agree that s. 530(3) is an important tool for the fulfillment of an accused's language rights (see Chief Justice's reasons, at para. 45). However, the importance of the informational obligation at the accused's first appearance cannot, in itself, transform the notice obligation in s. 530(3) into a substantive right. As we discuss

below, nor does it necessarily transform the failure of the judicial official at the first appearance to abide by that obligation into a “wrong decision on a question of law”.

D. *Characterizing Non-Compliance With Section 530(3)*

[172] We do not accept that a failure to comply with s. 530(3) qualifies as a trial judge’s “wrong decision on a question of law” within s. 686(1)(a)(ii) or that it necessarily causes a breach of the accused’s substantive right to a trial in their official language of choice. A breach of s. 530(3) does not give rise to a question of law alone, nor does it concern a decision by a trial judge. Accordingly, unlike other errors of law recognized under s. 686(1)(a)(ii), a breach of s. 530(3) fails to give rise to a *presumption* that the error has caused a miscarriage of justice. In our view, non-compliance with s. 530(3) is properly considered under the residual category in s. 686(1)(a)(iii) — in which case the appellant bears the burden of *showing* that the error actually caused a miscarriage of justice.

[173] First, a failure to comply with s. 530(3) does not give rise to a question of law alone. Additional evidence may be necessary in order to understand whether an error occurred, which typically converts such errors into questions of mixed fact and law (*Khan*, at para. 25; *Fanjoy*, at pp. 238-40; Sopinka, Gelowitz and Rankin, at p. 302; Desjardins, at No. 439). Section 530(3) requires a judicial official to “ensure” that the accused is advised of their right to a trial in the official language of choice — but such assurance could come in many forms, including a standard advertisement which the judicial official ensures that the court clerk reads at the start of all proceedings,

documents distributed to accused persons in both official languages at the judicial official's direction, and other methods at the court's discretion sufficient to advise all accused persons based on the needs of the community it serves. A finding of non-compliance with s. 530(3) on appeal, in turn, would ordinarily require fresh evidence and findings to determine not only whether the judicial official personally informed the accused of their language rights on the record, but also whether they did enough to ensure that the accused had been informed in some other way.

[174] Second, a breach of s. 530(3) is not a wrong decision by a trial judge. Non-compliance with s. 530(3) is not attributable to the trial judge. It arises outside the trial process without the trial judge making any ruling on this point. While the question of when a trial officially begins is a vexed one which does not need to be answered on this appeal (see, e.g., *Litchfield*), the judicial official's failure to advise the accused of their language rights *at their first appearance* clearly occurs outside the trial. Importantly, the text of s. 530(3) also clearly indicates that the failure to abide by the obligation can be committed by a "justice of the peace" — who, in criminal cases, *cannot* be the trial judge. If this error had been brought to the trial judge's attention, who then failed to correct it through the discretionary order available to them within s. 530(4), then this may amount to a "wrong decision" (see *Beaulac*, at paras. 9-11). Other pre-trial errors which the trial judge knowingly fails to correct have been found to be "wrong decision[s] on a question of law" by this same reasoning (see, e.g., *Litchfield*, at pp. 349-50; *R.V.*, at para. 83). However, on its own, and including in this case, non-compliance with s. 530(3) is clearly not an error made by the trial judge: ". . . when the



issue had not been raised at trial and therefore the trial judge had made no ruling on it, it could be said that no error of law is alleged . . .” (*Khan*, at para. 17; see also para. 7).

[175] Non-compliance with s. 530(3) therefore fails to meet the criteria that typically characterize errors of law under s. 686(1)(a)(ii). We would add that in other cases where the *Criminal Code* imposes a mandatory obligation on a judicial official to ensure that the accused can make a meaningful choice as to the exercise of their substantive rights, the judicial official’s failure to do so is only of consequence on appeal if the accused can prove it had some *effect* — namely, that they did not know about the proper exercise of their substantive right and were prejudiced as a result (*Wong*, at paras. 33-35; *White*, at paras. 8-9). The appellate court cannot simply presume that the breach of the obligation necessarily led to a breach of the substantive right.

