APPENDIX I

Canada – a study in legal bilingualism.

Language rights under the Canadian constitution.

The Canadian Charter of Rights and Freedoms Act 1982, "the Charter", (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11) Sections 16- 22, which are entitled "Official languages of Canada", set out the status of English and French in various settings, including the court room. The Charter states as follows:

"OFFICIAL LANGUAGES OF CANADA

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

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

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is

> *continued by virtue of any other provision of the Constitution of Canada.*
>
> *22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French."* (emphasis added)

The province of New Brunswick is referred to specifically in the Charter. New Brunswick, along with Ontario, Quebec and Nova Scotia, was one of the first provinces to join together to form the Dominion of Canada in 1867. The New Brunswick Commission for Official Languages, comments that with the enacting in 1969 of the New Brunswick Official Languages Act it was made Canada's first, and only, bilingual province. Certain language rights in this province were then entrenched at a federal level by the Charter of Rights and Freedoms. The obligations flowing from these rights apply to the Legislature and it's institutions as well as the government of New Brunswick. As part of the Canadian constitution, any law or government action inconsistent with the Charter is unconstitutional (see: http://www.officiallanguages.nb.ca/publications-links-other/history-official-languages). Michel Helie at page 381 of his article: Michel Y. Hélie, "Michel Bastarache's Language Rights Legacy" (2009), 47 S.C.L.R. (2d) 377;

> *"As an influential and active minority language rights advocate with broad roots in New Brunswick, it is difficult not to see Michel Bastarache's influence in these constitutional provisions*.* [Footnote: *Michel Bastarache is described as "one of the artisans of New Brunswick's bilingual status" in The Great Names of the French-Canadian Community. …See online: <http://franco.ca/edimage/grandspersonnages/en/carte_v04.html>] *As he wrote in 1991:*
>
> > *Fighting assimilation, therefore, requires a degree of linguistic institutional completeness which, I submit, can only be achieved through meaningful constitutional protection."* [Michel Bastarache, "Language Rights in the Supreme Court of Canada: The Perspective of Chief Justice Dickson" (1991) 20 Man. L.J. 392, at 392]

Language Rights in Canada were born out of a historical and political compromise between its two founding peoples; the British settlers and the French settlers. The initial status of language rights in the Constitution Act of 1867 was discussed by Hélie at page 379;

> *"With small deference to the need to ensure a modicum of accommodation for the participation of the minority Francophone population in federal institutions, section 133 of the Constitution Act, 1867 guarantees the right to use either French or English in the federal Parliament and federally established courts, as well as the requirement that federal statutes be published in both languages.*
>
> *Even the modest guarantees under section 133 were contingent upon Quebec accepting to be subject to the same strictures in regard to its provincial assembly, courts and statutes. Although section 133 was not made applicable to any of the other original uniting provinces, it was extended to Manitoba upon its entry into Confederation.*
>
> *From this perspective of Confederation, the survival of the French language and culture would depend on the people and government of Quebec. Developments after Confederation intended to do away with the use of the French language in other parts of the country, notably in New Brunswick, Ontario and Manitoba, would confirm this view of Confederation to the dismay of many French-Canadians. In response, an alternative interpretation of Confederation developed which was premised on a compact between two nations (or two founding peoples): English Canada and French Canada."*

The Official Languages Act 1969 (OLA), Hélie comments, was enacted to provide *"a degree of official bilingualism at the federal level throughout Canada"* and was a response to a report entitled "The B & B Report", officially known as Hugh R. Innis, Bilingualism and Biculturalism: An Abridged Version of the Royal Commission Report (Ottawa: McClelland and Stewart Ltd., 1973). On commenting upon this report Hélie says;

> *"The meaning of the equality of both official languages is not self-evident. For instance, the right to receive services from the federal government in the official language of choice was subject to demographic requirements. The B & B Commission sought an approach "determined by the realities of Canadian life". It adopted "an approach aimed at attaining the greatest equality with the least impracticality". This meant that services should be available*

> *"wherever the minority is numerous enough to be viable as a group"."* (emphasis added)

It was this approach that influenced the 1969 Act.

