

R. v. Tran, [1994] 2 S.C.R. 951

Quoc Dung Tran

Appellant

v.

Her Majesty The Queen

Respondent

Indexed as: R. v. Tran

File No.: 23321.

Hearing and judgment: February 25, 1994.

Reasons delivered: September 1, 1994.

Present: Lamer C.J. and La Forest, Sopinka, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the nova scotia supreme court, appeal division

Constitutional law -- Charter of Rights -- Right to interpreter -- Trial -- Accused's court-appointed interpreter testifying as defence witness -- Interpreter not translating testimony in full but only summarizing evidence -- Whether accused's right to assistance of an interpreter breached -- Canadian Charter of Rights and Freedoms, s. 14.

The accused, a native of Vietnam, was charged with sexual assault. In her statement to the police a few hours after the assault was alleged to have occurred, the complainant described her two assailants as "Asian", one being "fat" and "clean-shaven". The complainant later picked the accused's photo from a photo line-up. At trial, the accused appeared as slender with a mustache. The complainant identified him in court as the man she had previously described as clean-shaven and fat, but conceded on cross-examination that as he appeared in court he was not fat. The defence called the accused's court-appointed interpreter to testify about the accused's weight at the time the attack was alleged to have taken place. Instead of translating his testimony in full as he gave it, as instructed by the trial judge and by defence counsel, the interpreter answered in English and only summarized his evidence in Vietnamese at the end of his direct examination and again after his cross-examination. An exchange between the trial judge and the interpreter which followed his cross-examination appears not to have been interpreted at all. The accused was convicted. He appealed his conviction on the grounds that the identification evidence was flawed and that deficiencies in the translation of the evidence deprived him of the right to be actually present at his trial, contrary to s. 650 of the *Criminal Code*. The Court of Appeal upheld the conviction. The main issue in this appeal is whether the failure to provide the accused with full and contemporaneous translation of all the evidence at trial constituted a breach of his right to an interpreter, as guaranteed by s. 14 of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be allowed and a new trial ordered.

The right of an accused who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. This right is also intimately related to our basic notions of justice, including the appearance of fairness, and to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*. The magnitude of these interests favours a purposive and liberal interpretation and a principled application of the right to interpreter assistance under s. 14 of the *Charter*. The principle underlying all of the interests protected by the right to interpreter assistance under s. 14 is that of linguistic understanding.

In determining whether there has in fact been a breach of s. 14, it must be clear that the accused did not understand or speak the language being used in court and was thus actually in need of interpreter assistance. Where an interpreter was appointed and it is the quality of the interpretation provided that is being challenged, it is necessary to determine whether there has been a departure or deviation from what is considered adequate interpretation. While the interpretation provided need not be perfect, it must be continuous, precise, impartial, competent and contemporaneous. The question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court. Not every deviation from the protected standard of interpretation will constitute a violation of s. 14 of the *Charter*: the claimant of the right must establish that the lapse in interpretation was in respect of the proceedings themselves, thereby involving the

vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter. In determining whether the alleged deviation in interpretation was part of an occurrence which actually served in some way to "advance the case", one must consider whether there was an unfolding or development in the proceeding with respect to a point of procedure, evidence and/or law. Since s. 14 guarantees the right to interpreter assistance without qualification, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. There will be situations where the right to interpreter assistance cannot be waived for reasons of public policy. Where waiver is possible, the Crown must not only show that the waiver was clear and unequivocal and made with a knowledge and understanding of the right, but also that it was made personally by the accused or with defence counsel's assurance that the right and the effect on that right of waiving it were explained to the accused in language in which the accused is fully conversant.

Here the accused was in need of interpreter assistance throughout his trial, since he did not understand or speak English, and there is no doubt that the interpretation of the proceedings in which the interpreter was involved as a witness fell well below the guaranteed standard. First, the accused did not receive continuous interpretation of all the evidence at his trial, since the questions posed to and answers given by the interpreter were condensed into two one-sentence summaries and the interpreter's exchange with the judge was not translated at all. Second, the interpretation was not precise, as the summaries failed to convey

everything that had been said and the first summary was incorrect in that it referred to something which had not in fact been said. Third, while there is no reason to doubt the actual impartiality or objectivity of the interpretation provided in this case, the practice of having an interpreter act as both a witness and an interpreter is one which should be avoided in all but exceptional circumstances. Finally, the timing of the interpretation was unsatisfactory, in that it should have occurred contemporaneously with the asking of questions and the giving of answers. These lapses were not trivial or *de minimis* in nature, but rather occurred at a point when the accused's vital interests were clearly involved and the case was thus being advanced. The problems with the interpretation arose during the testimony of a witness, and the evidence given by that witness covered a topic of considerable importance to the accused, namely, the issue of identification upon which his entire defence was built. There was no clear or unequivocal waiver by the accused of his right to interpretation. There is also no indication that the accused personally understood the scope of his right to interpreter assistance and what he was giving up, and that the waiver was made by him personally. The curative provisos of the *Criminal Code* are not applicable when an infringement of the right to interpreter assistance is in issue. While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Recourse should be had to s. 24(1) of the *Charter*, which allows a court to tailor the remedy to the particular circumstances of the violation. Since the violation of s. 14 of the *Charter* in this case occurred in the trial proper, the appropriate and just remedy under s. 24(1) is to quash the accused's conviction and order a new trial.

Cases Cited

Referred to: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Reale* (1973), 13 C.C.C. (2d) 345, aff'd [1975] 2 S.C.R. 624; *Roy v. Hackett* (1987), 45 D.L.R. (4th) 415; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *R. v. Kwok Leung* (1909), 4 Hong Kong L.R. 161; *R. v. Lee Kun*, [1916] 1 K.B. 337; *Kunnath v. The State*, [1993] 4 All E.R. 30; *Negron v. New York*, 434 F.2d 386 (1970); *Valladares v. United States*, 871 F.2d 1564 (1989); *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183; *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510; *R. v. Barrow*, [1987] 2 S.C.R. 694; *Vézina v. The Queen*, [1986] 1 S.C.R. 2; *R. v. Rahey*, [1987] 1 S.C.R. 588; *Dubois v. The Queen*, [1985] 2 S.C.R. 350; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388; *United States v. Joshi*, 896 F.2d 1303 (1990); *R. v. Tsang* (1985), 27 C.C.C. (3d) 365; *R. v. Tabrizi*, [1992] O.J. No. 1383 (QL); *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416; *People v. Aguilar*, 677 P.2d 1198 (1984); *R. v. L.L.*, [1986] O.J. No. 1954 (QL); *Unterreiner v. The Queen* (1980), 51 C.C.C. (2d) 373; *Meunier v. The Queen* (1965), 48 C.R. 14, aff'd [1966] S.C.R. 399; *R. v. Grimba* (1980), 56 C.C.C. (2d) 570; *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41; *R. v. Evans*, [1991] 1 S.C.R. 869.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C., 1985, App. III, s. 2(g).

Canadian Charter of Rights and Freedoms, ss. 2(a), 7, 8, 10(b), 11(d), 14, 15, 24(1), 25, 27.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 36.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 6(3)(e).

Criminal Code, R.S.C. 1970, c. C-34, ss. 577(1), 613(1)(b)(iii).

Criminal Code, R.S.C., 1985, c. C-46, ss. 271(1), 650(1), (3), 686(1)(b)(iii), (iv) [ad. c. 27 (1st Supp.), s. 145(1)], 795, 800(2), (3), 803(2)(a).

International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 14(3)(f).

United States Constitution, Fifth, Sixth and Fourteenth Amendments.

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Proulx, Michel. "The Presence of the Accused at Trial" (1982-83), 25 *Crim. L.Q.* 179.

Rydstrom, Jean F. "Right of Accused to Have Evidence or Court Proceedings Interpreted" (1971), 36 *A.L.R.3d* 276.

Steele, Graham J. "Court Interpreters in Canadian Criminal Law" (1992), 34 *Crim. L.Q.* 218.

APPEAL from a judgment of the Nova Scotia Supreme Court, Appeal Division (1992), 116 N.S.R. (2d) 300, 320 A.P.R. 300, dismissing the accused's appeal from his conviction on a charge of sexual assault. Appeal allowed and new trial ordered.

Marguerite J. MacNeil and Frank E. DeMont, for the appellant.

Robert E. Lutes, Q.C., for the respondent.

The judgment of the Court was delivered by

//Lamer C.J.//

LAMER C.J. -- This appeal raises for the first time before this Court s. 14 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to the assistance of an interpreter. As a result, these reasons for judgment are somewhat longer than would normally be warranted. The context is that of a criminal proceeding and the claimant of the right is an accused who neither spoke nor understood English, the language of the proceedings. Following the hearing of this case, the appeal was unanimously allowed from the bench and a new trial ordered, with reasons to follow.

I. Facts

The appellant, a native of Vietnam, was charged with committing on September 22, 1990, a sexual assault contrary to s. 271(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended. The appellant's command of English was insufficient to permit him to follow the proceedings without the assistance of an interpreter. As a result, Mr. Nguyen served as the appellant's interpreter at election on November 22, 1990, at his preliminary inquiry on March 13, 1991 and, subject to the lapses which are at issue in this appeal, at his trial on October 31, 1991.

The complainant, a 15-year old, testified that she had been kissed and fondled by two Asian men while waiting in the lobby of an apartment building for a drive home from babysitting in the early hours of the morning. In her statement to the police a few hours after the assault was alleged to have occurred, the complainant described her two assailants as being "Asian", one being "fat" and "clean-shaven" and the other having a "pock-marked face". Three weeks after the alleged incident, the complainant picked the appellant's photo from a photo line-up. At trial, the appellant appeared as slender with a mustache. The complainant identified the appellant in court as the man she had previously described as "clean shaven" and "fat". On cross-examination, the complainant conceded that the appellant, as he appeared in court, was not fat.

The police constable who had put together the photo line-up and arrested the appellant was called by the Crown. On cross-examination, the constable testified that the appellant "might have been a few pounds heavier" at the preliminary inquiry, but was "maybe 10 or 15 pounds heavier in the mid-section" on the date of the appellant's arrest, October 24, 1990.

After a brief adjournment to consider whether it would call any evidence, the defence called the interpreter, Mr. Nguyen, to testify about the accused's weight in the fall of 1990 when the attack was alleged to have taken place. Although the interpreter was instructed by the trial judge and by defence counsel to translate in full his testimony as he gave it, he did not do so. Instead, he answered in English and only summarized his evidence in Vietnamese at the end of his direct examination and again after his cross-examination. Based on the record and the affidavit submitted on appeal, it appears that an exchange between the trial judge and Mr. Nguyen which followed

his cross-examination was not interpreted at all to the appellant. (The text of the relevant passages from the transcript is reproduced below at pp. 999-1001.)

On October 31, 1991, Chief Judge Palmeter of the County Court of Nova Scotia convicted the appellant. The appellant appealed his conviction on the grounds that the identification evidence was flawed and that deficiencies in the translation of the evidence deprived him of the right to be actually present at his trial, contrary to s. 650 of the *Criminal Code*. An affidavit was filed before the Court of Appeal in which the interpreter, Mr. Nguyen, swears to having listened to the tapes of the summaries he provided to the appellant at trial and provides a verbatim translation of his summaries back into English. On September 22, 1992, the Nova Scotia Supreme Court, Appeal Division, dismissed the appellant's appeal: (1992), 116 N.S.R. (2d) 300, 320 A.P.R. 300.

