SCC File No. 37790

**IN THE SUPREME COURT OF CANADA**
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

**JOSEPH ROY ÉRIC BESSETTE**

APPELLANT
(Appellant)

AND:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

RESPONDENT
(Respondent)

**COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA**
**FÉDÉRATION DES ASSOCIATIONS DE JURISTES D'EXPRESSION FRANÇAISE DE COMMON LAW INC.**

INTERVENERS

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# RESPONDENT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW, FACTS, PROCEEDINGS AND JUDGMENT UNDER APPEAL

### A. Overview

1. On his trial date, the appellant's application for a French language trial was dismissed by a provincial court judge. The application was dismissed on two bases: 1) that s. 133 of the provincial *Offence Act* does not incorporate s. 530 of the *Criminal Code*, which allows an accused person to elect to be tried in either of Canada's official languages; and 2) nor does it displace a 1731 British statute (*1731 Act*) received into British Columbia law mandating the use of English in court proceedings that are within provincial jurisdiction. For matters within provincial jurisdiction, the ability to define the scope of minority language rights is a fundamental attribute of provincial powers.

2. By petition to the British Columbia Supreme Court, the appellant sought prerogative relief that the provincial court judge's decision be quashed and a French language trial be ordered. The Supreme Court judge dismissed the petition on the basis that the principles deprecating interlocutory appellate relief by way of extraordinary remedies in criminal proceedings were not displaced by any special circumstances.

3. The appellant's appeal of this ruling to the Court of Appeal for British Columbia (BCCA) was dismissed on the basis that the Supreme Court Judge correctly concluded that judicial economy favoured adjudicating the language issue by means of an appeal and that no special circumstances warranted the immediate granting of prerogative relief. Because of these interlocutory proceedings, the appellant has yet to be tried for the British Columbia *Motor Vehicle Act* offence of driving while disqualified which he is alleged to have committed on June 18, 2014.

4. The appellant characterizes the provincial court judge's decision as a paradigmatic jurisdictional error that warranted prerogative relief because he failed to apply the mandatory provisions of s. 530 of the *Criminal Code*. However, the judge did no such thing: his conclusion was that *s. 530 itself did not apply* to the provincial offence trial over which he was presiding. This was a matter of statutory interpretation of the *Offence Act*, which could be appealed following the trial. Only if he decided that s. 530 applied, and if he then failed to follow its terms, could the latter decision be jurisdictional in character.

5. The appellant's assertion that immediate prerogative relief is warranted because a new trial ordered following an appeal could not undo the *inherent and irreparable prejudice* to this statutory right is unsupported in principle and law. While the s. 530 language right is important if applicable, infringements of the right are typically remedied by ordering a new trial.

6. Beyond the procedural issue, the ruling of the provincial court judge is correct. The *1731 Act* specifically addresses the language to be used in court proceedings. Section 133 of the *Offence Act* is designed to fill procedural gaps and there is no support for the suggestion that it intended to amend or repeal the *1731 Act* in any fashion. Consequently, s. 133 does not expressly or impliedly incorporate s. 530 or any of the language provisions in Part XVII of the *Criminal Code*.

**B. Facts, Judicial Proceedings and Rulings**

7. The Attorney General of British Columbia (AGBC) does not take significant issue with the facts, judicial proceedings and rulings as set out in Part I of the appellant's factum, but prefers to briefly state the facts as follows.

8. On September 29, 2014, the appellant was charged under the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, with driving on June 18, 2014 while prohibited. (AR p. 19, para. 1)

9. On January 19, 2015, the appellant appeared at the Provincial Court of British Columbia in Surrey and requested that his trial be conducted in the French language. The request was opposed by the Crown. (AR p. 19, para. 2-3)

10. On July 13, 2015, in reasons indexed at 2015 BCPC 230, Gulbransen P.C.J., dismissed the appellant's application to be tried in French. In doing so he acknowledged that *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774 "confirmed that the law in British Columbia remained as provided for in the *1731 Act;* that the language of the courts in all civil proceedings must be in English." He noted that provincial prosecutions pursuant to the *Offence Act,* R.S.B.C. 1996, c. 338 are not criminal prosecutions to which the *Criminal Code* would apply, nor are they civil matters. He concluded that "British Columbia has chosen not to specifically provide that persons being prosecuted under the provincial statutes may be granted the right to have their trial in French. The mere fact that the province has not done so does not in itself result in the incorporation of ss. 530 to 533 of

the *Criminal Code* into the provisions of the *Offence Act*." (AR p. 4, para. 11; p. 5, para. 14; p. 7, para. 22)

11. On March 14, 2016, the appellant filed a petition in the British Columbia Supreme Court seeking an order in the nature of *certiorari* quashing the decision of Gulbransen P.C.J. and an order in the nature of *mandamus* directing that his trial be conducted in French. On December 23, 2016, Blok J., in reasons indexed at 2016 BCSC 2416, dismissed the petition, finding that it was premature to review the decision because it was an interlocutory ruling that would, if necessary, be reviewable by way of an appeal once the trial has concluded. The appellant had failed to establish that the circumstances of this case were such that the interests of justice required the immediate granting of the prerogative remedies sought. He did not consider the merits or the substantive issue in the case. (AR p. 17, paras. 36-37; p.19, para. 5; p. 20, para. 6)

12. The appellant's appeal of this ruling to the BCCA was dismissed: 2017 BCCA 264. The court held that the conclusions of Blok J. were open to him and the appellant had not shown any error in principle or other basis warranting appellate intervention. (AR p. 28, paras. 29-31)

**PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE**

13. As stated by the appellant, this case raises a procedural question (referred to as a "question préliminaire") and a substantive statutory interpretation question. The respondent states the questions differently:

1) The procedural question: Did Blok J. err in dismissing the appellant's petition for prerogative relief that sought *certiorari* and *mandamus* in relation to the decision of Gulbransen P.C.J.?

   AGBC's position is that Blok J. was correct in dismissing the petition. He correctly concluded that Gulbransen P.C.J.'s decision that s. 133 of the *Offence Act* did not incorporate s. 530 of the *Criminal Code* was not jurisdictional in nature and that no special circumstances warranted prerogative relief being granted on an interlocutory basis.

2) The substantive statutory interpretation question: If Blok J. erred in declining to consider the merits of the impugned decision, was Gulbransen P.C.J.'s decision to dismiss the appellant's application for a French trial correct?

   AGBC says the impugned ruling is correct. Section 133 of the *Offence Act* neither incorporates s. 530 of the *Criminal Code*, nor does it in any manner displace the requirement of the *1731 Act* mandating English as the language of *Offence Act* proceedings.

## PART III – STATEMENT OF ARGUMENT

### A. Legislation

14. Before addressing the arguments relating to the procedural and the substantive statutory interpretation questions, it is useful to set out the main legislative provisions that are engaged in this case.

15. As with all prosecutions for provincial offences under British Columbia statutes, the appellant's prosecution for the alleged *Motor Vehicle Act* offence is procedurally governed by the *Offence Act*. Section 133 of the *Offence Act* states:

> **Application of *Criminal Code***
>
> 133 If, in any proceeding, matter or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the *Criminal Code* relating to offences punishable on summary conviction apply, with the necessary changes and so far as applicable, as if its provisions were enacted in and formed part of this Act.

16. On its face, this provision affirms the primacy of the *Offence Act* and the ancillary nature of any incorporation of the *Criminal Code*, contrary to similar legislation in other provinces.