The Canadian Charter of Rights and Freedoms Act 1982, according to Hélie, "entrenched the key aspects of the OLA". Hélie noted one significant departure from the OLA;

> *"The most noteworthy change is the absence of any express reference to Quebec in sections 16 to 22 of the Charter and the presence of special provisions under which New Brunswick subjects itself to language rights equal to and beyond those applicable to the federal government. For instance, under section 20(2), New Brunswick must provide services in both official languages without reference to demographic criteria. More significantly still, section 16.1 (added in 1993) provides that the English and French "linguistic communities" (not merely the languages) have "equality of status and equal rights" including:*
>
> > *"… the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities."*

Jury trials in Canada.

- How a Francophone jury is assembled.

Regardless of the linguistic demographics of a province, when a trial is to be held, the accused person is entitled to a trial through either of the official languages of Canada, i.e. English or French, this includes a judge and jury that are fluent in the language. British Columbia, a predominantly Anglophone province with a French speaking minority, has provided for this by means of maintaining two jury registers. The Justice website for British Columbia, (which can be accessed at http://www.justicebc.ca/en/cjis/you/juror/french-trials/index.html), provides the following information to potential jurors;

> *"The provincial voters list is used to summon individuals for English-speaking jury trials. Names in the database are picked at random and summonses are issued to those that have been identified. If you are a registered voter in British Columbia, your name and address appears in this database.*

Since 1990, Francophone accused persons in British Columbia have the right to be tried by a judge and jury who speak French. French-speaking jury trials are very rare in British Columbia, with only one, on average, occurring per year. It's important to ensure the French-speaking juror list is updated so that French-language jury trials can be provided whenever possible.

If you are a French-speaking British Columbian and wish to have your name transferred from the current database used for summoning individuals for English-speaking jury trials to the database used for summoning for individuals for French-speaking trials, ***click here****. The information you provide will be kept confidential."* (emphasis added)

A juror list specifically for French-language trials is maintained in British Columbia despite small number of such trials which take place. British Columbia's court services actively recruits for this jurors list by trying to increase the awareness of its existence. The excerpt below was advertised on the Government of British Columbia Newsroom website to potential Francophone jurors in Victoria, British Columbia, on the 20th September 2013.(It can be accessed at: http://www.newsroom.gov.bc.ca/2013/09/bc-calls-for-french-speaking-jurors.html);

"VICTORIA - Are you French-speaking or bilingual and eligible to be a juror? If so, B.C.'s court services invites you to put your name on its French-language jury list. All eligible B.C. voters are listed on the general jury list.

Adding your name to the French-language jury list is as simple as going to the website - www.ag.gov.bc.ca/courts/jury_duty/info/french-trials.htm - and choosing to move your name from the general jury list to the list for French-language trials.

Why It Matters:
Serving on a jury is a civic responsibility that is essential to our justice system. Many British Columbians may be unaware there is a juror list specifically for French-language trials. The website helps expand the pool of eligible bilingual individuals…"

- The importance of the jury trial in Canada Jury Representativeness.

Some academic commentators have looked at this issue. Schuller & Vidmar note; that a change of venue is also an option, in special circumstances, for an accused person who wishes to have the trial conducted in the language that is the minority language of a province: -

Schuller & Vidmar "The Canadian Criminal Jury Trial" (2011), 086 Chi.-Kent L. Rev. 497. At pages 499-500;

> *"LIMITATIONS ON THE RIGHT TO A JURY TRIAL*
>
> *Although the right to jury trial is enshrined in the Canadian Charter of*
> *Rights and Freedoms, that right needs to be understood in the context of the*
> *Criminal Code* [Canada Criminal Code, R.S.C. 1985, c. C-46] ….
>
> *Canada has two official languages, English and French. Section 530 of the Code provides that an accused has the right to be tried by a judge and jury who speak the language of the accused, or, if special circumstances warrant it, a judge and jury Section 531 provides that a change of venue to a different territory within a province may be made in order to obtain a jury with the required language skills. Additionally, as will be discussed in more detail below, exceptions are made for aboriginal peoples in Canada's arctic regions…. When summary conviction offenses are taken into account, the vast bulk of criminal cases, at least ninety percent, are tried by judge alone. That said, the institution of the criminal jury continues to occupy an important place in Canadian law."* (emphasis added)

Few cases have been taken regarding jury repetitiveness in Canada. The cases which have been taken have centred on gender and irregularities in the selection of aboriginal citizens (page 501);