II. Judgments Below

County Court (Chief Judge Palmeter)

In oral reasons for judgment, Chief Judge Palmeter concluded that the girl had been the victim of a sexual assault and that she had picked out the appellant as the person who had assaulted her. He observed that the case boiled down to identification: was the assault actually caused by the appellant? Chief Judge Palmeter instructed himself as to the frailty of identification evidence and the weight it should be given, and then concluded that because the photo line-up in this case was an excellent one, it should be given "considerable weight". With respect to the fact that the complainant had initially identified the appellant as "fat", Chief Judge Palmeter stated:

In this particular case we're dealing with the use of the word "fat". What does fat mean? It means, I assume, overweight. Does it mean rotund? Does it mean pudgy? We don't really have any definition of that. But I do agree with submissions by Crown that weight, of course, can fluctuate.

The constable involved has indicated that the accused was heavier, some 10 to 15 pounds heavier and it was around the middle, around the stomach area.

In looking at the accused, the accused is certainly not tall [approx. 5'6"] and he appears to be of slight build and I accept the comments of the officer that even 10 or 15 pounds would have some significant difference in the appearance of the accused.

... I accept the evidence of the young lady in this particular case. I accept her identification of the accused. I have considered submissions made particularly to determine whether her evidence on identification is so significantly flawed ... that standing alone it cannot justify the conviction. I do not find it is so significantly flawed.

Under the circumstances I accept the identification. I find the Crown has proved its case beyond a reasonable doubt and I find the accused guilty as charged.

Importantly, the issue of the adequacy of the interpretation provided to the appellant was not raised before the trial judge and he made no comments about it.

Nova Scotia Supreme Court, Appeal Division (Freeman J.A.)

Freeman J.A. for the Court of Appeal held as follows with respect to the interpretation issue (at pp. 301-2):

The translation issue arose with respect to the court-appointed translator's own evidence when he was called as a defence witness. The translator was Philip Nguyen, who had on previous occasions acted as a court-appointed Vietnamese translator. In his brief testimony he stated in English that Mr. Tran was about five pounds heavier when he first made his acquaintance the previous year. He translated summaries of his evidence at the end of direct examination and cross-examination. The trial

judge asked him several questions to clarify how long he had known Mr. Tran, and those were not translated while he was on the witness stand.

No objection was taken at trial to the adequacy of the translation. Part of the impugned translation related to Mr. Nguyen's questioning by Mr. Tran's own lawyer. No affidavit has been filed by Mr. Tran to suggest that he did not understand the nature of the evidence against him.

There is no doubt that Mr. Tran was entitled to a full translation, and not mere summaries, of all testimony and proceedings, which should have been as nearly simultaneous with the actual testimony as possible. Translation by a witness of his own evidence is not a practice to be encouraged. There can be no doubt that Mr. Nguyen's translation of his own evidence fell short of an ideal standard. See *R. v. Petrovic* (1984), 4 O.A.C. 29; 13 C.C.C. (3d) 416 (C.A.).

Having said that, the departure from the best standard was not so serious that it can be said to have deprived Mr. Tran of the right to be present at his trial, nor of the right to make full answer and defence. The evidence was of minor probative value, and Mr. Tran was made aware of the gist of it.

III. Points in Issue

1. Did the failure to provide the appellant with full and contemporaneous translation of all the evidence at trial, in particular the questioning and testimony of the interpreter, deny the appellant of his right to be present during the whole trial and to make full answer and defence, contrary to ss. 650(1) and (3) of the *Criminal Code*?
2. Did the above-described circumstances constitute a breach of the appellant's right to an interpreter, as guaranteed by s. 14 of the *Charter*?

IV. Analysis

This is the first appeal heard by this Court in which the right to interpreter assistance guaranteed by s. 14 of the *Charter* has been directly in issue. Section 14 provides as follows:

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Subsections 650(1) of the *Criminal Code*, which stipulates that an accused "shall be present in court during the whole of his trial", and 650(3), which entitles an accused to "make full answer and defence", are also implicated in this appeal. However, these provisions of the *Criminal Code* play a subordinate role to that of s. 14 of the *Charter*. Not only does s. 14 expressly provide for the right to the assistance of an interpreter, but also it is, by virtue of its constitutional status, part of the supreme and overarching law of the country. Section 14 of the *Charter* also has a wider reach than s. 650 of the *Code*. Section 650 applies most directly and fully to proceedings upon an indictment. The rules governing the appearance and presence of an accused in connection with offences punishable upon summary conviction are somewhat different and less rigorous: see ss. 800(2), 800(3) and 803(2)(a), but also s. 795 of the *Code*. Section 14 of the *Charter*, however, confers upon all accused, irrespective of the gravity of the offence charged and its classification, a constitutionally guaranteed right to the assistance of an interpreter where the accused does not understand or speak the language of the court.

The elevation of the right to interpreter assistance to the level of a constitutional norm is a significant step requiring, at a minimum, that the rules and

principles governing interpreters which have been developed under the common law and under various statutes be reconsidered and, where necessary, adapted to fit with the dictates of the new *Charter* era. At the same time, there is no doubt that the rich body of jurisprudence which already exists with respect to interpreters, including that which has been developed under s. 650 of the *Code*, will play an important role in determining the scope of the right guaranteed by s. 14 of the *Charter*.

At the outset, I would like to make it very clear that the discussion of s. 14 of the *Charter* which follows relates specifically to the right of an accused in criminal proceedings, and must not be taken as necessarily having any broader application. In other words, I leave open for future consideration the possibility that different rules may have to be developed and applied to other situations which properly arise under s. 14 of the *Charter* -- for instance, where the proceedings in question are civil or administrative in nature.

This case requires this Court to begin the process of delineating the parameters of the right to interpreter assistance, a right which is framed in very general terms under s. 14 of the *Charter*. In determining the scope of a *Charter* right, the words of Dickson J. (as he then was), writing for the Court on s. 8 of the *Charter* in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 156-57, are a useful starting point:

The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. . . .

. . . the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one . . . [which makes it] first necessary to specify the purpose underlying [the section of the *Charter*]: in other words, to delineate the nature of the interests it is meant to protect.

In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, Dickson J. (as he then was) elaborated on how the interests which are intended to be protected by a particular *Charter* right are to be discovered:

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

The interpretive process must, therefore, begin with an examination and review of how an accused's right to the services of an interpreter has historically been interpreted and applied under the common law and statute, how it has been framed in international and European human rights instruments, and the way in which American courts have developed the right inferentially under the United States Constitution. It is only by considering the legal-historical context in which the right has evolved, combined with an examination of the language of s. 14 of the *Charter* and its relationship to other provisions of the *Charter*, that the purpose of the right and the interests sought to be protected by it can be discerned and its parameters begin to be defined.

(a) *Background*

(i) Common Law

Historically, the common law has not always been consistently supportive of an accused's need for the assistance of an interpreter, even in serious criminal trials. This has been noted not only in *R. v. Reale* (1973), 13 C.C.C. (2d) 345 (Ont. C.A.) (aff'd [1975] 2 S.C.R. 624), at p. 347, but also more recently in *Roy v. Hackett* (1987), 45 D.L.R. (4th) 415 (Ont. C.A.), at pp. 423-24. However, with the passage of time, the protections afforded under the common law to accused persons in need of interpreter assistance have increased. This is illustrated by two recent decisions involving official language rights under the Constitution in which this Court referred to interpreter assistance as a fundamental right grounded in the rules of natural justice: *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549, and *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460. For a hearing to be fair, a party who has difficulty with the language of proceedings must not only understand the proceedings, but must also be understood. In *MacDonald*, Beetz J., for the majority, stated at pp. 499-500:

It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing.

It should be absolutely clear however that this common law right to a fair hearing, including the right of the defendant to understand what is going on in court and to be understood is a fundamental right deeply and firmly embedded in the very fabric of the Canadian legal system. That is why certain aspects of this right are entrenched in general as well as specific provisions of the *Charter* such as s. 7, relating to life, liberty and

security of the person and s.14, relating to the assistance of an interpreter.
[Emphasis added.]

The fundamental importance of the right of an accused to the assistance of an interpreter under the common law was also stressed by Wilson J., writing for herself and concurring in the result, in *Société des Acadiens*. She noted at p. 622 that "the ability to understand and be understood is a minimal requirement of due process".

In tracing the evolution under the common law of the right of an accused to the services of an interpreter, the case of *R. v. Kwok Leung* (1909), 4 Hong Kong L.R. 161 (Full Ct.), stands out as an early landmark decision. However, the better known authority is the English case, *R. v. Lee Kun*, [1916] 1 K.B. 337 (C.C.A.), which relied heavily on the principles advanced in *Kwok Leung*. In *Lee Kun*, the accused was charged with murder. He neither spoke nor understood English. Although the evidence was interpreted to him at his appearance before a magistrate (a proceeding akin to our preliminary inquiry), the evidence at his trial was not. The Court of Criminal Appeal denied leave to appeal on the ground that, even if the failure to interpret at the trial was an irregularity, there had been no substantial miscarriage of justice because the evidence at the trial was the same as that which had been presented before the magistrate. However, its dictum has proven highly influential in the subsequent development of the common law right to interpreter assistance, and continues to have considerable resonance to this day.

In short, *Lee Kun* stands for two basic propositions. First, in the case of an unrepresented person charged with a criminal offence who does not understand or speak the language of the court, the evidence given at the trial must be interpreted to

him or her. This rule cannot be waived. Second, in the parallel situation of an accused represented by counsel, the evidence must also be interpreted unless the accused or counsel expresses a wish to dispense with the service and the judge is of the opinion that the accused substantially understands the nature of the evidence which is going to be given against him or her.

Over and above the statement of these two basic rules, *Lee Kun* is important for the significance it attaches to the "presence" of an accused in the active sense of understanding the proceedings. Lord Reading C.J. phrased the issue at p. 341 as follows:

The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. [Emphasis added.]

Also of note is what *Lee Kun* says about other issues which continue to be relevant to the delineation of the right today -- namely, the positive obligation on our courts to ensure that those whose liberty is in jeopardy understand and are understood, waiver and the underlying rationale for providing accused persons with the assistance of an interpreter. For instance, in the ensuing passage relating to unrepresented accused, Lord Reading C.J. denied the possibility of a valid waiver, stressed the independent role of courts, and laid out the broad policy reasons why the right to interpreter assistance is to be valued and protected (at p. 341).

If [the accused] does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It

is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law.

Importantly, Lord Reading C.J. made it clear that the overriding consideration in cases where an accused does not speak or understand the language used by the court is to ensure that injustice is not done, even where this causes inconvenience or takes up additional time, and where an accused wishes to dispense with the right or is careless in exercising it.