17. Section 530 of the *Criminal Code* is contained in Part XXIV entitled "Language of Accused":

| | |
|---|---|
| **Language of accused** | **Langue de l'accusé** |
| **530 (1)** On application by an accused whose language is one of the official languages of Canada, made not later than | **530 (1)** Sur demande d'un accusé dont la langue est l'une des langues officielles du Canada, faite au plus tard : |
| **(a)** the time of the appearance of the accused at which his trial date is set, if | **a)** au moment où la date du procès est fixée : |
| **(i)** he is accused of an offence mentioned in section 553 or | **(i)** s'il est accusé d'une infraction mentionnée à l'article 553 ou punissable sur déclaration de culpabilité par procédure sommaire, |

| | |
|---|---|
| punishable on summary conviction, or | […] |
| […] | un juge de paix, un juge de la cour provinciale ou un juge de la Cour de justice du Nunavut ordonne que l'accusé subisse son procès devant un juge de paix, un juge de la cour provinciale, un juge seul ou un juge et un jury, selon le cas, qui parlent la langue officielle du Canada qui est celle de l'accusé ou, si les circonstances le justifient, qui parlent les deux langues officielles du Canada |
| a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada. | |

### B. Procedural Issue: BCSC correct to dismiss petition for prerogative relief

***Overview of Analytical Framework: Prerogative Relief in Prosecution Proceedings***

18. The established jurisprudence restricting interlocutory prerogative relief in criminal and quasi-criminal cases is justified by two principal factors: 1) the need for efficient, timely and fair decision making (a factor re-invigorated in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631); and 2) respect for the jurisdictional competence of statutory decision-makers.

19. Importantly, where broad rights of appeal from final decisions are statutorily available, the fragmentation of prosecutions through interlocutory review mechanisms is deprecated because of its effects on timeliness and efficiency. Consequently mid-trial judicial review is highly constrained. Limiting prerogative relief to jurisdictional error is one aspect of the limitations.

20. The other is found in the discretionary nature of the relief and the narrow exceptional circumstances in which it may be granted even in the absence of jurisdictional error, a recent development designed to accommodate, for example, scenarios where appeal rights are either non-existent or would not be effective. The rights of third parties affected by an order in a criminal case offer an example: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331.

21. This Court will decide in *R. v. Awashish* (SCC File No 37207) whether and to what extent prerogative relief in criminal cases should be expanded beyond traditional jurisdictional error. However, whether scrutinized using the jurisdictional test or the nascent test by which special or exceptional circumstances may justify *certiorari*, the decision of Blok J. (the reviewing judge) in this case was correct.

22. A review of the authorities demonstrates that the reviewing judge was correct to decline the prerogative relief sought by the appellant in this case. The impugned decision was one which Gulbransen P.C.J. (the trial judge) was entitled to make, and which would be subject to possible review on appeal following the trial. The decision was not jurisdictional in nature.

23. The jurisprudence also demonstrates that no exceptional circumstances existed in this case that warranted exercising discretion to grant prerogative relief, again as correctly concluded by the reviewing judge.

***Standard of review in appeals from decisions concerning prerogative relief***

24. The standard of review applicable by an appeal court to the decision of a superior court granting or denying prerogative relief is not straightforward. Much will turn on the nature of the decision that was scrutinized by the reviewing court. If it involves a legal question *simpliciter*, correctness will be the standard. To the extent it involves the assessment of evidence to determine if a legal standard is met, a deferential standard will be applied to that assessment: *R. v. Russell*, [2001] 2 S.C.R. 804, at para. 48; *R. v. Eckstein (S.M.)*, 2012 MBCA 96.

25. As asserted by the appellant, some courts have said that the standard of review applicable to decisions of judges reviewing statutory court rulings to determine whether prerogative relief should be granted is correctness. See *R. v. Rao*, 2012 BCCA 275 at paras. 33, 57 and 101; *R. v. Black*, 2011 ABCA 349 at para. 13; and *R. v. Ramalheira*, 2009 NLCA 4 at para. 13.

26. However, because the granting of prerogative relief is a discretionary remedy, other courts have also recognized that a deferential standard of review is appropriate. This Court recently addressed the historic and continuing discretionary nature of judicial review and its impact on the standard of review on appeal from those decisions. Cromwell J. (for the majority) in *Strickland v.*

*Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 explained how the discretionary nature of prerogative relief impacts the appellate standard of review (at paras. 37, 39):

> (a) The Discretionary Nature of Judicial Review and Declaratory Relief
>
> [37] Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief: see, e.g., D. J. Mullan, "The Discretionary Nature of Judicial Review", in R. J. Sharpe and K. Roach, eds., *Taking Remedies Seriously*: 2009 (2010), 420, at p. 421; *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, at p. 575; D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at pp. 686-87; Brown and Evans, at topic 3:1100. Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: ". . . the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded" (Dickson C.J. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, at p. 90, citing S. A. de Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at p. 513).
>
> …
>
> [39] The fact that undertaking judicial review is discretionary means that the Federal Court judge's exercise of that discretion is entitled to deference on appeal. As this Court noted in *Matsqui*, an appellate court "must defer to the judge's exercise of . . . discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently": para. 39, quoting Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046.
>
> [Emphasis added]

27. Although *Strickland* involved a judicial review application in relation to federally legislated child support guidelines, the discretionary nature of prerogative relief persists in the criminal law context as well: *R. v. Duvivier* (1991), 3 O.R. (3d) 49 (ONCA), 1991 CarswellOnt 87 (sub nom. *R. v. Johnson*), at para. 6 (Westlaw citation).

28. The Manitoba Court of Appeal has reconciled the apparent inconsistency flowing from the legal and deferential issues in judicial review. It says there are two standards of appellate review of decisions concerning prerogative relief: correctness is applicable to the reviewing justice's choice of standard of review, and if properly applied, deference will then be shown to the ultimate decision: *Canadian Broadcasting Corporation et al v. Morrison*, 2017 MBCA 36 at para. 27.

29. However the standard of review ends up being formulated and applied by this Court, AGBC says that the reviewing judge's decision was *correct* in all respects. He correctly found 1) that the trial judge did not commit jurisdictional error and 2) that there were no special circumstances otherwise warranting *certiorari*.

***Certiorari in prosecution proceedings for jurisdictional error – no jurisdictional error in this case***

30. The appellant sought relief from the BCSC pursuant to s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, (*JRPA*) in the nature of *mandamus* and/or *certiorari*. The *JRPA* sets out the procedure and available remedies for civil and administrative law proceedings on judicial review. It appears to also apply to *Offence Act* proceedings: *R. v. Budgell*, 2012 BCSC 1302; *R. v. Patrick*; *Bruce v. R.*, 2009 BCSC 560, at paras. 4-6. Because of shared policy concerns regarding fragmentation and respect for decision-maker authority that apply in criminal law matters, restrictive common law principles governing *certiorari* should apply in *Offence Act* proceedings.

31. In criminal law matters, applications for *certiorari* in relation to interlocutory decisions of statutory courts are rare due to the comprehensive appeal rights for parties available in the *Criminal Code*. Sections 102 and 124 of the *Offence Act* provide for similar appeal rights in relation to provincial offences. It is well-established in the jurisprudence that there are no appeals from interlocutory findings in criminal matters. Both the limited scope of prerogative relief and the related principle prohibiting interlocutory appeals in criminal matters reflect the previously mentioned importance attached to timely and efficient decision-making and respect for the statutorily assigned functions of the judicial officer. See *R. v. M.P.S.*, 2014 BCCA 338, at paras. 44-47, which summarizes this Court's leading jurisprudence in *Skogman v. The Queen*, [1984] 2 S.C.R. 93, *Dubois v. The Queen*, [1986] 1 S.C.R. 366 and *Russell*.