[176] For these reasons, a breach of the informational obligation within s. 530(3) cannot be “a wrong decision on a question of law” within s. 686(1)(a)(ii). If the court of appeal is to have any power to intervene, this breach must fall within the residual category of a “miscarriage of justice” in s. 686(1)(a)(iii). The burden is thus on the appellant to establish that this error deprived them of their substantive right to a trial in their official language of choice, resulting in a miscarriage of justice. Further evidence from the accused is required for an appellate court to draw that connection. Whether a miscarriage of justice occurred in this context will depend on whether the accused already knew of their right to a trial in English or French, or learned of it through other

means: either prior to the first appearance, or only later but in time to make an application under s. 530(1) or (4).

E. *The Evidentiary Burden on the Appellant*

[177] This results in another key point of departure from the reasons of the majority. The Chief Justice concludes (at para. 82) that, to make out a breach of their substantive right to a trial in either official language, all that is required of an appellant is to show that s. 530(3) was not complied with — thereby shifting the evidentiary burden almost entirely to the Crown within the scope of the curative proviso in s. 686(1)(b). In our view, that is not enough. Evidence from the appellant must be required to show that non-compliance with s. 530(3) had an actual consequence on their right to choose the language at trial: the accused must establish they did not otherwise know they had that choice.

[178] The language rights s. 530 of the *Criminal Code* protects are undoubtedly important. Their importance, however, does not mean that any breach, even of a procedural or notice requirement, should result in a near-automatic right to a new trial when raised for the first time on appeal. Nor should appellants be relieved of demonstrating that the lack of notice under s. 530(3) was consequential and actually deprived them of knowledge of their right to trial in the official language of their choice. In other contexts involving fundamental rights, it is not sufficient for the appellant to merely prove that a right has been violated — even if the alleged violation could

ostensibly have had devastating impacts on the fairness of the trial or on the integrity of the accused's conviction.

[179] For example, the constitutionally entrenched right to counsel under s. 10(b) of the *Canadian Charter of Rights and Freedoms* is fundamental to the very workings of our criminal justice system and ensures all accused are able to meaningfully respond to the charges. The right to counsel allows a person to be informed of their rights and obligations under the law so that they can obtain advice as to how to exercise them (*R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310, at para. 26). Though not precisely analogous to s. 530(3), both provisions are designed to empower the accused with information that enables them to make a meaningful choice as to how the criminal proceedings against them will unfold. Yet this Court has never shied away from the reality that the right to counsel is not absolute; there is a correlative duty on the detainee to invoke their right to counsel and be duly diligent in exercising it (*R. v. Bartle*, [1994] 3 S.C.R. 173). Given that this duty is imposed even at the pre-trial stage, it should therefore be no surprise that arguments based on breaches of s. 10(b) *Charter* rights are often not entertained at all if raised for the first time on appeal. If the appellant does wish to make such an argument, at the very least they must lay a proper evidentiary foundation (see, e.g., *R. v. Lewis*, 2007 ONCA 349, 86 O.R. (3d) 46, at paras. 16-28; *R. v. Luu*, 2021 ONCA 311, 488 C.R.R. (2d) 225, at para. 23).

[180] While again in a different legal context, the burden placed on an appellant who seeks to have their guilty plea set aside, despite the trial judge's statutory obligation to ensure it was properly informed, is also instructive. In pleading guilty and waiving their right to a trial on the merits, the accused surrenders a constitutional protection that lies at the very heart of the criminal law and animates all aspects of a criminal justice system in a free and democratic society: the presumption of innocence (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 119-20). A guilty plea that was not voluntary, unequivocal, or informed raises concerns about wrongful conviction. Yet an accused who seeks to withdraw that plea after the conviction is entered still bears the burden of establishing subjective prejudice, including the rather high bar of showing that, had they been properly informed, there is a reasonable possibility that they would have chosen differently (*Wong*, at para. 19).