Lord Reading C.J.'s dictum in *Lee Kun* was expressly approved and applied in the very recent Privy Council decision, *Kunnath v. The State*, [1993] 4 All E.R. 30. The accused in *Kunnath* was from India, but was arrested in Mauritius and tried for drug trafficking there. The trial was conducted entirely in English. The accused, who was represented by counsel, spoke Malayalam. Although an interpreter was present throughout the trial, the interpreter only translated the charge to the accused and did not translate any of the evidence to the accused, apparently because he was under the impression that he could only interpret when directed to do so by the trial judge. When the accused made a statement to the court from the dock, the interpreter translated his words, including the accused's assertion that he had not understood what the witnesses had said. The accused was convicted and sentenced to death. While the case raised the interpretation and application of a provision of the Constitution of Mauritius guaranteeing the right to the assistance of an interpreter, the Privy Council

decided the case on the basis of common law principles, making only a few supplementary comments on the correct interpretation of the constitutional guarantee.

In its *per curiam* decision, the Privy Council in *Kunnath* noted that, as part of his duty to ensure a fair trial, the trial judge should have made sure that effective use was made of the interpreter who had been provided to the accused. On the facts of the case, the Privy Council found that this was not a case in which the trial judge could in any way be said to have been unaware of the accused's inability to understand the proceedings. The Privy Council reiterated at p. 35 the necessity for an accused to be meaningfully and actively present at his or her trial:

It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the accused [citations omitted] the basis of this principle is not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him [citations omitted]. An accused who has not understood the conduct of proceedings against him cannot, in the absence of express consent, be said to have had a fair trial. [Emphasis added.]

In the result, the Privy Council held that the appeal should be allowed and the conviction quashed on the ground that the accused had been deprived of the opportunity for a fair trial and that a substantial miscarriage of justice had occurred.

The recent Privy Council decision in *Kunnath* along with this Court's dicta in the official language rights cases of *MacDonald* and *Société des Acadiens* confirm that a person facing criminal charges who does not speak or understand the court's language has the right under the common law to be provided with an interpreter. The

right to interpreter assistance is a means of ensuring that proceedings are fair and comply with the basic principles of natural justice.

(ii) Statute

The correlation between an accused's entitlement and obligation to be present at trial and his or her right to the assistance of an interpreter, which was first noted in early common law cases such as *Kwok Leung* and *Lee Kun*, was subsequently incorporated into courts' interpretation of the provision of the *Criminal Code* mandating an accused's presence in court during the whole of his or her trial. The current formulation of this provision of the *Code*, which is found in s. 650(1), reads:

650. (1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.

According to G. J. Steele, "Court Interpreters in Canadian Criminal Law" (1992), 34 *Crim. L.Q.* 218, at p. 229, until the advent in this country of statutory and constitutional instruments expressly proclaiming interpretation to be a right, "[t]he entire law of court interpreters was written upon this *tabula rasa*".

It was not until 1960 that the right to interpreter assistance received express statutory recognition in Canada in the *Canadian Bill of Rights*, R.S.C., 1985, App. III. Section 2(g) of the *Canadian Bill of Rights* reads as follows:

2. ... no law of Canada shall be construed or applied so as to ...

...

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

Apart from the obvious and most significant difference which stems from the fact that the *Charter* is a constitutional document with far broader application than the *Canadian Bill of Rights*, a mere federal statute, the primary difference between s. 2(g) of the *Canadian Bill of Rights* and s. 14 of the *Charter* is that the latter expressly includes deaf persons and is more clearly declarative of a positive right: A. Morel, "Certain Guarantees of Criminal Procedure" in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989) 497, at pp. 526-28.

In so far as the provinces are concerned, Quebec is unique in having specific legislation which guarantees the right to an interpreter. Section 36 of its *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, reads as follows:

36. Every accused person has a right to be assisted free of charge by an interpreter if he does not understand the language used at the hearing or if he is deaf.

What is significant about Quebec's guarantee is that, while it is limited to criminal proceedings ("[e]very accused person"), it nonetheless specifies that interpreters will be provided free of charge.

The priority given to the right to interpreter assistance of criminally accused persons, which is seen not only in Quebec's guarantee but also more generally in the jurisprudence, is echoed in international human rights instruments. For instance, both the United Nations' *International Covenant on Civil and Political Rights*, 999

U.N.T.S. 171, art. 14(3)(f), and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 6(3)(e), provide that everyone charged with a criminal offence has the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". While the United States' Constitution lacks a provision which expressly guarantees the right to interpreter assistance, American courts have found such a right to exist inferentially under the Fifth Amendment (right not to be deprived of liberty without due process of law), the Sixth Amendment (right of accused to confront witness against him and to have the assistance of counsel) and the Fourteenth Amendment (right not to be deprived by any State of liberty without due process of law), as well as in the counterparts to these provisions found in state constitutions: J. F. Rydstrom, "Right of Accused to Have Evidence or Court Proceedings Interpreted" (1971), 36 A.L.R.3d 276, *Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970), and *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989).

In interpreting and applying s. 650 of the *Criminal Code* and s. 2(g) of the *Canadian Bill of Rights*, Canadian courts have developed guidelines and rules which help to shed light on the important purposes served and the interests protected by s. 14 of the *Charter*. Two decisions in particular stand out.

The first is *Reale*, *supra*, in which this Court, in brief reasons, dismissed an appeal from a decision of the Ontario Court of Appeal. The accused in *Reale* was of Italian origin and it was common ground at the trial that he required an interpreter. Although interpretation was provided during the trial, the trial judge refused, despite defence counsel's objection, to permit his charge to the jury to be interpreted to the accused because of concern that the interpreter's voice might distract the jury. The

accused was convicted of non-capital murder. On appeal, the Ontario Court of Appeal held, in a *per curiam* decision, that the denial of contemporaneous translation of the charge to the jury violated both s. 2(g) of the *Canadian Bill of Rights* and s. 650(1) (then s. 577(1)) of the *Criminal Code*.

With respect to s. 2(g) of the *Canadian Bill of Rights*, the Court of Appeal in *Reale* stated at pp. 349-50:

In our opinion, the right not to be deprived of the assistance of an interpreter when the circumstances require such assistance extends to every essential part of the proceedings and in the circumstances of this case there was an infringement of a fundamental right of the accused which is protected by the *Canadian Bill of Rights*. No doubt the right of an accused to the assistance of an interpreter with respect to some part of the proceedings may, in proper circumstances, be waived or dispensed with, in which case the accused would not be "deprived" of any right. In the present case counsel for the appellant at the trial did not waive the appellant's right to the assistance of an interpreter but, on the contrary, urged that he should continue to be provided with the services of the interpreter during the Judge's charge.

(As an aside, the Court of Appeal's suggestion that waiver of the right under s. 2(g) of the *Canadian Bill of Rights* was possible and could be achieved by counsel was confirmed in its subsequent decision in *R. v. Hijazi* (1974), 20 C.C.C. (2d) 183 (Ont. C.A.), leave to appeal refused [1974] S.C.R. ix, where counsel's failure to object at trial in circumstances almost identical to those in *Reale* proved to be fatal. In light of the elevation of the right to interpreter assistance to the level of a constitutional norm, the issue of waiver is clearly one which will need revisiting under s. 14 of the *Charter*.)

With respect to s. 650 of the *Code*, the Court of Appeal in *Reale* again reiterated that more than mere physical presence at a trial is required to satisfy the provision. An accused must be "present" in the sense of being able to understand the language of the proceedings. The court stated at p. 354:

We are of the opinion that the accused, by reason of being deprived of the assistance of the interpreter during the trial Judge's charge, was not present for that part of the proceedings within the meaning of s. 577 [now s. 650] of the *Criminal Code*. We are of the view that he was no more present than if he were unconscious as the result of a heart attack or a stroke, and was as effectively denied any meaningful presence as if he had been physically removed from the court-room during that part of the proceedings.

In the result, the Court of Appeal in *Reale* quashed the conviction and ordered a new trial on the basis that the curative provision of the *Criminal Code*, s. 613(1)(b)(iii) (now s. 686(1)(b)(iii)), should not be applied because the accused "did not have a trial according to law" (p. 356). In a brief judgment, the majority of this Court *per* Laskin C.J. approved the Court of Appeal's reasons and dismissed the appeal, citing in particular its agreement with "making s. 2(g) of the *Canadian Bill of Rights* the principal ground of its order for a new trial" (p. 627).

The second case which I find helpful, particularly with respect to how it links the right to be present with concerns for fairness in the criminal justice system, is that of *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), cited with approval in *R. v. Barrow*, [1987] 2 S.C.R. 694, at pp. 705-7, *per* Dickson C.J. for the majority, and *Vézina v. The Queen*, [1986] 1 S.C.R. 2, *per* Lamer J (as he then was) for the Court. *Hertrich* was decided under s. 650 (then s. 577) of the *Criminal Code*. While interpretation was not an issue, *Hertrich* nonetheless provides important insight into the reasons why an accused's presence and, therefore, understanding are important

values which need to be upheld. As such, *Hertrich* is useful when considering the kinds of interests which s. 14 of the *Charter* is meant to protect.

On two separate occasions during the first degree murder trial in *Hertrich*, the trial judge learned that individual jurors had received anonymous telephone calls conveying negative information about Skinner, one of the seven accused. On the first occasion, which is the one most relevant to the outcome of the case, the judge examined two of the jurors for bias. The judge's interviews of the jurors took place, over the objections of defence counsel, in the absence of the seven accused. Satisfied that the jurors in question had not been influenced by the messages, the judge dismissed the motion for a mistrial. Skinner, along with two others, was eventually convicted.

After examining various authorities, Martin J.A. for the Ontario Court of Appeal concluded that the rule requiring the presence of the accused at all stages of the trial exists not only to enable the accused to hear the case against him or her and to make full answer and defence, but also to allow him or her to witness, first-hand, all the proceedings which could affect his or her vital interests. Martin J.A. explained at p. 537:

The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it: *R. v. Lee Kun* (1915), 11 Cr. App. R. 293. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and

overriding principle underlying those decisions. [Two examples of cases provided.] [Emphasis added.]

Having defined the rationale behind s. 650 of the *Code* in broad, purposive terms, Martin J.A. then had to decide whether the judge's interviews of jurors in the absence of the accused fell within the meaning of "trial" in s. 650. He concluded that they did. In his view, they could not be characterized as merely collateral inquiries into extrinsic matters. The basis for Martin J.A.'s finding was as follows (at p. 537):

If the question whether the in-chambers examination of the jurors on April 6th was a part of the trial depended solely upon whether the appellants' absence affected their opportunity to defend themselves the proceeding could not, I think, be properly characterized as part of the trial. I cannot think that the appellants' presence at the in-chambers examination of the jurors in which they were represented by counsel would have been of any benefit to them in defending themselves or that their absence prejudiced their opportunity of defending themselves. As I have previously indicated, however, I do not consider that this is the exclusive criterion upon which the characterization of a proceeding as a part of the trial depends. Rather the characterization of a proceeding as a part of the trial in relation to the accused's right to be present at the proceeding would seem to depend upon whether his exclusion from the proceeding violates his right to be present so that at all times he may have direct knowledge of anything that transpires in the course of his trial which could involve his vital interests. [Emphasis added.]

In the result, Martin J.A. found that, by denying the accused the right to confront the jurors directly in a situation where their impartiality was being questioned, s. 650 of the *Code* had been violated and a new trial would have to be ordered. In other words, the appearance of unfairness that had been created by the judge's response to the incidents in question -- i.e., his interviews of the jurors in the absence of the accused -- proved to be fatal and the convictions could not be upheld.