32. The concept of jurisdiction in the context of the availability of extraordinary remedies was concisely described by Watt J. in *R. v. Sarson* (1992), 73 C.C.C. (3d) 1 (Ont. Gen. Div.), 1992 CarswellOnt 1066 (aff'd 88 C.C.C. (3d) 95 (Ont. C.A.), further aff'd [1996] 2 S.C.R. 223) at paras. 69-70 (Carswell citation):

> The extraordinary remedies, including *habeas corpus*, are concerned with jurisdiction. It is their purpose, even under *Gamble, supra*, to ensure that courts of limited jurisdiction do not exceed, or for that matter decline their mandate. It necessarily follows that what is said to warrant their grant must be a loss, refusal or excess of jurisdiction. Nothing less will suffice. Neither is more required.
>
> … A trial judge has as much jurisdiction to decide an issue wrongly as he or she does to determine it rightly. Jurisdiction is not acquired or retained only by a correct decision. Neither is it lost by a wrong decision. Jurisdiction is concerned with the authority to decide an issue. It matters not to that authority the correctness of the decision.
>
> [Emphasis added]

33. The scope of review on *certiorari* in both prosecutions for provincial statutory offence and federal prosecutions under the *Criminal Code* or other federal statutes has been limited to jurisdictional error: *M.P.S.*, at para. 46; *R. v. Budgell*, 2012 BCSC 1302 at paras. 19-24; and *Re Poulin*, [1968] 4 C.C.C. 221 (B.C.S.C.), affirmed [1969] 3 C.C.C. 118 (B.C.C.A.).

34. The central flaw in the appellant's argument stems from his assertion that the trial judge committed jurisdictional error because he failed to comply with the mandatory requirements of s. 530 of the *Criminal Code* (at paras. 20-32 appellant's factum). The appellant's misapprehension of the decision made by the trial judge in turn leads him to incorrectly characterize it as a ruling that was jurisdictional in nature.

35. The trial judge did not fail to apply the provisions of s. 530. Indeed, he did not consider whether the terms of s. 530 should apply at all because he decided the provision as a whole was inapplicable to the case as it did not apply to *Offence Act* prosecutions by means of s. 133 of that act or otherwise.

36. It cannot be maintained that deciding whether s. 133 incorporates s. 530 of the *Criminal Code* amounts to jurisdictional error. The trial judge interpreted a procedural provision of a provincial statute (s. 133 of the *Offence Act*) that says nothing about his own authority or jurisdiction to try the offence with which the appellant is charged. Because *this decision* is not jurisdictional in character, contesting its correctness cannot be done through interlocutory prerogative relief but must be undertaken by an appeal following the conclusion of the trial.

37. The appellant relies on this Court's decision in *Russell* to support his assertion that the trial judge's decision that s. 133 of the *Offence Act* did not incorporate s. 530 of the *Code* amounted to jurisdictional error. The appellant says that *Russell* mandates that the reviewing court assume the incorrectness of this decision in order to determine whether it gives rise to an issue that goes to the jurisdiction of the court. Assuming that the trial judge's decision is incorrect, according to the appellant, leads to the conclusion that the trial judge committed jurisdictional error by failing to follow the mandatory terms of s. 530 of the *Criminal Code*.

38. AGBC says that the *Russell* decision does not mandate this analytical device in every case and it should not be resorted to in this case; indeed, its use is appropriately confined to preliminary inquiries. Like many of the cases concerning prerogative relief in the criminal law context, *Russell* involved the unique screening process undertaken by judges hearing preliminary inquiries. The screening function of the preliminary inquiry is limited to determining if there is *some* evidence that *could* result in a conviction for the offence charged, in which case the accused *must* be committed to stand trial on the charge. It is this mandatory consequence of committal if there exists some evidence on the elements of the offence that shows how the central function of a preliminary hearing judge is fundamentally distinct from that of a trial judge. This distinction also exemplifies how the analytical device in *Russell* is inapplicable to the trial judge's decision in the instant case.

39. In *Russell*, the issue was whether the preliminary inquiry judge committed jurisdictional error in deciding that a *Criminal Code* sentence classification provision applied such that the evidence warranted a committal for first degree, rather than second degree, murder. McLachlin C.J. (for the Court) emphasized how the interpretation of the *Criminal Code* provision in that case was intrinsically bound up with the central function of the preliminary inquiry, and how this differed fundamentally from a trial (at paras. 20 and 24):

> 20 …Critically, the preliminary inquiry is not meant to determine the accused's guilt or innocence. That determination is made at trial. The preliminary inquiry serves a screening purpose, and it is not meant to provide a forum for litigating the merits of the case against the accused. The limited scope of supervisory remedies reflects the limited purpose of the preliminary inquiry.
>
> 24 However, the logic that applies to the absence of evidence on an element of the offence also applies to the absence of evidence as to an essential condition of a sentence-classification provision like s. 231. The "while committing" requirement is an essential

> condition to the application of s. 231(5). If the central purpose of the preliminary inquiry here was to ensure that there was sufficient evidence to warrant a trial for first degree murder, the absence of evidence that the accused murdered "while committing" an enumerated offence would be as determinative as would be an absence of evidence on an essential element of the offence.
>
> [Emphasis added]

40. As *Russell* shows, it is the essential connection between the limited evidentiary assessment and the legal parameters of the offence which necessarily make the question jurisdictional. This is because the elements of the offence before the preliminary inquiry judge are the only thing against which the evidentiary sufficiency of the Crown's case will be measured. Therefore, correctness about the elements of the offence goes to the sole function (i.e. the jurisdiction) of the judge presiding at the preliminary inquiry in that it determines the offence that will or will not proceed to trial. (Appeal rights are non-existent for both the accused and the Crown from preliminary inquiry outcomes.)

41. In contrast to the restricted and narrow task assigned to a preliminary inquiry judge, the central function of the trial judge in this case is determining guilt or innocence, either result being open to statutory rights of appeal enjoyed by both the appellant and the Crown. Unlike the scenario in *Russell*, the judge's determination of the whether s. 133 of the *Offence Act* incorporates the language of trial provision in s. 530 of the *Criminal Code* is disconnected from and bears no relationship to the central function of the trial, namely the determination of guilt or innocent in relation to the offence charged.

42. This point is also illustrated in the jurisprudence establishing that the interpretation of statutory provisions that are themselves not jurisdictional (i.e. define the authority of the court) is not amenable to prerogative relief. Watt J.A. concisely explained the principles in *R. v. Vasarhelyi*, 2011 ONCA 397 (leave to appeal to SCC refused, 2012 CarswellOnt 1555) at para. 52:

> 52 Jurisdiction has to do with the authority to decide an issue or perform a duty, not the nature or correctness of the decision made: *Belgo Canadian Pulp & Paper Co. v. Trois-Rivières (Cour des sessions de la paix)* (1919), 33 C.C.C. 310 (C.S. Que.). In Review, at pp. 317-318. On subjects within its jurisdiction, if a court of limited jurisdiction misconstrues a statute or otherwise misdecides the law, the remedy to correct the legal error is an appeal from the final disposition, not an application for an order in lieu of the

> extraordinary remedies of mandamus or certiorari: *Long Point Co. v. Anderson* (1891), 18 O.A.R. 401 (Ont. C.A.), at pp. 406 ; 407-408; 411.
>
> 53 As a general rule, errors in the admission or exclusion of evidence are not jurisdictional errors: *Cohen v. R.*, [1979] 2 S.C.R. 305 (S.C.C.), at pp. 307-308. Further, errors in the application of the rules of evidence are not jurisdictional errors: *R. v. DesChamplain*, [2004] 3 S.C.R. 601 (S.C.C.), at para. 17. The same may be said about errors in interpreting statutory provisions that are not jurisdictional in nature.
>
> [Emphasis added]
>
> See also: *R. v. Gray* (1991), 68 C.C.C. (3d) 193, 1991 CarswellOnt 747 (Gen Div) at para. 35.

43. An example illustrates how this principle is apposite to the case at bar. In *Fraser v. R.*, 2010 NBCA 60, a provincial court judge ruled that amendments to the *Criminal Code* which significantly restricted legal defences that were previously available, were procedural and evidentiary and therefore applied retrospectively to the accused's drinking and driving trial. This ruling was challenged on judicial review on the ground that it amounted to jurisdictional error. The Court of Appeal endorsed the reviewing judge's conclusion that the trial judge's decision was a legal one and therefore, if in error, correctable on appeal. AGBC says this case supports its position that the trial judge's decision in this case was not jurisdictional.