> *"Litigation based on an unrepresentative jury pool is sparse. At the start of the trial the prosecution or defence may challenge the whole jury array on the grounds of fraud, partiality, or misconduct, but such challenges have been infrequent. In R. v. Catizone and R. v. Nepoose new arrays were ordered when too few women appeared on the original arrays. In R. v. Nahdee, the accused successfully challenged the array because of irregularities in the selection of aboriginal persons, and in R. v. Born with a Tooth the Crown*

prevailed on a challenge to irregularities in the selection of aboriginal citizens. However, challenges to arrays on the grounds that they did not contain a sufficient proportion of persons of a racial or ethnic group have tended to fail if there were no irregularities in the selection process itself. If the challenge to the array is not made at the start of trial, section 670 of the Criminal Code states that any irregularity in the summoning or empanelling of the jury shall not be grounds for reversing a verdict. It is not clear how successful an appeal would be if strong evidence showing deliberate racial or gender biases in selection were produced after a conviction."

At page 504, while commenting on peremptory challenges, Schuller & Vidmar note that legal issues on jury representativeness are at a minimum, given the case law and Criminal Code;

"Given the tighter controls in Canada on the trial process, coupled with
the restrictive pretrial questioning of jurors and the fact that legal issues of
jury representativeness are minimized by case law and the Criminal Code,
peremptory challenges have not been as controversial as they have been in
England or the United States."

- There is a right to a trial by jury through either of the national languages of Canada (R v Beaulac).

R v Beaulac [1999] 1 SCR 768 was the second of three cases that marked a significant departure from the preceding case law regarding language rights in Canada. (The other cases were *Reference re Secession of Quebec, [1998] S.C.J. No. 61* and *Arsenault-Cameron v. Prince Edward Island [1999] S.C.J. No. 75*.) The ratio and indeed legacy of *Beaulac* is that language rights are distinct; they are not related to the right to a fair trial or to the ability to conduct a defence in one language or another. They are human rights which are protected in Canada; constitutionally and through legislation. The purpose of giving legal recognition to two official languages was not to ensure fair procedures but to give strong cultural recognition to the minority language of a given province. This was born out of a historical political compromise. Language is a key element of cultural identity and the failure of the State to validate the language rights of citizens renders those rights hollow.

Bastarache J delivered the judgment of the Court and at paragraphs 20 and 22 noted the responsibility such language rights placed on "the system";

> *"These pronouncements are a reflection of the fact that there is no contradiction between protecting individual liberty and personal dignity and the wider objective of recognizing the rights of official language communities. The objective of protecting official language minorities, as set out in s. 2 of the Official Languages Act, is realized by the possibility for all members of the minority to exercise individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees."* (emphasis added)

Paragraph 22;

> *"With regard to existing rights, equality must be given true meaning. This Court has recognized that* ***substantive equality*** *is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada."* (emphasis added)

After *Beaulac* the obligation on a court to provide a trial in the national language chosen by the accused, either French or English, was clear. All a person need demonstrate is the ability to instruct counsel through the chosen language, a fluency in the alternative language is not a matter to be considered (see paragraph 34 of *Beaulac*). It is the obligation of there Government to ensure the proper institutional infrastructure is there to support language rights in official settings. Bastarche J. stated at paragraph 39;

> *"I wish to emphasize that mere administrative inconvenience is not a relevant factor. The avail of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a*

proper institutional infrastructure and providing institution services in both official languages on an equal basis." (emphasis added)

Bastarche J enunciated clearly the origins of such language rights, and at paragraph 34 stated;

"The solution to the problem, in my view, is to at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity Ford, supra, at p. 749. The language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language.... ….The court, in such a case, will not inquire into specific criteria to determine a dominant cultural identity, nor into the language preferences of the accused. It will only satisfy itself that the accused is able to instruct counsel and follow the proceedings in the chosen language." (emphasis added)

The purpose of having two official languages was elaborated upon at paragraph 41;

"The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions." (emphasis added)

APPENDIX II

Irish in European Law (1).

According to the official website of the Commission of the European Union:

> "The European Union has twenty-four official and working languages. They are:
>
> Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish".

According to the official website of the Irish presidency of the EU, 2013:

> "When Ireland joined the EEC in 1973, Irish was a 'treaty' language, although not an official working language. In 2005 the EU Council of Ministers voted unanimously to make Ireland the twenty-first official and working language of the European Union. This decision took effect on 1st January 2007."