The case of *Hertrich* is important because it makes it clear that an accused need not demonstrate any actual prejudice flowing from his or her exclusion from the trial -- i.e., that he or she was in fact impeded in his or her ability to make full answer and defence. Prejudice is a sufficient but not a necessary condition for a violation of the right to be present under s. 650 of the *Code*. For a violation of the right to be present under s. 650 to be made out, it is enough that an accused was excluded from a part of the trial which affected his or her vital interests. Importantly, the two rationales provided in *Hertrich* for the right of an accused to be present at his or her trial -- i.e., full answer and defence, and first-hand knowledge of proceedings which affect vital interests -- need not necessarily overlap. For instance, as was the case in *Hertrich*, there will be situations where an accused's right to full answer and defence is not prejudiced, but his or her right to first-hand knowledge of proceedings affecting his or her vital interests is negatively affected.

The argument that the presence of an accused throughout his or her trial has independent value over and beyond actual impact on an accused's right to full answer and defence is also advanced in the leading American authority on the right to interpreter assistance, *Negron, supra*. In *Negron*, the defendant was charged with murder. The defendant spoke only Spanish. His counsel spoke English. Without the aid of an interpreter, the defendant was unable to communicate with his counsel, or to understand the English-speaking witnesses, the judge and the prosecutor. The only interpretation provided was "spasmodic and irregular" (p. 388), with most of it consisting of brief summaries of witnesses' testimony during recesses in the trial. This prompted Kaufman J., who delivered the opinion of the Second Circuit Court of Appeals, to observe at p. 388: "To *Negron*, most of the trial must have been a babble of voices." The defendant was convicted.

In affirming a lower court decision granting the accused's petition for a writ of *habeas corpus*, Kaufman J. explained, at p. 389, that the right to the services of an interpreter goes beyond the right to confrontation protected by the Sixth Amendment, and is a critical component of due process.

... the right that was denied Negron seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial [citations omitted], unless by his own conduct he waives that right. [Citations omitted.] And it is equally imperative that every criminal defendant -- if the right to be present is to have meaning -- possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." [Citations omitted.] Otherwise, "[t]he adjudication loses its character as a reasoned interaction * * * and becomes an invective against an insensible object." [Citations omitted.] [Emphasis added.]

This point was reiterated later when Kaufman J. stated at p. 390: "Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded" (emphasis added).

It is clear that the right to the assistance of an interpreter of an accused who cannot communicate or be understood for language reasons is based on the fundamental notion that no person should be subject to a Kafkaesque trial which may result in loss of liberty. An accused has the right to know in full detail, and contemporaneously, what is taking place in the proceedings which will decide his or her fate. This is basic fairness. Even if a trial is objectively a model of fairness, if an accused operating under a language handicap is not given full and contemporaneous interpretation of the proceedings, he or she will not be able to assess this for him or herself. The very legitimacy of the justice system in the eyes of those who are subject

to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.

(iii) Relationship with Other *Charter* Provisions

Support for an expansive interpretation of s. 14 may also be found within the *Charter* itself. This Court has already indicated that provisions of the *Charter* are not to be read in isolation, but rather interpreted in light of one another: e.g., *R. v. Rahey*, [1987] 1 S.C.R. 588, *per* Wilson and La Forest JJ., *Dubois v. The Queen*, [1985] 2 S.C.R. 350, *per* Lamer J. (as he then was), and *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. It has already been noted by this Court that s. 7 of the *Charter* is a general expression of the legal rights contained in ss. 8 to 14 of the *Charter*: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J. (as he then was), at p. 502. Not surprisingly, therefore, s. 14 bears a close relationship to s. 7 and the other "legal rights" guaranteed under the *Charter*. Indeed, I would argue that the right to interpreter assistance under s. 14 is a means of ensuring that criminal proceedings comply with the constitutional guarantee of a fair and public hearing found in s. 11(d) of the *Charter*. At the same time, the force of s. 14 can be understood in part by reference not only to the right to make full answer and defence, but also to the right to have full disclosure of the case which has to be answered prior to making one's defence, both rights which are protected under ss. 7 and 11 of the *Charter*. Indeed, the close connection between s. 14 and these other *Charter* guarantees suggests that the right to interpreter assistance in the criminal context should be considered a "principle of fundamental justice" within the meaning of s. 7 of the *Charter*.

Sections 15 (equality rights), 25 (aboriginal rights) and 27 (multicultural heritage) of the *Charter* also speak to the importance of the right to interpreter assistance in Canadian society. Section 27, which mandates that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians, is particularly germane. In so far as a multicultural heritage is necessarily a multilingual one, it follows that a multicultural society can only be preserved and fostered if those who speak languages other than English and French are given real and substantive access to the criminal justice system. Just as s. 27 has already been held to be relevant to the interpretation of freedom of religion under s. 2(a) of the *Charter* (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 752, and *R. v. Gruenke*, [1991] 3 S.C.R. 263), so too should it be a factor when considering how to define and apply s. 14 of the *Charter*.

(iv) Conclusions on the Purposes Served by Section 14

The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the *Charter*. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive

and liberal interpretation of the right under s. 14 of the *Charter*, and a principled application of the right.

Importantly, the underlying principle behind all of the interests protected by the right to interpreter assistance under s. 14 is that of linguistic understanding. The centrality of this principle is evident not only from the general jurisprudence dealing with interpreters, but also more directly from the language of s. 14 itself, which refers to "not understand[ing] or speak[ing] the language in which the proceedings are conducted". The level of understanding protected by s. 14 will, therefore, necessarily be high. Indeed, it has been suggested that a party must have the same basic opportunity to understand and be understood as if he or she were conversant in the language of the court. For example, in the immigration case, *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), Stone J.A. stated at p. 392:

In my opinion, the appellant was entitled, through the interpreter, to tell the story of his fear in his own language as well he might have done had he been able to communicate to the Board in the English language. Natural justice demanded no less. [Emphasis added.]

Similarly, in *United States v. Joshi*, 896 F.2d 1303 (1990), the U.S. Court of Appeals, 11th Circuit, held that the "general standard for the adequate translation of trial proceedings requires continuous word for word translation of everything relating to the trial a defendant conversant in English would be privy to hear" (p. 1309) (emphasis added). This view is echoed by Steele, who writes in "Court Interpreters in Canadian Criminal Law", *supra*, at p. 240, that,

[a]n interpretation of testimony should be as good as -- no better and no worse than -- the testimony that the applicant would give if the source language were the language of the court, due allowance being given for the circumstance that the testimony is, in fact, being interpreted. [Emphasis added.]

At the same time, however, the principle of linguistic understanding which underpins the right to interpreter assistance should not be elevated to the point where those with difficulty communicating in or comprehending the language of the proceedings, be it English or French, are given or seen to be given unfair advantages over those who are fluent in the court's language. Ultimately, the purpose of the right to interpreter assistance is to create a level and fair playing field, not to provide some individuals with more rights than others.

(b) Framework for Determining a Violation of Section 14

In determining the scope of the right to interpreter assistance under s. 14 of the *Charter*, care must be taken in defining what constitutes an appropriate standard of interpretation, what the considerations should be in deciding whether a particular departure from this standard is constitutionally permissible, where the burden of persuasion (and, therefore, risk of non-persuasion) lies, whether the right can be waived, and what the remedy for a violation of the right should be. The framework of analysis which I propose be applied to determine whether there has in fact been a breach of s. 14 is, in short, as follows.

First, it must be clear that the accused was actually in need of interpreter assistance -- i.e., that he or she did not understand or speak the language being used

in court. Although the ultimate burden of proof in establishing the required level of need rests, of course, on the party asserting that he or she has suffered a violation of his or her s. 14 rights, it is important to appreciate that the right to interpreter assistance is not one which must necessarily have been invoked or asserted in order to be enjoyed. As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood. Accordingly, unless the issue of interpretation is only being raised for the first time on appeal and/or there is some question as to whether the right is being asserted in bad faith, establishing "need" will not normally be an onerous step.

Second, the claimant of the right must show, assuming it is not a case of a complete denial of an interpreter but one involving some alleged deficiency in the interpretation actually provided, that there has been a departure from the basic, constitutionally guaranteed standard of interpretation. For the purposes of this appeal, I define this standard as one of continuity, precision, impartiality, competency and contemporaneousness.

Third, the claimant must establish that the alleged lapse in interpretation occurred in the course of the proceedings themselves when a vital interest of the accused was involved -- i.e., while the case was being advanced -- rather than at some point or stage which was extrinsic or collateral to the advancement of the case.

The onus with respect to these three steps for establishing a breach of s. 14 of the *Charter* falls on the party asserting the violation and the standard of proof is one of balance of probabilities. Once a court is satisfied that the first three

requirements have been met, a violation of s. 14 will have been made out unless the Crown is able to prove, again on a balance of probabilities, that there was a valid and effective waiver of the right which accounts for the lapse in (or lack of) interpretation shown to have occurred.

It is to describing in greater detail the various components of this proposed framework of analysis for s. 14 of the *Charter* that I now turn.

(i) The Need for an Interpreter

The first step in the analysis as to whether a breach of s. 14 of the *Charter* has in fact occurred requires consideration of the need for interpreter assistance. That is, the claimant of the right must demonstrate that he or she satisfies (or satisfied) the conditions precedent to entitlement to the right. Section 14 of the *Charter* states clearly that, to benefit from the right, an accused must "not understand or speak the language in which the proceedings are conducted".

While the right to interpreter assistance is not an automatic or absolute one, it stands to reason, particularly with the elevation of the right to the level of a constitutional norm, that courts should be generous and open-minded when assessing an accused's need for an interpreter. As a general rule, courts should appoint an interpreter when either of the following occurs:

- (1) it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing him- or herself or understanding the proceedings and that the assistance of an interpreter would be helpful; or

- (2) an accused (or counsel for the accused) requests the services of an interpreter and the judge is of the opinion that the request is justified.

Importantly, neither the language of s. 14 of the *Charter* nor the legal-historical underpinnings of the right require courts to inform all accused appearing before them of the existence of the right to interpreter assistance. Similarly, courts are not obliged to inquire, as a matter of course, into every accused's capacity to understand the language used in the proceedings. At the same time, however, there is no absolute requirement on an accused that the right be formally asserted or invoked as a precondition to enjoying it. This is because courts have an independent responsibility to ensure that their proceedings are fair and in accordance with the principles of natural justice and, therefore, to protect an accused's right to interpreter assistance, irrespective of whether the right has actually been formally asserted.

Just as a court should conduct a hearing into an accused's mental capacity if it appears that the accused may not be competent to participate fully in his or her own defence, or likewise should decline to accept a guilty plea if not satisfied that an accused understands the nature of the charge and appreciates what it is he or she is doing, so too should a court conduct, on its own motion, an inquiry into the need for an interpreter when it appears that an accused is having language difficulties. As I suggested above, the overriding consideration is that of understanding. Failure to conduct an inquiry where there is some positive indication that the accused may not understand or cannot be understood for reasons related to language, and to appoint an interpreter where one may prove helpful, could result in a miscarriage of justice and the ordering of a new trial.