44. AGBC submits that the exercise of statutory interpretation by the trial judge in this case lacks sufficient nexus to the central function of determining guilt or innocence and consequently the decision cannot be said to be jurisdictional.

***Intervention for jurisdictional error remains discretionary, not mandatory***

45. Even if an error can be characterized as jurisdictional in the traditional sense, it does not follow that a reviewing court is bound to grant prerogative relief. In *R. v. Prince*, [1986] 2 S.C.R. 480, the issue was whether superior courts should decline to grant prerogative relief on an interlocutory application in respect of the rule against multiple convictions in *Kienapple*. This Court, speaking through Dickson C.J., noted that despite the possibility of jurisdictional error, delays caused by prerogative challenges against erroneous *Kienapple* rulings meant that superior courts should decline to consider them on an interlocutory basis (at para. 50):

> Although it was not argued in this Court, I wish to add that in my view it is normally appropriate for a superior court to decline to grant a prerogative remedy on an interlocutory application in respect of the rule against multiple convictions. That rule has proved to be a fertile source of appeals. The delay engendered by an erroneous application of the *Kienapple* principle prior to the conclusion of the trial is regrettably illustrated by the present case. Prerogative remedies are discretionary, and notwithstanding the possibility of jurisdictional error in some cases, it would generally be preferable for superior courts to decline to consider the merits of a *Kienapple* argument on an interlocutory application.
>
> [Emphasis added]

**C. Non-Jurisdictional Prerogative Relief: Special Circumstances**

46. The appellant also relies on the evolving principle that *certiorari* may be granted to a party in the absence of jurisdictional error but where special circumstances nonetheless justify granting such relief. He argues that the result of the trial judge's ruling, if incorrect, deprives him of a fundamental right and results in irreparable prejudice that could not be cured on appeal.

47. AGBC submits that the reviewing Superior Court judge correctly concluded that no special circumstances warranted judicial review and that the application for prerogative relief was premature.

48. Before addressing the contours of the "special circumstances" doctrine, it is important to reiterate the context of this case in order to assess whether the reviewing judge correctly concluded that special circumstances did not justify the requested relief.

49. The trial of this matter (a single count of driving while prohibited) will be straightforward and English-French interpretation would be provided on request. It would likely take no more than an hour (AR p. 20, para. 8).

50. If convicted, the appellant could exercise rights of appeal pursuant to ss. 102 and 124 of the *Offence Act*. The record of an appeal would contain the full factual account of how the trial proceeded and how the issue of interpretation was handled, which could possibly be an important consideration in deciding the linguistic issue.

51. Even as courts have expanded the availability of prerogative relief in criminal cases beyond jurisdictional error, the policy-based limitations that ensure effectiveness, efficiency and respect

for the statutory decision maker still apply. The relief is discretionary. A superior court should generally decline to grant *certiorari* where there is an appeal route available. Prerogative relief is discretionary and "a court will usually refuse such relief on the basis of prematurity if the tribunal has not completed its work": *R. v. Arcand* (2004), 192 C.C.C. (3d) 57 (Ont. C.A.), at para. 13; *R. v. Paterson*, 2000 CanLII 9775 (Ont. C.A.) at para. 3; and *M.P.S.*, at para. 40.

52. The strong policy reasons restricting the availability of extraordinary remedies in relation to interlocutory rulings were summarized by Doherty J.A. in *Johnson*, at para. 8 (Westlaw citation):

> …Such applications can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record, and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course. The effective and efficient operation of our criminal justice system is not served by interlocutory challenges to rulings made during the process or by applications for rulings concerning issues which it is anticipated will arise at some point in the process. A similar policy is evident in those cases which hold that interlocutory appeals are not available in criminal matters [citations omitted].
>
> [Emphasis added].
>
> See also *M.P.S.*, at paras. 40-43 and *R. v. Felderhof*, 2002 CanLII 41888 (ONSC), at paras. 11-16, affd (2003) 180 C.C.C. (3d) 498 (C.A.).

53. The policy considerations that inform the discretionary nature of prerogative relief are equally applicable to *Offence Act* proceedings: *R. v. Sekhon*, 2016 BCSC 1697, at paras. 8-9. In the Ontario provincial offence context, see *Arcand*, at paras. 13-14.

54. *Johnson* is perhaps the leading case on the "special circumstances" extension of prerogative relief in criminal matters. In that case, Doherty J.A. noted the shared features of prerogative relief and remedies pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms*. Both are discretionary. Both forms of relief should not be routinely granted during ongoing criminal proceedings by way of interlocutory application to a supervisory court.

55. Doherty J.A. also noted that the very same policy considerations regarding delay and fragmentation that preclude interlocutory appeals in criminal cases apply to supervisory prerogative relief. For these reasons, Doherty J.A. concluded (at para. 7 Westlaw citation):

> 7 These cases dictate that issues, including those with a constitutional dimension which arise in the context of a criminal prosecution, should routinely be raised and resolved within the confines of the established criminal process which provides for a preliminary inquiry (in some cases), a trial, and a full appeal on the record after that trial.

56. In *Johnson*, Doherty J.A. reviewed the jurisprudence illustrating that exceptional circumstances will allow a superior court to grant interlocutory relief despite the absence of jurisdictional error. Some examples, most of which were grounded in potential *Charter of Rights* infringements are:

- Where an adverse ruling to an accused on a *Charter* issue is manifestly and palpably wrong (*R. v. Corbeil* (1986), 27 C.C.C. 3d 245, 1986 CarswellOnt 984 (Ont. C.A.), at p. 254);
- Where the trial judge was in part responsible for the *Charter* violation in a s. 11(b) application, due to the trial judge's delay of 11 months to decide a motion on a directed verdict (*R. v. Rahey* , [1987] 1 S.C.R. 588 at pp. 599-601); and,
- Where the appellant was convicted and sentenced for murder under the wrong law and was granted immediate relief by the Supreme Court in the form of a s. 24(1) *Charter* declaration of her eligibility for parole (*R. v. Gamble*, [1988] 2 S.C.R. 595 at pp. 648-649).

57. None of these special circumstances were present in *Johnson* (which involved issuance of a subpoena) because the trial court had jurisdiction to consider the issue and grant relief.

***No special circumstances warrant exercising discretion to grant prerogative relief***

58. In the case at bar, the reviewing judge was correctly concluded that no special circumstances warranted intervention by way of prerogative relief. He specifically reviewed each of the circumstances identified in the jurisprudence canvassed in *Johnson* and properly concluded that they were not present: AR pp. 14-17, paras. 21-35.

59. The appellant's assertion that the reviewing judge erred in this conclusion is without merit. The cases he relies on do not support his argument.

60. The first group of cases are relied on for the suggestion that the decision reviewed in the case at bar was a final one affecting a fundamental right, thereby constituting a special circumstance.

61. *Awashish c. R.*, 2016 QCCA 1164 and *Canada (Procureur général) c. Dubois*, [1987] J.Q. no 1822 (QCCA) do not support the appellant's claim. *Dubois* is referred to in *Awashish*, and involved as a special circumstance a putative violation of informer privilege, where the lifting of the privilege and disclosure of an informer's identity could not, of course, be remedied on appeal. It is trite that once an informer's identity is disclosed, it can never regain its previous confidential character. The privilege will only be judicially lifted if the onerous innocence at stake threshold is met.

62. The case at bar cannot be analogized with this scenario. First, as occurred in *R. v. Beaulac*, [1999] 1 S.C.R. 768 at para. 57, if reversible error in the trial judge's decision concerning the scope of s. 133 of the *Offence Act* is established on an eventual appeal, a new trial can be ordered. Mr. Beaulac had three trials for the same offence during which he was not afforded his s. 530 *Criminal Code* language rights; yet this Court, after clarifying Part XVII, order a new trial.