This decision of the Council of Ministers was made at the request of the Irish Government. Accordingly, on 1 January 2007 Irish was the national and first official language of Ireland by virtue of Article 8 of the Constitution adopted in 1937. Seventy years later, the Irish Government arranged for it to become an official and working language of the European Union. However, what was described as "a temporary and transitory derogation" was introduced in 2007, according to the

presidency website “because of difficulties in recruiting sufficient numbers of Irish language translators”. This was done by Council Regulation (EU (No. 1257/2010)).

Public Policy on Irish in Ireland.

The present public policy in Ireland in relation to the Irish language is expressed in the “Twenty-Year Strategy for the Irish Language 2010-2030”. This policy commanded cross party support according to the official website of the Department of Arts, Heritage and An Gaeltacht. The same source declares:

> “The strategy is the result of a consultative and research process, including a report commissioned by the Department, The Comprehensive Linguistic Study for the use of Irish in the Gaeltacht (2007) and the report of Coimisíun na Gaeltachta (2002).”

This policy was launched by a Government statement which anticipated the recognition of Irish as an official and working language of the European Union, and stated that that recognition took place “at the request of the Irish Government”.

See:
http://www.taoiseach.gov.ie/eng/News/Archives/2006/Taoiseach's_Speeches_Archive_2006/Launch_of_%E2%80%98The_Irish_Government_Statement_on_the_Irish_Language_2006%E2%80%99,_Farmleigh_House.html

It further declared:

> "As one of the oldest languages in Europe that is still used as a vernacular language, Irish has a special role to play in this tapestry ['the diverse rich tapestry of European culture'] and it is the duty of the Government to ensure that it continues to flourish".

The Statement continued:

> "The Government is committed to the development of the Irish language and the promotion of functional bilingualism, while full recognising the value of English to Irish citizens as the dominant language used in international discourse."

Later in the Statement, and very significantly: it is said:

> "It is a choice for the citizen, whether they wish to interact with the State in Irish or in English".

Even assuming a condition of feasibility as attaching to the immediately previous statement, it is plainly one of the greatest significance. Mr. Ó Maicín wishes to interact with a very important organ of the State, a Court established under the Constitution, in Irish, and this case raises the question of whether or not it is in truth "a choice for the citizen whether they wish to interact with the State in Irish or English", and indeed whether Irish is "… still used as a vernacular language". The State has committed itself to both these propositions.

According to the Oxford English Dictionary the word "vernacular", used as a noun, means "the language or dialect spoken by the ordinary people of a country or region"; used as an adjective it means "the

language spoken as one's mother tongue; not learned or imposed as a second language". I can only say that if indeed, as has been officially declared, Irish "is still used as a vernacular language", that proposition seems quite at variance with others which have been advanced in this case such as the proposition that it is not possible to supply an Irish speaking jury to try the case against Mr. Ó Maicín or the proposition that a jury of Irish speakers would be unrepresentative of the community as a whole.

Mr. Justice Clarke, at para. 2.3 of his judgment observes, quite correctly:

> "Some persons have no option but to be tried before a jury which does not speak their native tongue. In modern Ireland there are many 'new Irish' or others who happen to be in the jurisdiction exercising rights such as the right to work under the European Treaties. Such persons may be able to speak English (or, perhaps, Irish) to a greater or lesser extent but many are not sufficiently fluent that they would wish to give evidence in an important case involving a serious criminal accusation against them other than in their native language. If a person could not ever have a fair trial, as such, unless the decision maker could speak their native language then it would, in practical terms, be impossible to put many such persons on trial".

This is self evidently true but I do not believe it is of any relevance to the present case which is the case of an Irish citizen, a native speaker of the Irish language, charged with an offence allegedly committed in the

Gaeltacht where he was reared. Such a person's case is quite different from that of a non-national, a person who does not speak, or speak sufficiently well, either of the official languages of the State, but who has immigrated voluntarily into the State, notwithstanding that he knows this.