However, it should be borne in mind by defence counsel that the safer course will always be to request an interpreter when one is required, rather than to rely on a court to appoint one entirely on its own motion. Indeed, as officers of the court, there is an obligation on both Crown and defence counsel to draw a court's attention to the need for an interpreter where counsel become aware that such a need exists. While courts must be alert to signs which suggest that an accused may have language difficulties, they are not nor can they be expected to be mind readers. Where there are no outward indications which point to a lack of understanding on the accused's part and where the right has not been invoked by the accused or by counsel (in the case of represented accused), these may be factors which are weighed against the accused if, after sitting quietly throughout the trial, the issue of interpretation is suddenly raised for the first time on appeal. The cases of *R. v. Tsang* (1985), 27 C.C.C. (3d) 365 (B.C.C.A.), and *R. v. Tabrizi*, [1992] O.J. No. 1383 (Ont. Ct. (Gen. Div.)) are illustrative of this point.

In *Tsang*, for example, the appellant was charged with possession of a dangerous weapon. Although he was represented by counsel, no request was made at any point for an interpreter. When asked how he pleaded after the charge was read to him in English, the accused replied "not guilty" in English. He sat quietly through his two-day trial without giving any indication that he did not understand the proceedings. His counsel elected not to call any evidence. The accused was convicted. He appealed his conviction on the ground that there had been a miscarriage of justice because he only understood a portion of what was said in court. In dismissing the appeal, MacFarlane J.A. for the British Columbia Court of Appeal explained at p. 372:

There is, in my opinion, no duty on the court to inform an accused of his right to an interpreter unless, of course, it is apparent that there is the need of such assistance. In such a case, the assistance ought to be provided, even though a request is not made.

...The accused did not assert the right to an interpreter. The court was not aware of any need for an interpreter. There was nothing in the record to reveal such need. The trial judge, in my opinion, was not bound to inquire whether there was a need when there was no apparent basis for doing so. In such circumstances, it cannot be said that the appellant was denied his right to an interpreter.

Importantly, MacFarlane J.A. distinguished the case before him of an accused failing to exercise his right to interpreter assistance and there being no indication of any lack of understanding, from the situation where either an accused asserts his right, but then is denied it, or where even though an accused does not assert the right, from the circumstances it appears that there may be a need for such assistance.

I would stress that courts must, as many have in the past, approach the question of the need for an interpreter with a spirit of sensitivity and understanding, particularly now that the right to interpreter assistance has been entrenched in our Constitution. As Steele makes clear in his article, "Court Interpreters in Canadian Criminal Law", *supra*, at pp. 226-27:

...linguistic competence takes colour from circumstances. For example, an allophone [i.e., a person not conversant in the language of the proceedings] might find it easy to understand her lawyer, particularly because she has had time outside the court-room to eliminate misunderstandings, but not opposing counsel, the judge or a witness. In the same way, she might be able to understand her lawyer in the relative calm of the lawyer's office, but not under stress in the court-room.

[In addition,] speaking, reading and oral comprehension are distinct skills. A party who is able to testify fluently may be unable to read documentary evidence. Similarly, a witness who is able to follow instructions or understand a question may be incapable of responding fully.

On these and other grounds, Steele argues for "a rather low standard in the assessment of need" (p. 227), whereby an interpreter would be allowed unless a court were convinced that the applicant was able to understand the proceedings to the same degree as if those proceedings were conducted in the language in which the applicant has the greatest facility.

Along the same lines, Lacourcière J.A. of the Ontario Court of Appeal has provided some sound advice with respect to assessing the need for an interpreter. In *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416 (Ont. C.A.), he stated, at p. 423:

It was common ground at the trial that a Serbo-Croatian interpreter was required, and the appellant entered his plea through an interpreter. While both the *Bill of Rights* and the *Canadian Charter of Rights and Freedoms* refer to the right to the assistance of an interpreter in any proceedings where the witness does not understand or speak the language in which the proceedings are conducted, it is not for the trial court and much less for an appellate court to conduct a detailed inquiry into the party's or witness' ability to understand or speak the language of the court proceedings. A person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter. Even if that person speaks broken English or French and understands simple communications, the right constitutionally protected by s. 14 of the Charter is not removed. [Emphasis added.]

I would also agree with the position taken by Lacourcière J.A. in *Petrovic*, at p. 423, and reiterated by the B.C. Court of Appeal in *Tsang, supra*, at p. 371, that, once claimed, the s. 14 *Charter* right to interpreter assistance should not be denied unless there is "cogent and compelling evidence" that an accused's request for an interpreter is not made in good faith, but rather for an oblique motive. In *Roy v. Hackett, supra*, a case involving interpretation at an arbitration hearing, Lacourcière J.A. pointed out,

at p. 427, that in coming to a decision regarding the good faith of a witness or party who requests an interpreter, a judge or chairman of a tribunal

... must take into account the legitimate desire of any witness to express himself in the language he knows best, usually his mother tongue... [and] avoid imputing an ulterior motive to a witness who asks for an interpreter, even if the witness has some familiarity with the language used and could, in a general way, understand the proceedings.

This comment attests to the sensitivity required when assessing an accused's need for an interpreter, and to the fact that courts must not be too quick to draw adverse inferences where the claimant of the right has some facility with the language being used in the court.

(ii) Guaranteed Standard of Interpretation

The second step in determining whether an accused has been deprived of his or her constitutionally guaranteed right to interpreter assistance involves a consideration of whether there has been a departure or deviation from what is considered "proper" interpretation. Where the accused shows that he or she was in need of an interpreter, but was refused such assistance, the limitation on the right will be self-evident (subject, of course, to the accused establishing that the denial occurred at a point when the case was being advanced). However, where, as here, an interpreter was appointed and it is the quality of the interpretation provided that is being challenged, assessing whether there has been an infringement of the right becomes more complicated. To do so, it is necessary to consider the scope of the right guaranteed by s. 14 of the *Charter* and to begin to define what constitutes an appropriate standard of interpretation in criminal proceedings.

While the standard of interpretation under s. 14 will be high, it should not be one of perfection. In my view, it can be defined by reference to a number of criteria aimed at helping to ensure that persons with language difficulties have the same opportunity to understand and be understood as if they were conversant in the language being employed in the proceedings. These criteria include, and are not necessarily limited to, continuity, precision, impartiality, competency and contemporaneousness. I shall consider each one in turn.

I. Continuous

In considering what constitutes adequate interpretation, courts and commentators have generally treated continuity as a necessary requirement. As a result, breaks in interpretation and/or summaries of the proceedings have usually not been viewed in a favourable light.

The American case of *People v. Aguilar*, 677 P.2d 1198 (Cal. 1984), is noteworthy in this regard. In that case, the defendant was provided with a court-appointed interpreter; however, this interpreter became unavailable to him during the testimony of two Spanish-speaking prosecution witnesses whose testimony needed to be translated into English for the court's benefit. The Supreme Court of California considered the scope of the right to interpreter assistance under the California Constitution, which expressly provides that a "person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings" (p. 1201). It held that, because "[t]he defendant's right to understand the instructions and rulings of the judge, the questions and objections of defense counsel and the prosecution, as well as the testimony of the witnesses is a continuous one" (p. 1201)

(emphasis added), the court's "borrowing" of his interpreter constituted a denial of his constitutional right to an interpreter.

I find, therefore, that s. 14 of the *Charter* requires that interpretation of proceedings be continuous. Breaks and interruptions in interpretation are not to be encouraged or allowed.

II. *Precise*

The need for precision in interpretation is self-evident. As Steele suggests at pp. 240-41 of his article, *supra*:

... the interpretation must be, as close as can be, word-for-word and idea-for-idea; the interpreter must not "clean up" the evidence by giving it a form, a grammar or syntax that it does not have; the interpreter should make no commentary on the evidence; and the interpretation should be given only in the first person, *e.g.*, "I went to school" instead of "he says he went to school".

This necessity for precision is an additional reason why summaries are most unlikely to meet the general standard of interpretation required under s. 14 of the *Charter*. Indeed, in the American case *Negron, supra*, Kaufman J. held, at pp. 389-90, that the summaries provided to the defendant by the prosecutor's interpreter were inadequate because:

However astute [the interpreter's] summaries may have been, they could not do service as a means by which Negron could understand the precise nature of the testimony against him during that period of the trial's progress when the state chose to bring it forth.

However, it is important to keep in mind that interpretation is an inherently human endeavour which often takes place in less than ideal circumstances. Therefore, it would not be realistic or sensible to require even a constitutionally guaranteed standard of interpretation to be one of perfection. As Steele explains, at p. 242:

Even the best interpretation is not "perfect", in that the interpreter can never convey the evidence with a sense and nuance identical to the original speech. For that reason, the courts have cautioned that interpreted evidence should not be examined microscopically for inconsistencies. The benefit of a doubt should be given to the witness.

In this respect, it may be helpful to note the conceptual distinction that exists between "interpretation", which is primarily concerned with the spoken word, and "translation", which is primarily concerned with the written word. In light of the fact that interpretation involves a process of mediation between two people which must occur on the spot with little opportunity for reflection, it follows that the standard for interpretation will tend to be lower than it might be for translation, where the source is a written text, where reaction time is usually greater and where conceptual differences which sometimes exist between languages can be more fully accommodated and accounted for.

III. *Impartial*

It also stands to reason that interpretation, particularly in a criminal context, should be objective and unbiased: see, e.g., *Unterreiner*, *infra*, *Tabrizi*, *supra*, and *Morel*, *supra*, at pp. 535-36. As Steele suggests, at pp. 238-39:

Certain persons are disqualified, by reason of apprehension of bias, from acting as interpreter. Obviously a party litigant will not be permitted to interpret, but neither will a relative or friend of a party, the judge, nor a person closely connected to the events giving rise to a criminal charge. These rules may be relaxed if the proceedings are non-adversarial.

While I agree with Steele that an interpreter should be impartial, I would further relax these rules, particularly on preliminary issues such as bail release or adjournment in remote areas of our country, where the practical reality of Canadian geography coupled with the urgency presented by some cases would result in the interests of justice being better served.

IV. *Competent*

To meet the standard of protection guaranteed by s. 14 of the *Charter*, interpretation must be of a high enough quality to ensure that justice is done and seen to be done. This means, at a minimum, that an accused has a right to competent interpretation. While there are, as of yet, no universally acceptable standards for assessing competency, a point stressed by Steele at p. 238, an interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings: see, e.g., *R. v. L.L.*, [1986] O.J. No. 1954 (Ont. Dist. Ct.), and *Petrovic*, *supra*, at p. 423. Where there is a legitimate reason to doubt the competency of a particular interpreter, a court will be well advised to conduct an inquiry into the interpreter's qualifications.

In *Unterreiner v. The Queen* (1980), 51 C.C.C. (2d) 373 (Ont. Co. Ct.), for example, the appeal court found that there had been a denial of natural justice and ordered a new reference on the basis that the judge below had failed to conduct an

inquiry to determine the competence and impartiality of the interpreter before he was sworn. The case involved a reference to a Provincial Court Judge in which denial of a firearms certificate was being appealed. When no court interpreter proved to be available to interpret the testimony of a Crown witness, a friend of this witness was used. On several occasions during the cross-examination of the witness, the applicant (who was unrepresented) complained that the interpreter was not accurately translating the proceedings. Nevertheless, the Provincial Court Judge dismissed the reference. By ordering a new trial, the appeal court made it clear that it was the responsibility of the Provincial Court Judge to ensure that the interpreter chosen possessed the necessary qualities of competence and impartiality.