63. Reliance by the appellant on *R. v. Douglas*, 2016 MBCA 81 is distinguishable on the same basis. That case involved the issuance of a search warrant that would compromise solicitor client privilege. As with informer privilege, solicitor client privilege cannot be regained once compromised, be it via appeal or otherwise.

64. The appellant cites a variety of other authorities in which trial fairness may be impaired such that appellate review may be inadequate. Each of these cases is distinguishable from the case at bar. In *R. v. Flahiff* (1998), 157 D.L.R. (4th) 485 (Que. C.A.) the issue concerned limiting publication of information disclosed by means of unsealing a search warrant, a process statutorily provided for by s. 487.3 of the *Criminal Code*, in order to protect the fairness of any future trial. Given that trial fairness for the appellant – or any accused or defendant – is not dependent s. 530 of the *Code, Flahiff* and the other cases implicating trial fairness are of no assistance in showing that a special circumstance existed in this case that justified prerogative relief.

65. *R. v. Chue*, 2011 ONSC 5322 and other cases are cited by the appellant where trial fairness is said to be sufficiently impugned that interruption of a trial by means of prerogative relief is justified. This does no more than highlight that determining whether special circumstances exist in these cases is highly fact specific, which in turn emphasizes the critical importance of discretion in the reviewing court. Only in highly exceptional and obvious cases should trial fairness be

assessed on a pre-trial or mid-trial basis by a judge other than the one conducting the trial, failing which cases will be routinely interrupted and delayed by prerogative or interlocutory *Charter* applications and appeals from those rulings. See *R. v. Lindsay*, 2007 BCCA 214 at paras. 5-7 in the context of prerogative relief and in the context of *Charter* challenges to charging provisions see *R. v. Martin* (1991), 63 C.C.C. (3d) 71, 1991 CarswellOnt 846 (Ont. C.A.) (affirmed [1992] 1 S.C.R. 838) at paras. 36-37 (Westlaw citation) and *R. v. Martin* (1994), 72 O.A.C. 316, 1994 CarswellOnt 914 (Ont. C.A.) at paras. 10-11 (Westlaw citation).

66. No infringement of any *Charter* right has been pleaded in this case and no constitutional question has been stated by the appellant. More importantly, none of the cases relied on by the appellant support his assertion that a "fundamental right" has been affected by the decision of the trial judge in way that causes irreparable prejudice. It is noteworthy that the appellant never alleged before the reviewing judge or the Court of Appeal for British Columbia that a *Charter* right had been infringed by the trial judge's decision, nor that the decision would impair his fair trial rights.

67. With respect, the appellant's submission concerning the alleged violation of his fundamental language rights as being an exceptional circumstance warranting discretionary prerogative relief is misplaced. As noted earlier, it operates on the *assumption* that s. 530 of the *Criminal Code* applies to his trial and he was therefore denied the statutory rights of the provision. But again, the trial judge decided that s. 530 was not applicable to the provincial proceeding, a conclusion supported by jurisprudence and which can be contested on appeal. This Court in *Beaulac* expressly noted that importance of a purposive interpretation of language rights was limited to where such provisions applied. Bastarache J. stated at para. 25:

> 25 …The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities <u>where they do apply</u>.
>
> [Emphasis added]

68. Subsequent to *Beaulac*, the Nova Scotia Court of Appeal in *R. v. MacKenzie*, 2004 NSCA 10 refused to grant *Charter* relief for judicial failure to accord the accused her s. 530 language right in a prosecution where it was conceded by the Crown that s. 530 applied to provincial offence prosecutions in that province. In doing so, the court noted that s. 530 was *itself* to benefit from a

large and purposive interpretation due to its quasi-constitutional status, but that it was not entrenched as a provision of the *Charter* and therefore an infringement does not invoke s. 24(1) (at para. 60). The summary conviction appeal judgment finding infringements of *Charter* ss. 15, 16 and 19 of the *Charter of Rights* was reversed.

69. Having determined that s. 24(1) *Charter* relief was unavailable, the court went on to state that failure to comply with s. 530 in that case was neither intentional nor done systematically in the province. There was therefore no basis to conclude that an abuse of process occurred or that the defendant's rights to fundamental justice and a fair trial under ss. 7 and 11(d) of the *Charter* were denied.

70. In quashing the stay of proceedings imposed by the summary conviction appeal judge and directing a new trial, the court ruled that the appeal judge erred additionally in not considering the *O'Connor* test, which prompted the Court to undertake the analysis *assuming there had been an abuse of process or Charter violation*. In doing so, it made this important conclusion that a new trial was warranted rather than stay of proceedings (at para. 92):

> …Applying the test in *O'Connor*:
>
> > (a) There was no prejudice to Ms. MacKenzie which would be manifest, perpetuated, or aggravated in the future by the conduct or outcome of a new trial.
> >
> > (b) There was no evidence of systemic discrimination and therefore no basis to say that the failure to comply with s. 530(3) impugned the integrity of the judicial system or would continue to do so in the future if there was a new trial.

71. These conclusions show that the appellant's assertion of "irreparable prejudice" to a "fundamental right" that cannot be remedied on appeal is unsubstantiated. It bears emphasis that this does not mean that the s. 530 language right is unimportant. Nor does it mean that, where the right applies, its denial may warrant a remedy. But absent denial of the statutory right that is established as serious and intentional, an appellate order for new trial will be the appropriate remedy.

72. AGBC says that this means that no special circumstance is made out for the asserted denial of the s. 530 right in this case.

73. By way of conclusion, the trial judge had jurisdiction to consider whether s. 133 of the *Offence Act* incorporated s. 530 of the *Criminal Code*. Having decided that it did not, his jurisdiction was not ousted by failure to comply with the provisions of a statute he concluded did not apply to the trial over which he was presiding. Similarly, the reviewing justice correctly concluded there were no special circumstances in the case to grant the relief sought by the appellant. The BCCA was correct to so conclude.

### D. Section 133 *Offence Act*: trial judge's decision was correct

74. In the event this Court does not accept the respondent's submission that the ruling of the reviewing judge concerning prerogative relief was correct and warranted the appellate deference shown by the BCCA, the respondent submits that the trial judge's ruling was correct in law. This involves consideration of substantive statutory interpretation question.

75. The English-only provisions of the *1731 Act* apply on their face to provincial prosecutions. The adoption clause in s. 133 of the *Offence Act* does not amend or repeal the *1731 Act*. To the extent constitutional considerations are relevant to this appeal, they include respect for provincial jurisdiction over language rights and are consistent with the trial judge's ruling below which should be upheld.

#### *Application of the 1731 Act to Offence Act proceedings: analytical framework*

76. AGBC says the substantive question is not about whether s. 133 of the *Offence Act* incorporates both procedural and more substantive or policy-based amendments to the *Criminal Code*. This is not the proper starting point for the analysis.

77. The first question is whether the English only rule in the *1731 Act* applies to *Offence Act* proceedings. If it does, then the next question is whether the adoption clause in s. 133 of the *Offence Act* can be interpreted as repealing or modifying the English only rule in the *1731 Act*. The respondent says the *1731 Act* does apply and that a mere adoption clause like s. 133 cannot be read as altering something as fundamental as the language of court proceedings, a matter this Court

has confirmed as falling squarely within provincial authority and which in turn is an established part of the Canadian federal-provincial constitutional structure.

***The English only rule in the 1731 Act applies on its face to provincial prosecutions***

78. In 2013, this Court confirmed that *An Act that all Proceedings in Courts of Justice within that Part of Great Britain called England, and in the Court of Exchequer in Scotland, shall be in the English Language* (G.B.), 1731, 4 Geo. II, c. 26 (the "*1731 Act*") is still valid provincial legislation and incorporated into British Columbia law as of 1858 by the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 2: *Conseil scolaire* francophone *de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774 at para. 41.