As it happens, the rights of a person such as Clarke J. envisages have been recently and comprehensively dealt with by Directive 2010/64/EU of the European Parliament and of the Council of 20th October 2010. This Directive sets out in comprehensive terms the language rights of a person "who does not speak or understand the language of the proceedings". It is extremely important that the language and other rights of persons in this category are carefully observed, but they are quite different from those of a person in the position of the appellant here. The rights he asserts, in the main, are language rights as opposed to fair trial rights or equality rights. That is not to say that he does not enjoy rights of the latter kinds, but merely that they are distinct from the language rights specifically in question here.

The twenty-four official and working languages of the European Union have been listed above.

In the case of every single one of those languages, other than Irish, the State whose language it is, is capable of conducting criminal trials and other legal proceedings, within its own jurisdiction, in the language which it has made an official and working language of the European Community.

To put this another way, none of these countries maintains as such an official language, not to mention as a “national and first official language” a language in which the organs of that State itself are incapable of conducting routine business.

Apart altogether from the European Union, I raise the question of whether there is a sovereign State anywhere in the world which maintains as its “national and first official language, and as an “official and working language” of the principal international organisation of which it is a member, a language in which its own organs are said *by the State itself*, to be incapable of conducting routine business.

Is there, anywhere in the world, a sovereign independent State which refuses to a native born citizen, a native speaker of the State’s constitutionally enshrined **“**national” and “first official language”, the right to defend himself or herself in that language before a duly

constituted Tribunal of that State, which is capable of understanding the citizen directly? According to the State defendants, Ireland is just such a State. There is no other.

Ninety years after independence, the Irish State itself, in this present case, most discreditably says that Ireland is just such a State. This case is partly about whether that shaming contention is correct. I use these strong terms because Irish has been the State's first official language for three or four entire generations and a compulsory subject in schools for as long. If the State's contention is correct, it evidences a truly dramatic failure of a policy pursued for the whole period of the State's existence, a failure so abject as to be almost without precedent in any area of public policy, here or abroad, contemporary or historic. But I do not believe the State's contention is correct. It is not, on the evidence in this case, at all impossible to provide a jury to try this fairly routine case in Irish. But it requires some action by the State, at minimal or no expense, which it is unwilling to take.

APPENDIX III

Bilingualism rejected by pre-Independence Government.

The essence of this case, in my view, is that the State is constitutionally committed to a policy of bilingualism. This, indeed is the main difference made by the two successive constitutional Articles referenced above, by comparison with the position under British rule. Prior to the coming into force of the first of these Articles, Ireland was judicially held not to be a bilingual country, but to be an *exclusively* English speaking country, in point of law. This case raises the issue whether that position has changed, for a real litigant in real life as opposed to the undoubted change in constitutional theory.

In **McBride v. McGovern** [1906] 2 IR 181, the appellant, Niall McBride, as he was called in the official report, or Niall Mac Giolla Bríde as he called himself, was prosecuted for using a cart on a public road without having his name and residence painted upon it in some conspicuous part of the off-side in legible letters, contrary to s.12(1) of the Summary Jurisdiction (Ireland) Act, 1851. This case was tried in the former Court of Petty Sessions in Dunfanaghy, County Donegal, and the offence was said to have happened in a nearby townland. The complainant proved that the relevant information was not painted on the cart in letters legible to *him* but were painted in letters "*believed to be*

Irish". The complainant "admitted that the letters were of the proper dimensions and that they might be legible to people who could read the Irish language".

It was proved by the appellant that his name and residence were correctly painted on his cart in legible letters and characters of the Irish language. It was further proved that in the district in question the Irish language was spoken by three quarters of the population and a large proportion both spoke Irish and English and a "considerable number" spoke Irish exclusively.

On those facts the Justices of the Peace convicted, and did so on the basis that the information, being painted in Irish, was not in legible letters as required by the Act. But they stated a case at the request of the Defence.

On the hearing of the case stated the appellant was represented by three counsel one of whom was P.H. Pearse. The leading counsel was Timothy Healy K.C., M.P., who did not however address the Court, and may not have been present. The third counsel was P.S. Walsh, B.L., a Donegal native, later President of the District Court of Cyprus and, from 1931, Chief Justice of the Seychelles.

The Crown submitted that:

> "… the Statute had been passed by an English speaking parliament, legislating in the English language, and that the *presumption is that it was intended* that the name and residence should be in the English language and in English characters".

It was emphasised that "*the Irish language has never been officially recognised in this country*" (p.183).

In reply, Mr. Pearse argued that the Statute was one applying "to a bilingual country and therefore there was no presumption that it was intended that the name must be in English or in English characters".