V. *Contemporaneous*

A further factor which needs to be taken into account when defining the proper standard for interpretation is that of timing. To meet the constitutionally guaranteed standard of protection under s. 14 of the *Charter*, interpretation must take place contemporaneously with the proceeding in question. Here, it may be useful to keep in mind the distinction between "consecutive" (after the words are spoken) and "simultaneous" (at the same time as words are spoken). While it is generally preferable that interpretation be consecutive rather than simultaneous, the overriding consideration is that the interpretation be contemporaneous. Although I need not decide the matter, I would tend to agree with Steele, at pp. 248-49 of his article, that, although consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation. Simultaneous interpretation is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained. Moreover, it requires

expensive sound equipment with which our trial courtrooms are rarely equipped. In addition, simultaneous interpretation works best when there is a minimum of distraction both for the interpreter and the listener(s), a feature which will not always be present in our busy courtrooms. Consecutive interpretation, on the other hand, has the advantage of allowing the accused to react at the appropriate time, such as when making objections. It also makes it easier to assess on the spot the accuracy of the interpretation, something rendered more difficult when one has to listen to the original language and its translation at the same time, as would be the case with simultaneous interpretation.

All of these factors suggest that consecutive interpretation is the better practice as compared to simultaneous interpretation. However, I recognize that the different needs of persons targeted by s. 14 of the *Charter*, such as those with a hearing disability, as well as the possibility of technological advances in interpretation methods may change this. What is important above all is that interpretation be contemporaneous with that which is being interpreted.

VI. *Summary*

In sum, the purpose of furthering understanding of the proceedings which underpins the right to interpreter assistance is most likely to be fulfilled if the standard for interpretation under s. 14 of the *Charter* is defined as one of continuity, precision, impartiality, competency and contemporaneousness. Given the underlying importance of the interests being protected by the right to interpreter assistance, the constitutionally guaranteed standard of interpretation must be high and allowable departures from that standard limited. In assessing whether there has been a sufficient

departure from the standard to satisfy the second stage of inquiry under s. 14, the principle which informs the right -- namely, that of linguistic understanding -- should be kept in mind. In other words, the question should always be whether there is a possibility that the accused may not have understood a part of the proceedings by virtue of his or her difficulty with the language being used in court.

(iii) Whether Departure Occurred While Case was Being Advanced

Importantly, it will not be every deviation from the protected standard of interpretation which will constitute a violation of s. 14 of the *Charter*. The claimant of the right must establish something more -- namely, that the lapse in interpretation which occurred was in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter, such as an administrative issue relating to scheduling. To distinguish between a limitation of the right which is of such a *de minimis* nature as not to constitute a violation of s. 14 and one which is more material and which does infringe s. 14, I find it helpful to borrow the language and accompanying rationale developed in the context of the right to be present under s. 650 of the *Criminal Code*, where absences which occur while the case is actually "proceeding" or being "advanced" or where the "vital interests" of the accused are involved are deemed to take place during the "trial" and to be in violation of s. 650. Of course, unlike s. 650 of the *Code* which mandates an accused's presence during the whole of a "trial", s. 14 of the *Charter* uses the more all-encompassing term "proceedings". Nonetheless, I believe that the case law under the *Code* provision is helpful in delineating the kinds of circumstances in which interpretation must comply with constitutional standards, particularly in light

of the purposive and expansive definitions which courts have, on the whole, given to the term "trial" under s. 650 of the *Code*.

One of the more comprehensive overviews of the kinds of occurrences which form part of a "trial" within the meaning of s. 650 of the *Code* is found in M. Proulx, "The Presence of the Accused at Trial" (1982-83), 25 *Crim. L.Q.* 179. Proulx considers three types of actions which courts have found form part of the trial: (1) hearing motions on the admissibility of evidence, (2) communications between the presiding judge, or the Crown, and the jury, and (3) taking the court to view a person, place or thing. Proulx notes at p. 189 that the jurisprudence under s. 650 of the *Code* has evolved so as to draw a distinction between acts which are considered to be an integral part of the trial itself versus purely administrative acts which, if undertaken in the absence of an accused, would have no prejudicial effect on the proceedings. Indeed, a distinction of this nature was expressly put forward in *Hertrich, supra*. Martin J.A. recognized at p. 539 of his reasons that a communication between the trial judge and the jury on an administrative matter, such as the judge telling the jury that if they could not reach a verdict they would stay at a hotel and resume deliberations the next day, would not concern the vital interests of the accused and, therefore, would not be recognized as part of the "trial" for the purposes of s. 650 of the *Code*.

The need to distinguish between material and immaterial parts of proceedings when protecting an accused's right to be present and to have the assistance of an interpreter is a constant refrain in the case law. For example, in *Reale, supra*, where s. 650 (then s. 577) of the *Code* and s. 2(g) of the *Canadian Bill of Rights* were in issue, the Ontario Court of Appeal found, at p. 349, that the right to interpreter assistance extended to "every essential part of the proceedings" (emphasis added),

including, in that case, the judge's charge to the jury. In *Hertrich, supra*, the Ontario Court of Appeal interpreted the s. 650 *Code* requirement of presence at a trial in terms of an accused having first-hand knowledge of everything that could involve his or her vital interests, including interviews with individual jurors conducted by the judge to determine bias. The case I find most useful in helping to distinguish between those parts of the proceedings which must be fully interpreted pursuant to s. 14 of the *Charter* and those which need not be is *Meunier v. The Queen* (1965), 48 C.R. 14 (Que. C.A.), aff'd [1966] S.C.R. 399, one of the leading authorities on the operation of s. 650 of the *Code*. In *Meunier*, the accused was charged with perjury. While he was testifying, the trial judge asked him to leave the courtroom so that a question pertaining to the admissibility of evidence he was about to give could be argued in the presence of counsel. With respect to the scope to be given to the term "trial", Casey J.A., for the majority of the Quebec Court of Appeal, suggested at p. 17 that the relevant question should be: "whether the Court proceeded, whether it did anything of a nature to advance the case, in the absence of the [accused]" (emphasis added). In the result, Casey J.A. ruled that the judge's action was a violation of the accused's right to be present at his trial, and in an order upheld by this Court, quashed the conviction and directed that a new trial be held.

By embracing for the purposes of s. 14 of the *Charter* the language of "advancing the case" and its underlying rationale found in *Meunier* and subsequently developed in the case law under s. 650 of the *Code*, I am not suggesting that there is any magical or fixed meaning to this phrase. Indeed, I would agree with the Ontario Court of Appeal's observations in *R. v. Grimba* (1980), 56 C.C.C. (2d) 570 (Ont. C.A.), a case where s. 650 (then s. 577) of the *Code* was held to have been contravened when the accused was twice excluded from the courtroom during his re-examination while

arguments took place and rulings were made regarding admissibility of evidence. With respect to the phrase "advancing the case", Zuber J.A., writing for the Court of Appeal, stated at p. 574:

I cannot think that this phrase was intended to be definitive. It is one way of putting the essential question of whether or not the trial continued and it is of little consequence whether the continuance embraced the adduction of evidence, the presentation of argument, rulings on evidentiary points, the address to the jury, etc. [Emphasis added.]

My intention is simply to make it clear that where a lack of or lapse in interpretation occurs in respect of some purely administrative or logistical matter which does not involve the vital interests of the accused, such as scheduling or agreeing to a recess, this will not be a violation of s. 14 of the *Charter*. Indeed, to say it was a violation would trivialize the right to interpreter assistance protected under the Constitution.

In determining whether the alleged deviation in interpretation was part of an occurrence which actually served in some way to "advance the case", one must consider whether there was an unfolding or development in the proceeding with respect to a point of procedure, evidence and/or law. One is not looking to the effect of the occurrence in question -- i.e., whether it proved to be to the advantage of one side or the other, such as where evidence sought to be excluded by one side is ruled inadmissible. Rather, one is looking to whether anything with a bearing on the procedural and substantive rights of the parties -- i.e., their "vital interests" -- has taken place. For instance, in *Meunier, supra*, counsel's argument on the motion was part of the "trial" and should not have been conducted in the absence of the accused, irrespective of whether or not the defence actually won the motion objecting to the admission of certain evidence. Likewise, in *Grimba, supra*, no distinction was made

between two rulings on evidentiary points, one of which had been decided in favour of the accused and the other against him -- both were considered part of the trial. And in *Hertrich, supra*, the fact that the trial judge eventually ruled that the jurors were not biased and dismissed the defence's motion for a mistrial was not deemed relevant to the question of whether the accused's right to be present had been violated while the judge interviewed the jurors in the absence of the accused.

(iv) Prejudice

With respect to the question of what has to be established by the party asserting a violation of s. 14 of the *Charter*, I wish to make one final comment. In my view, it is crucial that, at the stage where it is being determined whether an accused's s. 14 rights were in fact violated, courts not engage in speculation as to whether or not the lack of or lapse in interpretation in a specific instance made any difference to the outcome of the case. To second-guess the defence's strategy in a particular case, or to ponder the utility of proper interpretation, is an inherently dangerous exercise. It is impossible to know for sure what would have happened if an accused had been provided with full and contemporaneous interpretation of the proceeding in question. For example, one can never really know what might have been triggered in an accused's mind had he or she received the interpretation to which he or she is entitled under s. 14 of the *Charter*.

Section 14 expressly guarantees the right to the assistance of an interpreter when certain conditions precedent are met. Nowhere does it require or suggest that an *ex post facto* assessment of prejudice to an accused's right to full answer and defence be carried out before a violation of the right can be found. Furthermore, the

right under s. 14 of the *Charter* is one held not only by accused persons, but also by parties in civil actions and administrative proceedings and by witnesses. If the right to interpreter assistance were based exclusively on the right to make full answer and defence and on avoiding prejudice to that right, there would be no reason for parties in non-criminal proceedings as well as witnesses to be separately guaranteed the right.

Section 14 guarantees the right to interpreter assistance without qualification. Therefore, it would be wrong to introduce into the assessment of whether the right has been breached any consideration of whether or not the accused actually suffered prejudice when being denied his or her s. 14 rights. The *Charter* in effect proclaims that being denied proper interpretation while the case is being advanced is in itself prejudicial and is a violation of s. 14. Actual resulting prejudice is a matter to be assessed and accommodated under s. 24(1) of the *Charter* when fashioning an appropriate and just remedy for the violation in question. In other words, the "prejudice" is in being denied the right to which one is entitled, nothing more.

(v) Waiver

In light of the fact that the right to interpreter assistance is not only a fundamental constitutional guarantee in its own right, but also an important means of ensuring a full, fair and public hearing, something which is separately protected under ss. 7 and 11(d) of the *Charter*, it follows that s. 14 *Charter* rights will be more difficult to waive than may formerly have been the case under the common law and under statutory instruments, such as the *Criminal Code* and the *Canadian Bill of Rights*. Indeed, there will be situations where the right simply cannot, in the greater public

interest, be waived. This has already been recognized under the common law in the two early cases of *Kwok Leung, supra*, and *Lee Kun, supra*. In both cases, the courts imposed definite restrictions on the possibilities for valid and effective waivers of the right to an interpreter, whether or not the accused was represented by counsel. Gompertz J. in *Kwok Leung*, at pp. 174-75, explained the rationale for so limiting waiver as follows:

... while in civil cases the rules of evidence may be waived by consent of the parties, in a criminal case, these rules are matters *publici juris* and cannot be so dispensed with. On a criminal trial not merely the single person accused has an interest at stake, but every other subject of the Crown is concerned in seeing that the prisoner is not deprived of life or liberty, except under the whole of the safeguards prescribed by law.