79. The plain language of the *1731 Act* is comprehensive and makes it applicable to all provincial proceedings, including penal ones commenced by "information" as in this case. The *Act* reads:

> …all writs, process and returns thereof, and proceedings thereon, and all pleadings, rules, orders, indictments, informations, inquisitions, presentments, verdicts, prohibitions, certificates, and all patents, charters, pardons, commissions, records, judgments, statutes, recognizances, bonds, rolls, entries, fines and recoveries, and all proceedings relating thereunto, and all proceedings of courts leet […] shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever…

80. There is an information in this case (Number 207335-1). The trial the appellant faces is included in the phrase "and all proceedings relating thereunto." The *1731 Act* restricts the language of proceedings to English. There is no ambiguity in the statute.

81. It is noteworthy that the terms of the *1731 Act* clearly encompassed criminal and quasi-criminal proceedings. The words of the statute show it applies to "indictments, informations, [...], presentments" (all penal or criminal law terms) and to "courts leet" – local courts charged with trying petty offences and misdemeanours, the ancestors of the provincial court hearing *Offence Act* matters. See Bouvier, John, *A Law Dictionary, Adapted to the Constitution And Laws of the United States of America and of the Several States of the American Union: with References to the Civil and Other Systems of Foreign Law*, vol. 1, 14ed. (Philadelphia, J.B. Lippincott & Co., 1877), at p. 381 [definition of "courts leet"] and Bouvier, John, *A Law Dictionary, Adapted to the Constitution*

*And Laws of the United States of America and of the Several States of the American Union: with References to the Civil and Other Systems of Foreign Law*, vol. 2, 6ed. (Philadelphia, Deacon & Peterson, 1852), at p. 372 [definition of "presentment"]

82. Section 129 of the *Constitution Act, 1867* continues pre-confederation legislation where the legislation deals with matters still under provincial jurisdiction. Once the statute is found to operate then it can cover all areas of provincial responsibility. Section 92(15) explicitly permits the provincial prosecutions:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […]
>
> > 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

83. Thus the *1731 Act*, incorporated as of 1858 into British Columbia law, applies to *Offence Act* prosecutions that are *intra vires* provincial jurisdiction under the division of powers. See *Constitution Act*, 1867, s. 92(15), s. 129; *British Columbia Terms of Union*, art. 10; and *Canadian Pacific Wine v. Tuley* (1921), 60 D.L.R 520 (P.C.) at pp. 523-524.

84. On this point, the trial judge correctly held in relation to *Conseil Scolaire Francophone* (AR p. 5, para. 15):

> …the Supreme Court ruling on the language issue logically applies to those provincial prosecutions brought under provincial statutes other than those statutes which involve the exercise of both federal and provincial jurisdictions, such as Fisheries.

85. Before s. 530 of the *Code* was enacted, the British Columbia Supreme Court repeatedly found that the *1731 Act* even applied to *Criminal Code* proceedings to make English the only language of court proceedings. See *R. v. Keller*, [1966] 2 C.C.C. 380 (B.C.S.C.); *Poulin*; *R. v. Lajoie* (1970), 2 C.C.C. (2d) 89 (B.C.S.C.); *R. v. Pelletier*, 2002 BCSC 561 at para. 25. Though s. 530 now precludes that in the sphere of prosecutions governed by the *Criminal Code*, the *Act* still applies to all provincial proceedings.

86. On the precise topic of the language of *Offence Act* proceedings, the Provincial Court in *R. v. Laflamme*, (17 February 1997), Prince Rupert 19739 (BCPC) adopted one of the decisions based

on the *1731 Act*: *Poulin. Laflamme* was in turn followed by the trial judge, a reliance confirmed by the *Conseil Scolaire Francophone* decision in areas of provincial jurisdiction. As stated by the trial judge (AR p. 3, para. 10), "The courts in British Columbia have held on many occasions that this law [the *1731 Act*] is still in force in British Columbia." See also *Laflamme* at p. 1.24.

### E. Section 133 of the *Offence Act* does not abridge or displace the *1731 Act*

87. The next issue is therefore whether the adoption clause in s. 133 of the *Offence Act* creates a possible exception to the English only rule in the *1731 Act* by importing into British Columbia law whatever new linguistic rights have been introduced into the *Criminal Code*.

#### *1731 Act preceded Offence Act, which preceded s. 530 of the Criminal Code*

88. In order to understand the textual arguments, it is important to place them in a temporal and legislative context.

89. Though there is no direct reference in s. 133 of the *Offence Act* to the *1731 Act*, this was (and remains) unnecessary as the *1731 Act* has always been part of foundational legislation on judicial proceedings in British Columbia, when the first predecessor version of s. 133 was enacted in 1955, 23 years before s. 530 of the *Code* was passed and 35 years before it was declared in force in British Columbia (AR p. 21, paras. 10-11). The *1731 Act* was received into British Columbia law in 1858 (*Conseil Scolaire Francophone*, para. 16).

90. Because s. 133 and its legislative predecessors existed before *Criminal Code* language provisions were made applicable in British Columbia, there could not have been any legislative intent for s. 133 to include language rights provisions from the *Criminal Code* because those did not yet exist or were not applicable to British Columbia. There is no reason to believe it was intended that any future federal language rights amendments would apply by virtue of s. 133: *Poulin*; *R. v. Pare* (1987), 31 C.C.C. (3d) 260 (B.C.S.C.) at paras. 11-18; *Beaulac* at para. 9; *Summary Conviction Act*, 1955, S.B.C. 1955, c 71, s. 102; *Offence Act*, R.S.B.C. 1979, s. 122

91. Indeed, the British Columbia legislature has in fact contemplated and specifically declined to act to change the law on the language of court proceedings in this province. In 1971, a bill was introduced to provide the courts with discretion to conduct trials in French, but it was never

adopted. It would appear that part of the reason the bill did not proceed was due to the (then) Attorney General's concerns about the court system's capacity to deal with cases in French. This illustrates that, absent further legislative action, there is no ability for the courts in British Columbia to conduct trials in French. See Bill 10, *An Act to Amend the Supreme Court Act*, 2nd Sess, 29th Parl, British Columbia, 1971; *Debates of the Legislative Assembly*, 2nd Sess., 29th Parl., March 10, 1971, at p. 646; *Conseil Scolaire Francophone*, at para. 53.

***Offence Act: Textual Argument***

92. It was argued in *Conseil Scolaire Francophone* that the English only *1731 Act* had been implicitly amended by later enactments. However, this Court found such an implicit modification requires that "subsequent legislation has occupied the field to such an extent that the court can infer that the legislature intended to repeal the earlier statute." *Conseil Scolaire Francophone*, at para. 44.

93. So the question is whether s. 133 occupies the linguistic field to the extent of overriding the *1731 Act* and is intended to repeal it. There is no evidence that the legislature ever had any such intention in enacting s. 133. First, s. 133 is not language rights legislation. It is completely silent in that regard. By a mere reference to the *Criminal Code*, which includes its own distinct "complete system" of language provisions, s. 133 cannot morph into language rights legislation and occupy the field otherwise governed by the *1731 Act*. *Conseil Scolaire Francophone*, at paras. 51-53.

94. Moreover, there is language within s. 133 and s. 3 of the *Offence Act* that expressly limits *Criminal Code* adoption where other provincial legislation has occupied the field, as the *1731 Act* has done with respect to the language of provincial offence prosecution proceedings. The language of these provisions is complementary and unambiguously preserves applicable provincial legislation from being set aside without express provincial action.

***Section 133 of Offence Act: "so far as applicable"***

95. Section 133 states that where no express, or only partial provision in the *Offence Act* has be made, "the provisions of the *Criminal Code* relating to offences punishable on summary conviction apply, with the necessary changes *and so far as applicable*, as if its provisions were

enacted in and formed part of this Act." The words "and so far as applicable" clearly denote that other provincial legislation may occupy the field in the sense of being applicable to *Offence Act* proceedings. And that is precisely what the *1731 Act* has done and continues to do with respect to the language of court proceedings in British Columbia.