[181] The *importance* of the substantive right that underlies s. 530 therefore provides no basis to relieve the appellant of any meaningful evidentiary burden when asserting a s. 530(3) violation for the first time on appeal. With respect, the importance of a right also has little bearing on whether an error is classified as a wrong decision on a question of law or a miscarriage of justice. While we agree with the Chief Justice's emphasis on the importance of the constitutional interests that *underlie* s. 530 as a whole, it is also crucial to remember that s. 530(3) is a statutory notice provision. It is not, in itself, a constitutional right. Even appellants asserting breaches of rights that are explicitly protected by our *Charter* are subject to a heightened evidentiary burden when raising those rights for the first time on appeal.

[182] Finally, the structure of s. 530 as a whole illustrates that the longer the proceedings go on, the more likely it is that an accused's request to be tried in their language of choice will *not* be granted. While s. 530(1) renders the right to a trial in either English or French absolute if requested not later than the first appearance, the election, or committal for trial, depending on the case (“*shall* grant an order”), s. 530(4) subjects that right to the discretion of the trial judge if the application is not made within that timeframe (“*may* ... order”; see *Beaulac*, at paras. 37-38). Surely, an accused who does not raise the issue of their language rights until only *after* their trial is completed — and they have been convicted — should bear some evidentiary burden beyond merely pointing to s. 530(3) non-compliance in order to receive a new trial.

[183] In sum, the appellant must do more beyond simply pointing to the judicial official's failure to inform them of their language rights at the first appearance. In order to justify appellate intervention, we would require an appellant raising a s. 530(3) violation for the first time on appeal to submit an affidavit attesting that they were unaware of their right to a trial in their own official language and that the option of a trial in that other language was a viable choice (see *Beaulac*, at para. 34). Since a breach of s. 530(3) deprives an *unknowing* accused of the ability to make a meaningful choice, the appellant need not state in this affidavit that they would have chosen a trial in the other official language had they been properly informed. However — obviously — an accused who raises this breach on appeal must seek a new trial in the other official language. Otherwise, no miscarriage of justice will have occurred.

[184] This burden is not onerous, and for good reason. It is tailored to the fundamental importance of language rights in this country and the miscarriage of justice that occurs if an appellant, who *truly* does not know of their language rights, is deprived of their substantive right to choose a trial in the other official language. In the context of late applications under s. 530(4), trial judges are already required to consider, “foremost, the reasons for the delay” — which includes evidence of any prior knowledge of the accused, or lack thereof (*Beaulac*, at para. 37). It only makes sense that evidence of that same nature will be required to make out a breach of s. 530(3) raised for the first time on appeal, a point even later in the proceedings. Crucially, this burden also creates no prejudice to an appellant who did not know they had a choice as to language at trial — disclosing this lack of knowledge on appeal will only help, not hurt, their claim.

[185] In relying on the curative proviso as a potential route to curing what he concludes is an error of law, the Chief Justice instead places the burden on the Crown to demonstrate that the appellant suffered no prejudice as a result of the s. 530(3) breach (paras. 88-90). He states that the court of appeal could dismiss the appeal if the Crown can show that the accused did not have a sufficient proficiency in the other official language, that the accused would have chosen the same language even if they had known of their substantive right, or that the accused knew of their language rights (para. 90). In our respectful view, this approach is problematic.

[186] The accused's choice of language under s. 530 is subjective and deeply personal, as opposed to being based on more objective factors like the accused's maternal or dominant language (*Beaulac*, at para. 34). A breach of s. 530(3), in turn, relates purely to the knowledge the accused needs to make that choice. Without placing some evidentiary duty on the accused in this respect, it will be difficult, if not impossible in some cases, for the Crown to prove a negative — that the accused did *not* know they could choose a trial in either official language. It would be equally difficult for the Crown to prove that the accused *did* know of their language rights. Whether the accused knew of their right to a trial in either official language despite the breach of s. 530(3) is usually a question that only the accused can answer. That is why this Court in *Beaulac* held that an accused who makes a late application under s. 530(4) must present evidence as to when they were made aware of the right (para. 37; see also *Dhingra*, at para. 51). In our respectful view, the Crown should not be tasked with proving information that often exists only in the mind of an appellant with no duty to speak.