In other words, it is simply beyond the bounds of a civilized society such as ours to permit a person charged with a criminal offence and facing deprivation of liberty who genuinely cannot speak and/or understand the language of the proceedings to dispense either wittingly or unwittingly with the services of an interpreter.

Where waiver of the right to interpreter assistance is possible, the threshold will be very high. In *Korponay v. Attorney General of Canada*, [1982] 1 S.C.R. 41, this Court made it clear *per* Lamer J. (as he then was) that to be valid, waiver of a statutory procedural right has to be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that waiver will have on those rights. This standard for a valid waiver has subsequently been adopted in the context of the *Charter*, specifically with respect to s. 10(b), which guarantees the right to retain and instruct counsel upon arrest or detention: see, e.g., *R. v. Evans*, [1991] 1 S.C.R. 869, *per* McLachlin J., at pp. 892-94. In the specific case

of waiver of the s. 14 right to interpreter assistance, I would add to existing safeguards the following condition. The waiver should be made personally by the accused, if necessary following an inquiry by the court through an interpreter to ensure that the accused truly understands what it is he or she is doing, unless counsel for the accused is fluent in the accused's language or has communicated with the accused through an interpreter before coming to court and satisfies the court that the nature of the right and the effect on that right of waiving it have been explained to the accused.

The necessity for personal waiver of the right to interpreter assistance under s. 14 of the *Charter* is illustrated by the American case of *Aguilar, supra*. In that case, the majority of the Supreme Court of California rejected the argument that defence counsel's consent to the use of the defendant's interpreter to translate testimony for the benefit of the court amounted to a waiver of the right to an interpreter. The court found that there was no indication in the record that the defendant had personally made a voluntary and intentional waiver, and held that mere acquiescence by counsel did not waive the right to interpreter assistance. The fact that the very interchange that produced the apparent waiver had involved the court, the prosecutor, the interpreter and defence counsel and had taken place entirely in English was one of the reasons why the court maintained that waiver should be personal. In other words, the very real potential for misunderstandings stemming from language difficulties, even where an accused is represented by counsel, underscores the need for a personal waiver from the accused of his or her right to interpreter assistance.

(vi) Summary of Conclusions

The scope of the right to interpreter assistance guaranteed by s. 14 of the *Charter* may be stated in the following broad terms. The constitutionally guaranteed standard of interpretation is not one of perfection; however, it is one of continuity, precision, impartiality, competency and contemporaneousness. An accused who does not understand and/or speak the language of the proceedings, be it English or French, has the right at every point in the proceedings in which the case is being advanced to receive interpretation which meets this basic standard. To establish a violation of s. 14, the claimant of the right must prove on a balance of probabilities not only that he or she was in need of assistance, but also that the interpretation received fell below the basic, guaranteed standard and did so in the course of the case being advanced. Unless the Crown is able to show on a balance of probabilities that there was a valid and effective waiver of the right which accounts for the lack of or lapse in interpretation, a violation of the right to interpreter assistance guaranteed by s. 14 of the *Charter* will have been made out. While there will be circumstances in which waiver of the right to interpreter assistance will not be permitted for reasons of public policy, in situations where waiver is possible, the Crown must not only show that the waiver was clear and unequivocal and made with a knowledge and understanding of the right, but also that it was made personally by the accused or with defence counsel's assurance that the right and the effect on that right of waiving it were explained to the accused in language in which the accused is fully conversant.

(c) *Application*

At the outset of the appellant's trial, it was accepted that the appellant was in need of the assistance of an interpreter in order to follow the proceedings. In the course of making some brief inquiries about the appellant's facility with the English

language, the trial judge learned from defence counsel that she had, up to that point, been taking instructions through the interpreter. When asked by the trial judge whether he had any objection to the interpreter, counsel for the Crown replied that he did not. After being asked by the trial judge whether he had previously served as an interpreter and answering that he had, Mr. Nguyen was duly sworn as an interpreter. Mr. Nguyen was instructed by the trial judge to sit beside the appellant in order to translate the proceedings to him and to advise defence counsel. During the trial, the trial judge was sensitive to the presence of the interpreter and, on a number of occasions, asked witnesses to slow down in order to allow Mr. Nguyen to do his job.

The question here is whether the appellant was denied his s. 14 *Charter* rights in the course of his trial. Specifically, was the appellant's right to interpreter assistance violated when the interpreter testified as a defence witness and, rather than giving his answers in English and Vietnamese, simply provided summaries in Vietnamese of his testimony and, in the case of a brief exchange with the trial judge, failed to provide any interpretation whatsoever? To answer this question, the analytical framework developed above must be applied to the facts of this case.

For ease of reference, I have reproduced the relevant portion of the transcript which starts immediately after Mr. Nguyen was sworn as a witness and took the stand. I have also inserted at the appropriate points a verbatim translation back into English of the interpretation which was provided in summary form to the appellant (based on the affidavit sworn by Mr. Nguyen and admitted into evidence by the Court of Appeal below).

DIRECT EXAMINATION

Q. Mr. Nguyen, you're familiar with Mr. Tran?

A. Before I met him in this case I only met him in the Vietnamese New Year. Like we have a community -- a small community so we usually celebrate the Vietnamese New Year so that's the first time I met him and --

Q. Did you know him in the fall of 1990?

A. Oh yes. Last year, that was the first time when I see him. This case begin, yeah.

Q. What can you say, if anything, about Mr. Tran's weight at the time you saw him in the fall of 1990?

A. About his weight, I think he tend to be slimmer. But very slight slimmer only about five pounds but, like I said, I couldn't tell from the first. He wearing -- if he wearing suit now. But when I first met him in the fall last year he wearing just a jacket. I think probably the difference is the belly down here. I think that's probably the difference.

Q. So you're saying very slight, is what you said?

A. Yeah.

DEFENCE COUNSEL Thank you, Mr. Nguyen.

THE COURT Perhaps you could just say that in Vietnamese.

[EVIDENCE TRANSLATED INTO VIETNAMESE]

[Translation according to affidavit: "I just testified that you are thinner than last year, probably five pounds less. Your face hasn't changed at all."]

CROSS-EXAMINATION

CROWN COUNSEL I'm not trying to be funny by this question now, Mr. Nguyen. The -- you didn't have scales. I mean you weren't weighing him to say as if like what he weighs then and what he weighs now, correct?

A. No.

Q. No. And would I be correct in saying it's -- if he was arraigned approximately a year ago today, or close to it, a year ago, you -- the first time to think back to that date as to what his weight would be like is today, is that correct?

A. [No audible response.]

Q. Your first efforts to try to think back to what this gentleman looked like back last year --

A. Yes.

Q. -- Around this -- October of last year, is today. That's the first time to try to throw your mind back to then.

A. Yeah.

Q. Okay.

A. Oh, again, I think in -- after the fall and after that couple of months he went to another court on Spring Garden. That's another time when I met him.

Q. Okay. No, but what I mean is your first effort to try to think back to how much or what his weight might have been -- the first time to ever think about what his size might be or what his weight might be is today to try to think back to last year in October.

A. Yeah.

Q. My explanation is, this is the first you thought of to try to think back as to what his weight was back then.

THE COURT He said that's the first he thought about it, today.

CROWN COUNSEL Yeah, okay. I'm just trying to be fair. You better translate that.

[EVIDENCE TRANSLATED TO VIETNAMESE]

[Translation according to affidavit: "The Crown Prosecutor questioned me about my memory on your weight and the time that I tried to think back about it."]

THE COURT When you say the "fall", you're talking about October, aren't you? At the time of the arraignment.

MR. NGUYEN No, I think that's the November -- like I said --

THE COURT In November.

MR. NGUYEN Before the Vietnamese New Year but --

THE COURT I see. So you didn't really know him before November.

MR. NGUYEN No, no. I never really knew him.

THE COURT You didn't know him on the 22nd of September 1990.

MR. NGUYEN Oh, no. I don't know him. I only know him in the Court.

THE COURT Thank you.

THE WITNESS WITHDREW

Since I am satisfied that the appellant did not understand or speak English, the language of the proceedings, and, therefore, that he was in need of interpreter assistance throughout his trial as found by the trial judge, the first step in the analysis will be to determine whether there was in fact a departure from the general standard of continuous, precise, impartial, competent and contemporaneous interpretation guaranteed by s. 14 of the *Charter*. In my view, there is no doubt that the interpretation of the proceedings in which Mr. Nguyen was involved as a witness fell well below what it should have been.

First, the appellant did not receive continuous interpretation of all of the evidence at his trial. Rather, the questions posed to and answers given by Mr. Nguyen were distilled and condensed into two, one-sentence summaries. Moreover, there is nothing in the record to suggest that the interpreter's exchange with the judge was translated at all, not even in summary form. In other words, the requirement of continuity was not complied with.

Second, the interpretation provided to the appellant was not precise. Not only was it completely missing in the case of the interchange with the judge, but also the one-sentence summaries which were provided failed to convey everything that had been said. In addition, the first summary was incorrect in that it referred to something which had not in fact been said. That is, Mr. Nguyen told the appellant that he had

testified that the appellant's "face hasn't changed at all". However, nowhere in Mr. Nguyen's actual evidence was the appellant's face mentioned.

Third, while there is no reason to doubt the actual impartiality or objectivity of the interpretation provided by Mr. Nguyen, the practice of having an interpreter act as both a witness and an interpreter is one which should be avoided in all but exceptional circumstances (e.g. where there is nobody else who can testify on the matter in question). In the rare event that such a dual role becomes necessary, it is the court's responsibility to make it clear that the interpreter is no longer serving in his or her capacity as an officer of the court and to appoint another interpreter for the remainder of the proceedings. Otherwise, having the interpreter double as a witness may give rise to a reasonable apprehension of bias, not to mention practical and logistical difficulties with respect to the interpretation being provided.

Lastly, the timing of the interpretation was unsatisfactory. It should have occurred contemporaneously with the asking of questions and the giving of answers. Indeed, at the outset, both the trial judge and defence counsel instructed the interpreter to give his answers in English and Vietnamese. However, these instructions were disregarded by Mr. Nguyen, who failed to provide consecutive interpretation.

To summarize, the interpretive assistance which was furnished to the appellant at the stage in the proceedings when the interpreter was on the witness stand was clearly deficient. At a minimum, it was neither continuous, precise nor contemporaneous. There is no doubt in my mind that it fell below the general standard of interpretation which is protected under s. 14 of the *Charter*. The next question then is whether the lapses in interpretation occurred in the course of the case being

advanced. While the Court of Appeal below was correct in saying that the assistance provided to the appellant fell short of the "ideal standard", in my respectful opinion, it was wrong not to recognize that this lapse was a significant one which infringed the appellant's s. 14 *Charter* rights.