***Section 3 of Offence Act: "Except where otherwise provided by law"***

96. The "and so far as applicable" language within s. 133 is also consistent with s. 3 of the *Offence Act*, which states:

> **Application to proceedings**
>
> 3 (1) Except where otherwise provided by law, this Act applies to proceedings as defined in section 1.
>
> [Emphasis added]

97. Proceedings are defined in s. 1 to encompass all proceedings to which the *Offence Act* applies:

> 1. In this Act…
> **"proceedings"** means
>
> (a) proceedings in respect of offences, and
>
> (b) proceedings in which a justice is authorized by an enactment to make an order;

98. Section 3 works in a complementary way with the "and so far as applicable" language in s. 133. First, by its express language, s. 3 is designed to ensure that a broadly applicable yet highly specific statute like the *1731 Act*, which applies to *all court proceedings* over which the province has jurisdiction, is not displaced by provisions in the *Offence Act*. Second, the "and so far as applicable" language in s. 133 is designed to shield other applicable provincial laws from the breadth of that provision. Together, ss. 3 and 133 operate to ensure that provincial laws which apply to *Offence Act* (and other provincial court) proceedings – like the *1731 Act* – are not displaced by other federal laws by silence or by implication.

99. This scheme is entirely consistent with this Court's decision in *Conseil Scolaire Francophone*. At para. 44, this Court confirmed that the tests for implied repeal and modification

are the same, being "based on the occupation of the field by subsequent legislation." Section 3 of the *Offence Act* and the "and so far as applicable" language in s. 133 of that act serve to protect the ongoing applicability of the *1731 Act* from both explicit and implicit legislative devices that might be inadvertently incorporated into the *Offence Act* through incorporation by reference. It can fairly be said that the two provisions ensure provincial paramountcy of statutes like the *1731 Act*.

100. Indeed, the argument of the appellant supports this view. At para. 75 his factum, the appellant says that "l'expression précise « *in this Act* »… indique clairement que, pour determiner quelle loi régit les instances judiciaires en matière d'infractions provinciales, la première étape est de regarder dans la loi elle-même (« *in this Act* »)" [Emphasis added]. It is precisely because s. 3 of the *Offence Act*, along with the "and so far as applicable" language of s. 133, so clearly contemplate the application of other provincial laws that the *1731 Act* is unaltered by s. 133. Indeed, these two provisions expressly preserve the *1731 Act* and effectively mandate specific legislation adverting to language use in courts in order to oust its application with respect to provincial offences.

101. The appellant's argument that s. 133 of the *Offence Act* provides for broad incorporation relies on the words that "express provision has not been made in this Act" [emphasis added]. However this argument does not assist in this case because s. 133 only refers to "has not been made in this Act" and not "has not been made in this Act *or any other provincial legislation*". This very specific language of s. 133, along with "and so far as applicable" and the words of s. 3 of the *Offence Act*, were intended to, and do in fact, operate to preserve laws like the *1731 Act*.

***Offence Act: Silence Argument***

102. The appellant states that there are no provisions in the *Offence Act* or the *Motor Vehicle Act* dealing with the language of a trial (Appellant's Factum paras. 69, 85 and 88). In fact, the *Offence Act* does contain a narrow reference to the use of French, thereby establishing that the broader provisions of s. 530 are not meant to apply.

103. The *Offence Act* provides for the use of French in a limited fashion. Section 132(2)(a.4) of the *Offence Act* allows for French forms for prosecutions under the *Federal Contraventions Act*. The reciprocal federal regulation incorporates explicitly s. 530 of the *Criminal Code* where

contraventions are prosecuted in British Columbia. See: *Federal Contraventions Forms Regulation*, B.C. Reg. 124/2005; *Application of Provincial Laws Regulation*, SOR/96-312, Part VIII, r. 3; and Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6 ed. (Ottawa, LexisNexis Canada, 2014), paras. 13.22 and 14.84

104. If the appellant's interpretation of s. 133 is correct and it incorporates the language provisions of the *Criminal Code*, then s. 132(2)(a.4) and the matching federal regulation are redundant because the *Criminal Code* already provides for French forms in s. 849(3) and for French trials under s. 530. If the *Code's* language provisions are fully incorporated - as the appellant suggests - then such forms and regulations would be unnecessary. Statutes should not be interpreted such that their provisions are surplusage: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General*), 2011 SCC 53, [2011] 3 S.C.R. 471 at para. 38

105. It is apparent that neither the provincial legislature nor the federal government consider that s. 530 of the *Code* is adopted into provincial procedure and therefore have set about providing for it in certain narrow circumstances that are not applicable to the appellant.

***Offence Act: MacKenzie Argument***

106. The appellant's invitation (in paras. 106 and 107 of his factum) to adopt the Nova Scotia decision in *MacKenzie* and its insertion of s. 530 into provincial prosecutions should be rejected for a number of reasons. The appellant says in para. 107 of his factum that "M. Bessette soutient que l'interprétation de la disposition d'incorporation générale dans l'arrêt *R v MacKenzie* est correcte, et que l'art. 133 de la *Offence Act* devrait être interprété de la même manière" [Emphasis added]. However the Nova Scotia Court of Appeal engaged in no interpretation of the incorporation provision (ss. 7(1) and (2)(a) of that province's *Summary Proceedings Act*, RSNS 1989, c 450). It appears that the application of s. 530 to provincial prosecutions was conceded by the Crown in that case. Thus *MacKenzie* does not provide a ruling on a contested point. Beyond a conclusory statement that s. 530 applied, there is no reasoning for this Court to find persuasive and adopt: *MacKenzie*, at paras. 3, 6-9.

107. Furthermore, the adoption clause in the *Summary Proceedings Act* works the opposite way from s. 133 of the *Offence Act*. Under the *Summary Proceedings Act*, *Criminal Code* provisions apply "Except where and to the extent that it is otherwise specially enacted" [emphasis added]. In other words, in Nova Scotia it takes specific legislative action for provisions of the *Criminal Code* *not* to apply.

| **Section 133 *Offence Act*** | **Section 7(1) *Summary Proceedings Act*** |
|---|---|
| If, in any proceeding, matter or thing to which this Act applies, express provision has not been made in this Act or only partial provision has been made, the provisions of the *Criminal Code* relating to offences punishable on summary conviction apply, with the necessary changes and so far as applicable, as if its provisions were enacted in and formed part of this Act. | Except where and to the extent that it is otherwise specially enacted, the provisions of the *Criminal Code* (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, *mutatis mutandis*, to every proceeding under this Act. |

108. In contrast, under the *Offence Act*, the presumption is the reverse: it is only where "express provision has not been made in this Act or only partial provision has been made, the provisions of the *Criminal Code* relating to offences punishable on summary conviction apply". Under this scheme, it takes a specific legislative void before the *Criminal Code* is imported. Given the often and recently applied *1731 Act*, there is no such void in this province in matters of language.

109. The distinction between presumptive incorporation (as in Nova Scotia) and the more selective process under s. 133 was correctly reviewed in *R. v. Corbett*, 2005 BCSC 1437. The mere absence of an option under the *Offence Act* does not lead to that option being imported from the *Code* under s. 133. What must be considered in addition to language specific to the different provincial statutes is the provincial legislative context. In this appeal, the *1731 Act* and the narrow language provision in the *Offence Act* itself (dealing only with federal contraventions), along with s. 3 and its complementary limiting language in s. 133, all serve to demonstrate that s. 133 was not intended to incorporate s. 530 of the *Code*.