The principal judgment was delivered by Peter, Lord O'Brien of Kilfenora, LCJ.

If "Niall McBride" was known as Niall Mac Giolla Bríde to everyone he had ever met except policemen, magistrates' clerks and other servants of the establishment, the euphoniously-titled Lord O'Brien of Kilfenora was much better known as "Peter the Packer" to everyone *outside* the establishment, and, privately, to not a few within it. This was a wry tribute to his skill, as Crown Prosecutor and later Attorney General in "packing" a jury with those likely to favour a conviction in the fraught

trials of the Land War, in the decade after 1879. Oddly enough, this *soubriquet* was not without a tinge of familiarity, even affection. His contemporary reputation was perfectly caught by the Nationalist barrister and memoirist, Maurice Healy, who wrote in "*The Old Munster Circuit*", after many affectionate recollections of O'Brien: "Pether only just missed being a great man".

O'Brien LCJ said the defendant was called McBride, "whose name in Irish I will not venture to pronounce least my faulty pronunciation might shock the many Irish scholars who take an interest in the case". He upheld the contention of the Crown saying:

> "The characters were not the characters of the language which the Crown and legislature recognise as the language of the United Kingdom *for all legal and official and public purposes*. Parliament conducts its debates in English and legislates in English. The enacting body expresses itself, and the enactment which contain the relevant provision is expressed, in English. English is the language of the Crown; of, as I have said the legislature both in debate and enactment; of all the government administrative and public departments; of the Courts, of the Supreme Courts; of the Courts of Summary Jurisdiction, where the very offence under consideration is to be investigated and, in the eyes of the law, of the Constabulary who, under the 14th Section of the Act, are to take cognisance of the offence."
>
> (Emphasis added)

Notwithstanding "the very ingenious, interesting and, from a literary point of view, instructive arguments of Mr. Walsh and Mr. Pearse", the Court, in the judgment of Gibson J. held that:

> "Counsel have not cited, and I have failed to discover, any statute relating to this country in which Ireland is treated as bilingual and requiring special and distinctive treatment accordingly, or in which recognition was given to the fact that in certain parts of the island the inhabitants used the Irish tongue… for civil purposes [civil, that is, as opposed to Ecclesiastical] *there is no trace in the Statute Book of the recognition of any language but English*".
>
> (Emphasis added)

It is manifest that the conditions of law recited by Lord O'Brien and Mr. Justice Gibson, no longer apply in Ireland. Ireland is now, legally and constitutionally, a bilingual country. It can no longer be said that "complaints under [the Act] are to be heard and determined by Justices who speak [exclusively] in the English language". And indeed there is special statutory provision to the contrary, considered below. Nor is English any longer the exclusive language of the country "for all legal and official and public purposes". This appeal was heard in Irish.

In the reported judgments and argument in **McBride**, there is an unmistakable air of haughty condescension in such phrases as:

> "… in letters believed to be Irish" and
>
> "… the Irish language has never been officially recocognised in this country" and
>
> "… McBride, whose name in Irish I will not venture to pronounce, least my faulty pronunciation might shock the many Irish scholars who take an interest in the case"

And in the entire exert from the judgment of Gibson J.

The question which this case raises is, do all the plangent legal and constitutional changes since 1922 make any difference in practice? Is the country to be regarded for all practical purposes as still mono-lingual in English, with the only concession made to an Irish speaker being that an interpreter will be provided, as an interpreter will be provided to a speaker of any language under the sun, who is haled into court?

McBride v. McGovern was decided in what was constitutionally politically and historically a very different country, almost a different world. This case, in its result, will indicate whether or not the position of an Irish speaker in his own country, and before his own courts, has in fact been altered to his advantage by the manifold changes since 1906. Or are those changes merely window dressing?

Appendix IV

"National and first official language" in European Law.

In **Anita Groener v. Minister for Education and City of Dublin Vocational Education Committee** (Case C - 379/87, judgment of the European Court of Justice 28 November 1989), Ms. Groener, who was a Dutch national, sued the Minister for Education and the Dublin VEC. She objected to a provision which made appointment as a full time teacher of art in a VEC institution conditional on proof of an adequate knowledge of the Irish language. This proof was usually provided by production of a special certificate of competency in Irish.