The lapses in interpretation which occurred were not trivial or *de minimis* in nature. Rather, they occurred at a point when the appellant's vital interests were clearly involved and, therefore, the case was being advanced. The problems with the interpretation arose during the testimony of a witness. It is axiomatic that an accused has the right to confront all witnesses and to be meaningfully present while evidence is being adduced, be it for or against the accused. In addition, the evidence given by Mr. Nguyen covered a topic of considerable importance to the appellant -- namely, the issue of identification upon which his entire defence was built. The details of Mr. Nguyen's testimony concerning the appellant's weight were vital. By simply being given one-sentence summaries of the evidence, the damage that had been done to Mr. Nguyen's testimony in cross-examination and in the exchange with the trial judge was not conveyed to the appellant. The trial judge's questions to the interpreter and the answers he received indicated that the interpreter did not know the appellant until two months after the alleged assault. In other words, the interpreter's evidence was not probative of the accused's weight at the time of the offence. Moreover, the first one-sentence summary which the appellant received was misleading. By telling the appellant that he had testified that the appellant's face had not changed at all, when in fact he had said no such thing, the interpreter may have left the appellant with the impression that his evidence would cover concerns about fluctuations in his weight (since the complainant's identification was based on a photo line-up).

As a consequence of not being fully informed in a timely fashion of what was actually being said, the appellant was not in a position to instruct his counsel with respect either to re-examination of the interpreter, or to calling another witness who might have been able to testify about his weight at the time of the alleged offence. If, for example, another witness had been called and been credible, that witness's evidence might have raised the necessary reasonable doubt required for an acquittal. The uncertainty associated with the question of what might have happened had the accused received the quality of interpretation to which he was entitled under s. 14 of the *Charter* demonstrates that courts must not engage in speculating about the utility or non-utility of proper interpretation. What is important is that the appellant was in need of interpreter assistance and was denied at a point when the case was clearly being advanced the standard of assistance to which he was entitled and which he is presumed to have required in order to understand the proceedings.

With the greatest of respect, I simply cannot agree with the Court of Appeal that, because the evidence which was not properly interpreted proved in the end to be of minor probative value, the appellant was not deprived of his right to be present or to make full answer and defence. The evidence concerning the appellant's weight was relevant to the central issue in the case, that of identification. In his reasons for judgment, the trial judge discussed at some length the question of the appellant's weight at the time of the alleged offence and ultimately relied on the identification evidence of the police officer and the complainant. Had there been credible evidence from the defence that the accused was not "fat" at the time of the assault, this evidence might have created a reasonable doubt in the trial judge's mind. For the Court of Appeal to say after the fact that the poor interpretation received by the appellant made no difference to the outcome of the case is, in my opinion, to

engage in the kind of second-guessing and speculation which I have suggested is inappropriate in determining whether there has been a breach of s. 14 of the *Charter*. Irrespective of whether the interpreter's evidence actually affected the appellant's right to full answer and defence, something we cannot know with certainty, the appellant was entitled under s. 14 to hear fully and contemporaneously what was being said on the topic of his weight.

I also wish to say that even though it was the defence which called the interpreter to the stand and not the Crown, this is not relevant to whether or not the interpretation provided in this case fell below the guaranteed standard at a point when the case was being advanced (although in a different fact situation it might have some impact on the question of waiver or remedy). In addition, I note that the Court of Appeal treated the lack of an affidavit from the appellant indicating that he had not understood Mr. Nguyen's evidence as being of some relevance. This point was picked up on by counsel for the Crown who argued before this Court that, in light of the fact that the appellant apparently understood some English, he was under an obligation to show that he did not actually understand what had been said while Mr. Nguyen was on the witness stand. I cannot accept this argument. It seems to me that, once an accused is found by a trial judge to be in need of the assistance of an interpreter, as was found here, the accused should be presumed to be in need from that moment on. Therefore, the assumption should be that, but for the proper assistance of an interpreter, the accused will not understand the proceedings.

The next issue to be decided is that of waiver. In my view, the facts of this case do not support the Crown's argument that the appellant waived his guaranteed right to continuous, precise, impartial and contemporaneous interpretation of Mr.

Nguyen's evidence. There was no clear or unequivocal waiver. At the time of calling the interpreter to the witness stand, defence counsel acknowledged that the situation was an unusual one and that she could have sought an adjournment in order to find another witness to testify as to the appellant's weight, but had instead agreed with the Crown that it was best to complete the trial that day. Following the interpreter's equivocation in the face of the trial judge's request that he properly interpret his testimony to the appellant, defence counsel indicated that answers should be given in English and Vietnamese. The relevant passage in the transcript reads as follows:

THE COURT Perhaps then, Mr. Nguyen, you will give your answers both in English and in Vietnamese so that the accused--

MR NGUYEN Oh yeah. I will explain to him later because it's only brief what--

DEFENCE COUNSEL No, give your answers in both languages, that would be more accommodating. [Emphasis added.]

As it turned out, these requests by both the trial judge and defence counsel were ignored by the interpreter.

There is also no indication on the record that the appellant personally understood the scope of his right to interpreter assistance and what he was giving up, and that the waiver was made by him personally. Nothing in the record suggests that the nature of the right and the consequences of waiving it had been explained to the appellant through the interpreter. Indeed, the exchange which immediately preceded the start of the interpreter's testimony occurred entirely in English. In my view, the trial judge fell into error when he did not conduct an inquiry through the interpreter to ensure that the appellant appreciated that he had a right to full and contemporaneous interpretation of all of the proceedings and that he was about to lose this right.

Finally, I should say that I am left in some doubt as to whether this was even a case where it was open for the appellant to give a valid and effective waiver in light of his acknowledged difficulty with English. This, however, would have been a matter for the trial judge's discretion, after conducting an inquiry into the appellant's appreciation of what was taking place and his facility with the English language.

To conclude, I find that the appellant needed an interpreter, that the standard of interpretation provided to him fell well below what was required under s. 14 of the *Charter*, and that the lapse in interpretation which occurred took place at a point in the proceedings when the case was clearly being advanced. In addition, the Crown has not satisfied me that there was a valid and effective waiver of the right in this case.

(d) *Remedy*

The final issue to be decided is that of remedy. By proceeding under s. 14 of the *Charter*, it is possible to fashion an "appropriate and just" remedy tailored to the particular circumstances of the case under s. 24(1) of the *Charter*. Section 24(1) provides:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

I cannot accept the Crown's argument that, if there was a violation of s. 14 of the *Charter* in this case, it was of such a minor, technical nature that the curative proviso of the *Criminal Code*, s. 686(1)(b)(iii), should be applied and the appeal dismissed.

In my view, neither s. 686(1)(b)(iii) nor, I might add, s. 686(1)(b)(iv) have any application when what is in issue is a breach of s. 14 of the *Charter*. The relevant parts of s. 686(1) of the *Code* read as follows:

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

...

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

(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, 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;

Section 686(1)(b)(iii) is designed to avoid the necessity of setting aside a conviction for minor or "harmless" errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred. Section 686(1)(b)(iv), a relatively new provision of the *Code* introduced in 1985, is also designed to permit a court to dismiss an appeal from a conviction, but in cases of procedural irregularity where the Crown can show that the accused suffered no prejudice. In other words, where the fairness of the proceedings has not been detrimentally affected, the *Code* effectively permits the error in question to be "cured", thereby allowing the appeal from conviction to be dismissed.

While denial of a *Charter* right constitutes an error of law, it is by its very constitutional nature a serious error of law, and certainly not one which, for *Criminal Code* purposes, can be characterized as minor or harmless, or as a "procedural irregularity". Therefore, I find as a matter of law that a violation of s. 14 of the *Charter* precludes application of both s. 686(1)(b)(iii) and s. 686(1)(b)(iv) of the *Code*. To the extent that a particular *Charter* violation is more or less serious and/or prejudices an accused to a greater or lesser degree, this raises remedial issues which fall squarely to be decided under s. 24(1) of the *Charter*, not under the *Criminal Code*.

Importantly, s. 24(1) of the *Charter* offers the advantage of remedial flexibility, something which has not always been the case with the right to be present under s. 650 of the *Code*, where the remedial consequences of a breach of this right have tended to be more rigidly defined: *Vézina, supra, per* Lamer J. (as he then was), at pp. 13-14. That is, denials of the right to be present under s. 650 of the *Code* have generally been considered to be fatal errors depriving courts of their jurisdiction, thereby precluding application of s. 686(1)(b)(iii) of the *Code*: *Barrow, supra, per* Dickson C.J., at pp. 718-19, *Meunier, supra*, at pp. 16-17, and *Proulx, supra*, at pp. 182-84. (However, without commenting one way or the other on the correctness of their decisions, I note that several courts of appeal have relied on the new procedural irregularity proviso, s. 686(1)(b)(iv), to avoid having to order new trials in cases involving breaches of s. 650 : see, e.g., E. G. Ewaschuk, *Criminal Pleadings & Practice in Canada* (2nd ed. 1987), vol. 2, at 23:8105.)

As a general rule, the appropriate remedy under s. 24(1) of the *Charter* for a breach of s. 14 of the *Charter* will be the same as it would be under the common law and under statutory guarantees, such as s. 650 of the *Code* or s. 2(g) of the *Canadian*

Bill of Rights -- namely, a re-hearing of the issue or proceeding in which the violation occurred. For example, where the violation takes place within the trial proper, it will generally be necessary to quash the conviction being appealed from and to order a new trial. Where, on the other hand, the violation takes place in some discrete and severable part of the proceedings, such as in a bail or sentencing hearing, a new hearing of the issue will usually be the fitting remedy under s. 24(1). However, it is important to recognize that s. 24(1) empowers a court to do what it considers to be "appropriate and just" in the circumstances. The remedial flexibility which is provided for in s. 24(1) may allow a court, in the right circumstances, to grant a remedy which either exceeds or falls short of the remedy I have suggested will normally be appropriate in cases where s. 14 of the *Charter* has been violated (i.e., a re-hearing of the issue).

One of the relevant considerations in adjusting the remedy to fit the circumstances of a particular violation of s. 14 will be that of prejudice. For instance, where an accused is able to demonstrate that he or she has suffered or will suffer prejudice over and above that which flows directly from the violation itself, such as having to incur the financial costs associated with a new trial, a court may find it appropriate to award an additional remedy under s. 24(1), such as damages. Likewise, where a violation of the right to interpreter assistance has occurred but has already been remedied in the course of the proceedings themselves, such as where a break in interpretation occurred and the court was able to "cure" the error by having the court reporter read back the missing parts to allow the interpreter to translate them, a court may decide that it is not necessary under s. 24(1) to order a new hearing of the issue.

In sum, recourse should be had to s. 24(1) of the *Charter*, not to the curative provisos of the *Code*, when dealing with an infringement of the right to interpreter assistance. While the remedy for a violation will normally be an order directing a new hearing of the issue or proceeding in which the violation occurred, s. 24(1) allows a court to tailor the remedy to the particular circumstances of the violation. In light of the fact that the violation of s. 14 of the *Charter* in this case occurred in the trial proper, and not in some discrete and severable part of the proceeding, I find that the appropriate and just remedy under s. 24(1) of the *Charter* is to grant the appellant's request for an order allowing the appeal, quashing the conviction and directing that a new trial be held.

(e) *Disposition*

In conclusion, the appellant's constitutionally guaranteed right to interpreter assistance under s. 14 of the *Charter* was infringed. The appeal is, therefore, allowed, the appellant's conviction quashed, and a new trial ordered.

Appeal allowed and new trial ordered.

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