[187] This appeal demonstrates how difficult it would be for the Crown to satisfy the proviso for a breach of s. 530(3). As we explain below, the evidence available to the Crown on the record in this case regarding the appellant's knowledge of his language rights exceeds what would normally be present in other cases, including the undertaking and the promise to appear the appellant himself signed that had clear information about his language rights, and a s. 10(b) motion specifically dealing with other language rights, that produced a substantial evidentiary record regarding the

appellant's knowledge of language rights and his abilities and preferences in both English and French. Of lesser significance, the rules of professional conduct in British Columbia, the jurisdiction in which this case was tried, require counsel to advise clients of their language rights. If the circumstances of this case do not satisfy the proviso, it is difficult to imagine what will.

[188] With respect, the risk is that accused persons who know of their language rights, but whose first-appearance judicial official fails to ensure that they are advised of them, can remain silent — secure in the knowledge that, if they are convicted, they can raise this breach for the first time on appeal and be rewarded with a new trial. In our view, such a result itself would cause a miscarriage of justice. It would undermine the integrity of the administration of justice. The burden must be on the appellant to show that they did not know of their language rights, and *not* on the Crown to establish they did. This is generally a matter within the knowledge of the accused and not the Crown. The accused suffers no prejudice in being asked to come forward to establish a limited point on which they have unique knowledge.

### III. Application

[189] Both parties agreed that the justice of the peace presiding over the appellant's first appearance violated s. 530(3). Under the ground of "miscarriage of justice" in s. 686(1)(a)(iii), 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. The appellant has brought no evidence to meet this minimal burden, both



before the British Columbia Court of Appeal and again before this Court. He has not shown that this breach affected his substantive right to a trial in the official language of his choice, thus causing a miscarriage of justice.

[190] While the appellant's silence is enough to dispose of this appeal, we also note that the evidence in the record strongly supports the inference that the appellant was aware of his language rights. Upon his release from the police station after arrest and before his first appearance, he signed a police undertaking and a promise to appear, both of which had notices informing him of the option to apply for a trial in French (2022 BCCA 177, 414 C.C.C. (3d) 86, at paras. 9-10). In the promise to appear, the notice was in both French and English. He signed the undertaking immediately above a statement that he was entitled to "apply, pursuant to Section 530 of the *Criminal Code*, to have [his] trial" in either English or French, and that if he wanted a trial in French, he "must apply to the court" within the specified timeframes (R.R., at pp. 2-3). The promise to appear contained the same statement, and the appellant again signed immediately above a written instruction to "See Notice of Language Rights at Trial on reverse" (p. 1).

[191] In addition, at his first appearance, the appellant's counsel affirmed he would ensure his client was aware that the terms of the undertaking were still in effect (C.A. reasons, at para. 12). Like lawyers in most jurisdictions in Canada, this counsel had an ethical duty to inform the appellant of his language rights (see Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, r. 3.2-2.1; see

also Law Society of Ontario, *Rules of Professional Conduct*, r. 3.2-2A; Federation of Law Societies of Canada, *Model Code of Professional Conduct*, October 2022 (online), r. 3.2-2A). Where an accused is represented by a lawyer, a court is entitled to presume that defence counsel will fulfill their professional obligations (see, e.g., *G.D.B.*, at para. 27). Although the presence of counsel cannot relieve a judicial official of their obligations under s. 530(3) (*Beaulac*, at para. 37), where a s. 530(3) breach is raised for the first time on appeal, the role of counsel may be a relevant factor to consider in determining whether the accused otherwise knew of their language rights.

[192] Once at trial, the appellant advanced an argument in a *voir dire* based on an allegation that the police had breached s. 10(b) of the *Charter* when they obtained a statement without first making sure the appellant understood he had the right to consult with French-speaking counsel (C.A. reasons, at para. 17). Such an argument would tend to demonstrate a nuanced understanding of his language rights and the protections that our law provides him.

[193] The appellant's silence in the face of this contrary evidence is concerning. This is evidence that the Crown could likely have used to question him on the key point of whether he had knowledge of his right to a trial in French or English. When the appellant alone has the evidence necessary to ground his appeal, an appellate court is arguably entitled to conclude that his silence on these matters raises an adverse inference that the evidence would not have helped his case. His silence speaks volumes (see *Lévesque v. Comeau*, [1970] S.C.R. 1010, at pp. 1012-13; *Jolivet*, at para. 28).