The European Court was asked for a preliminary ruling under Article 177 of the EU Treaty. Three questions were raised on the interpretation of Article 48(3) of the Treaty (relating to freedom of movement for workers within the community) and Article 3 of Regulation 1612/68 made by the European Council on the 15th October 1968, also relating to the free movement of workers. This latter regulation stated that legal provisions, regulations or administrative actions or practices in a Member State "shall not apply" where they limit application for and offers of employment or the right of foreign nationals to take up and pursue employment, and provides for cognate matters. This latter regulation however is subject to the exception that it is not to

apply "to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled".

At paragraphs 18 and 19 of the judgment the Court of Justice held:

> "As is apparent from the documents before the Court, although Irish is not spoken by the whole Irish population, the policy followed by Irish governments for many years has been designed not only to maintain but also to promote the use of Irish as a means of expressing national identity and culture. It is for that reason that Irish courses are compulsory for children receiving primary education and optional for those receiving secondary education. The obligation imposed on lecturers in the public vocational education schools to have a certain knowledge of the Irish language is one of the measures adopted by the Irish government in furtherance of that policy. The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and the first official language. However, implementation of such a policy must not encroach on a fundamental freedom such as that of the free movement of workers. Therefore, the requirements deriving for measures intended to implement such a policy must not in any circumstances be disproportionate in relation to the aim pursued and the manner in which they are applied must not bring discrimination against nationals of other Member States."

In the **Groener** case, the national rules were found to be proportionate, at para. 21:

> "It follows that the requirement imposed on teachers to have an adequate knowledge of such a language must, provided that the level of knowledge required is not disproportionate in relation to the objective pursued, be regarded as a condition corresponding to the knowledge required by reason of the nature of the post to be filled within the

> meaning of the last sub-paragraph of Article 3(1) Regulation 1612/68."

This case was followed in the opinion of Advocate General Van Gerven (18th February, 1993) in **Federación de Distribuidores Cinematográficos v. Estado Espanol and Ors**. This case related to a requirement to dub into one of the official languages of Spain films imported from third countries.

The Advocate General surveyed community law on language rights and continued as follows:

> "It follows from this case law that rules within the framework of the cultural policy of national or regional authorities may where appropriate be warranted by an overriding reason of general interest recognised by community law, justifying certain restrictions to the movement within the community of persons, goods or services. That applies to measures intended to ensure the preservation and appreciation of historical and artistic treasures or the dissemination of knowledge of the arts and culture ("tourist - died" judgments) which are directed towards preserving the freedom of pluralistic expression of the various social cultural religious and philosophical trends in a country ("Mediawet" judgments) or towards the protection of a national language (Groener judgment). These overriding reasons of general interest may I think be described in general as the protection, development and dissemination of a Member State's own cultural heritage or that of a region thereof, in a pluralist context and as a component of a cultural heritage common to the Member States…". (Emphasis supplied)

Equally, the well regarded text book, TC Hartley, *The Foundations of European Community Law*, 6th Edition (Oxford, 2007) has this to say, at page 68:

> **"Court Procedure".**
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> What languages may be used in court proceedings? The question depends on what is known as the 'language of the case'. Any one of the official languages of the Member States (including Irish) may be chosen and the theory behind the rules governing the choice of languages is that the community is regarded as multi-lingual and consequently able to operate in any official language. Community institutions are therefore required to accommodate themselves to the needs of the other party."
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> In direct actions the basic rule is that the applicant has the choice of languages. However, where the defendant is a Member State, or an individual or corporation having the nationality of a Member State, the language of the case is the official language of the State. Where the Member State has more than one official language - as, for example, is the case with Belgium - the applicant may choose between them.
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> Except in the rare case where a Member State brings enforcement proceedings against another Member State, the community will always be party to a direct action; the effect of these rules, therefore, is to benefit the other party. The Court may depart from the rules at the request of the parties; however where the request is not made jointly by the parties, the Advocate General and the other party must be heard."

It will be seen from the foregoing (which is merely the most relevant of the many European cases available on language rights) that many of the cases related to the legality or otherwise, in terms of European law, of measures taken by the States to protect or develop their

national or official language. This may be the national language or the language of a part or region of a country, depending on circumstances. There has not to date, as far as I am aware, been a case of a State who constituted a language as the national and first official language of the State, and then refused to conduct official business in that language. The very idea is ludicrous and contradictory. It is to be hoped that Ireland does not provide the first example of a case of that sort in the Courts at Luxembourg or Strasbourg.