[194] The record below also reveals no serious dispute that the appellant is bilingual: the evidence available as to his language abilities suggests that he could have chosen a trial in either English or French. Although the appellant disputes his English abilities for the first time before this Court, we would not depart from the findings of the trial judge on the *voir dire* that he is fluent in English, as these findings are entitled to deference (trial reasons, 2019 BCSC 1529, at para. 35 (CanLII); *voir dire* reasons, 2019 BCSC 2442, at paras. 11-12, reproduced in A.R., vol. I, at pp. 7-9). The appellant's bilingualism does not affect whether his substantive right to a trial in French was breached if he did not know of his ability to choose a trial in either official language. However, if he knew of this right, the fact that he is competent in English means it is plausible that, from the beginning, he chose to be tried in English. What he knew, he will not say.

[195] The appellant has not met his burden to show that a miscarriage of justice occurred. He has not shown that he suffered any consequence from the failure of the justice of the peace presiding over his first appearance to follow s. 530(3) or that this failure deprived him of his substantive right to choose the official language of his trial. Although the breach that occurred in his proceedings should not have happened, this Court has no power to grant relief from an error that, ultimately, had no proven effect.

#### IV. The Trial Judge's Duty Under Section 530(4)

[196] We turn briefly to the appellant’s alternative submission that the trial judge had a duty under s. 530(4) to verify whether the appellant’s trial was taking place in the official language of his choice, and that the trial judge erred in law by failing to order on his own initiative that the appellant be remanded for a trial in French. We would dismiss this ground of appeal as well.

[197] Under s. 530(4), trial judges have no mandatory duty to confirm the accused’s choice of language: the ability of the trial judge to do so is left to their discretion. Typically, such an inquiry would be conducted following a late application by the accused, although s. 530(4) also allows the trial judge, of their own motion, to ask and remand the accused to be tried in the other official language if doing so is in “the best interests of justice”. Trial judges should thus be vigilant for signs that the trial is *not* proceeding in the accused’s official language of choice, such as the accused switching between languages while testifying (see *Mazraani*, at para. 45; *Parsons v. R.*, 2014 QCCA 2206, at para. 35 (CanLII)). At the same time, trial judges are not “expected to be mind readers” (*Tran*, at p. 982). Unless the circumstances in the trial record are such that the choice of the accused (or lack thereof) to proceed in that language calls out for an inquiry, there will be no breach of s. 530(4) if the trial judge fails to do so.

[198] The accused’s choice of language for trial is highly subjective and deeply personal. Although it is important for trial judges to ensure that the accused is being tried in their language of choice, they must also be cautious about interfering with that

choice simply because the accused's first language differs from that of the proceedings. The substantive right to a trial in one's own official language is not necessarily related to the fairness of the trial or the ability of the accused to testify in one language better than another. An accent, or brief slippages into another language, do not automatically trigger a duty under s. 530(4). Each case depends on its own unique circumstances.

[199] Here, the trial judge found that the appellant was fluent in both English and French (trial reasons, at para. 35; *voir dire* reasons, at paras. 11-12). In English, the appellant was articulate, able to understand certain nuances, had a solid vocabulary, and spoke fluidly and rationally (trial reasons, at paras. 76 and 83). Although the appellant sometimes struggled to find the right words, he overall "displayed an excellent ability to understand and express himself in English" and any difficulties in speaking he experienced were like those encountered by many witnesses who testify in criminal proceedings, even those whose first language is English (para. 84).

[200] In these circumstances, the trial judge cannot be faulted for failing to ask about the appellant's choice to proceed in English. We would dismiss this alternative ground of appeal.

## V. Disposition

[201] We would dismiss the appeal.

*Appeal allowed, KARAKATSANIS and MARTIN JJ. dissenting.*

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*Solicitor for the respondent: Attorney General of British Columbia, B.C.  
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*Solicitors for the intervener the Canadian Bar Association: McCarthy  
Tétrault, Vancouver.*

*Solicitor for the intervener the Commissioner of Official Languages of  
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