In the extract from Mr. Hartley's text book above, it emerges that an Irish citizen suing Ireland before the European Court of Justice would be in a stronger position to require his business there to be conducted in Irish, than the same Irish citizen who has been charged with a criminal offence by the State would be to require his trial, in a Gaeltacht region of Ireland, to be conducted in that language. But, just as European Law regards the European Union as multilingual, so Irish law regards Ireland as bilingual. The result in each case is that a litigant may choose which of the official languages he will litigate in. The Irish State procured the recognition of Irish as an official and working language of the European Union. That same State must recall that Irish is also the National and first official language of Ireland.

APPENDIX V

S.I. 245 of 1956:
GAELTACHT AREAS ORDER, 1956

Section 2 provides.

"2. The district electoral divisions and parts of district electoral divisions specified in the Schedule to this Order are hereby determined to be Gaeltacht areas for the purposes of the Ministers and Secretaries (Amendment) Act, 1956 (No. 21 of 1956)."

The Schedule provides:
"COUNTY OF GALWAY.

1. The District Electoral Divisions of Owengowla, Claregalway, Camus, Carnmore, Carrowbrowne, Killannin, Kilcummin (Galway), Kilcummin (Oughterard), Knockboy, Cong, Cur, Crumpaun, Annaghdown (Galway), Cloonbur, Furbogh, Gorumna, Inishmore (Aran Islands), Lettermore, Moycullen, Ross, Selerna, Skannive, Slieveaneena, Spiddle, Turlough and Illion.

2.—(1) That part of the District Electoral Division of Ballintemple comprised in the Townlands of Ballygarraun and Pollkeen.

(2) That part of the District Electoral Division of Barna comprised in the Townlands of Ahaglugger, Oddacres, Aille, Aubwee, Attyshonock, Ballard West, Ballard East, Newvillage, Ballynahown East, Brownville, Ballyburke, Ballymoneen West, Ballymoneen East, Barna, Boleybeg West, Boleybeg East, Boleynashruhaun, Cappagh, Cloghscoltia, Cloonagower, Oranhill, Knockaunnacarragh, Kimmeenmore, Corboley (Lynch), Corboley (Morgan). Corcullen, Drum West, Drum East, Forramoyle West, Forramoyle East, Seapoint, Gortnalecka, Lacklea, Lenabower, Lenarevagh, Kisheenakeeran, Loughinch, Pollagh, Rusheen, Freeport, Shanballyduff Shangort, Tonabrocky, Trusky West and Trusky East.
(3) That part of the District Electoral Division of Bencorr comprised in the Townlands of Barnanang, Barnanoraun, Derryadd West, Derrynavglaun, Emlaghdauroe, Finnisglin, Gleninagh, Glencoaghan, Lettershea, Lettery and Luggatarriff.

(4) That part of the District Electoral Division of Roundstone comprised in the Townlands of Inishnee Island, Errisbeg West and Errisbeg East.
(5) That part of the District Electoral Division of Galway Rural comprised n the Townlands of Castlegar, Menlough and Parkmore.

(6) That part of the District Electoral Division of Galway North Urban bounded on the South-East by Terryland River, on the South-West by the River Corrib and on the North by the boundary of Galway Urban District.

(7) That part of the District Electoral Division of Lackaghbeg comprised in the Townlands of Kiltroge and Crusheeny.
(8) That part of the District Electoral Division of Letterbrickaun comprised in the Townlands of Bunnasviskaun, Poundcartron, Knockaunbaun, Derreen, Griggins, Lee, Munterowen Middle, Munterowen West and Munterowen East.

(9) That part of the District Electoral Division of Lisheenavalla comprised in the Townland of Carnmore East.

(10) That part of the District Electoral Division of Moyrus comprised in the Townlands of Doonreaghan, Garroman, Lehanagh South, Lissoughter and Tawnaghmore.

(11) That part of the District Electoral Division of Tullyokyne comprised in the Townlands of Ballydotia, Carrowlustraun, Cloonnabinnia, Knockshanbally, Killarainy, Drummaveg, Gortachalla, Gortyloughlin, Leagaun and Tullokyne.”