***Scope of s. 133 was properly interpreted by trial judge***

110. AGBC submits that the decision in *Laflamme* and the ruling by the trial judge in this case both found correctly that the focus of s. 133 is on the incorporation of missing procedural sections. Both decisions properly contrast this type of straightforward incorporation with the policy or substantive change that reading in linguistic rights would bring about. In that context, s. 133 is simply not a robust enough vehicle for such a shift. *Laflamme* properly stated the issue (at p. 1.29-38):

> I agree with the argument of the Crown that the right to have a trial conducted in French comes under the heading of language rights and not procedure. I find that Section 122 [now s. 133] is intended to incorporate appropriate sections of the *Criminal Code* with regard to procedure and that it was not intended to extend French language rights. In British Columbia, the extension of French language rights would be something more than mere procedure and would be a political decision.

111. This was reiterated by the trial judge (AR pp. 6-7, paras. 19, 21-22),:

> I see no reason not to follow the decision in *Laflamme*. Although it is not binding on me because it is a decision of another Provincial Court judge, it is a considered decision based on accepted legal principles. In particular, I agree with Judge Krantz' characterization of the nature of language rights as being substantive rather than a procedural issue. I agree with her conclusion that the decision to order a French trial in the circumstances would be a political decision rather than a legal one.
>
> […]
>
> While Canada is a bilingual country and all provinces should support the ability of those who speak either official language to actually use those languages effectively in any province, including participating in court proceedings, ultimately the decision to pass laws for that purpose is completely up to the province.
>
> British Columbia has chosen not to specifically provide that persons being prosecuted under the provincial statutes may be granted the right to have their trial in French. The mere fact that the province has not done so does not in itself result in the incorporation of sections 530 to 533 of the *Criminal Code* into the provisions of the *Offence Act*.
>
> See also: *Conseil Scolaire Francophone*, at para. 52

112. Both judges correctly found that s. 133 - a generic, adoption-by-reference provision that makes no reference to language - could not effect such a significant change.

113. Most decisions on the scope of s. 133 of the *Offence Act* conclude, as did the trial judge, that it is procedural:

- *R. v. Jamieson*, [1984] B.C.J. No. 805, 1984 CarswellBC 2115 (Co.Ct.) [provision dealing with release pending appeal]
- *Central Okanagan (Regional District) v. Ushko*, [1998] B.C.J. No. 2123 (S.C.) [provision dealing with want of prosecution and loss of jurisdiction]
- *R. v. Lindsay*, 2002 BCSC 248 [provision dealing with change of venue]
- *R. v. Stad* (1992), [1993] 40 M.V.R. (2d) 114 (B.C.S.C.) [provision dealing with the formalities of informations]

114. The appellant cites cases to suggest that s. 133 has been interpreted to include substantive criminal law provisions from the *Criminal Code*. Before addressing these authorities, the appellant's reliance on the family law case of *Carvell v. Carvell*, [1969] 2 O.R. 513 (C.A.) should be addressed. In the criminal and quasi-criminal law context, a much more precise distinction between substantive and procedural law has been set out and repeatedly accepted. In *R. v. Harrington*, 181 O.A.C. 395, 2004 CarswellOnt 312 the Ontario Court of Appeal approved of the following formulation (at para. 9 Westlaw citation):

> The appellant submits that s. 613(1)(b)(iv) ought not to be construed as applying to errors of substance.
>
> It is necessary then to define the difference between matters of substantive law and those involving criminal procedure.
>
> Substantive criminal law is concerned with the creation of offences (including a definition of the elements necessary to constitute an offence in criminal law), the recognition of defences, including exemptions, justifications and excuses.
>
> Criminal procedure is concerned with the conduct of a criminal trial, as well as with pre-trial and post-trial procedures.
>
> …
>
> Many of the procedural provisions of the *Criminal Code* are designed to protect the right of an accused to a fair trial. Taking a plea, putting an accused to his election, the presence of an accused at his trial, are all matters which are mandatory but which are procedural, in the natural sense of that word. They all involve a manner of proceeding with the trial of an accused. They all have to do with the conduct or mode of conducting a trial. An accused has the right to have the statutory procedure applied, but it is still procedure which is being applied. … If the error can be remedied without prejudice to the accused then Parliament has said that the case may be determined as if no error had occurred.

115. *R. v. Singh*, 2001 BCCA 79 involved ignorance of the law not being a defence - something that could be achieved either by s. 133 incorporating s. 19 of the *Criminal Code* or simply as a matter of general principle that does not require statutory support (see *R. v. Forster*, [1992] 1 S.C.R. 339 at p. 346e-h). It is not clear which path the court picked respecting this issue: para. 8

116. The appellant relies on the British Columbia Court of Appeal decision in *Little v. Peers*, [1988] B.C.J. No. 101 (BCCA) for the proposition that s. 133 of the *Offence Act* incorporates all provisions of the *Criminal Code* that apply to summary conviction proceedings and not just those contained in Part XXVII of the *Code*. Beyond this statement in *Little v. Peers*, there is no support in the jurisprudence for the conclusion that s. 133 of the *Offence Act* incorporates portions of the *Criminal Code* touching upon summary conviction matters beyond those contained in Part XXVII of the *Code*.

117. With respect, the Crown submits that the court's conclusion in *Little v. Peers* that the predecessor to s. 133 of the *Offence Act* imported *all* provisions of the *Criminal Code* that apply to summary matters, rather than those contained in what is now Part XXVII (Summary Convictions) of the *Code* is incorrect as it is based on an erroneous interpretation of and reliance on this Court's decision in *R. v. Moore*, [1979] 1 S.C.R. 195.

118. The majority judgment in *Moore* does not discuss, let alone decide, the two interpretations of s. 101 of the *Summary Convictions Act* (now s. 133 of the *Offence Act*) that were referred to in *Little v. Peers*. Spence J. merely quoted the provision and then referred to s. 450(2) of the *Criminal Code* as being the arrest power that was incorporated by s. 101.

119. In fact, rather than supporting broad adoption of all *Code* provisions that might touch upon summary conviction matters, a close examination of the legislation establishes the contrary. When *Moore* was decided Part XXIV of the *Code* (now Part XXVII) governed summary convictions. Within Part XXIV, s. 728 of the *Code* provided:

> 728. (1) The provisions of Parts XIV and XV with respect to compelling the appearance of an accused before a justice apply, *mutatis mutandis*, to proceedings under this part.
>
> (2) Where a warrant is issued in the first instance for the arrest of a defendant, a copy thereof shall be served on the person who is arrested thereunder. 1953-54, c.51, s.700

120. The incorporated arrest power in *Moore* - s. 450(2) - was contained in Part XIV (Compelling Appearance of Accused Before a Justice and Interim Release). Section 795 of the present *Code* (in Part XXVII Summary Convictions) is the current analogous provision to s. 728.

121. Clearly there is no support for the conclusion of Lambert J.A. in *Little v. Peers* concerning the scope of what is now s. 133 of the *Offence Act*. Indeed, the procedural incorporation in Part XXVII of other provisions in the *Code* supports a narrower interpretation than advanced by the appellant. It supports instead the conclusion that s.133 is a procedural provision.

***Constitutional interpretive principles inapplicable***

122. The appellant argues that s. 530 as a language rights provision has some heightened status or interpretative weight that needs to be assessed in interpreting s. 133 of the *Offence Act*, a provincial statute. This Court's decision in *Conseil Scolaire Francophone* made it clear that while this might be the case in relation to the federal jurisdiction, it did not extend to all provincial matters.

123. *Conseil Scolaire Francophone* opens with the following broad statement (at para. 1):

> [1] Each of the provinces has the power under the Constitution, subject to certain restrictions, to make laws governing the language to be used in its courts. This power derives from the provinces' jurisdiction over the administration of justice.

124. Wagner J. (as he then was) acknowledged both the importance of *Charter* values in statutory interpretation as well as the important role of linguistic minorities in Canada (at para. 55). He then added that one has to look to provincial considerations, not federal ones, when determining the language of the courts charged with adjudicating in areas of provincial responsibility. Those provincial considerations establish that the *1731 Act* still applies. Wagner J. concluded at paras. 56-57:

> [56] However, the *Charter* also reflects a recognition that Canada is a federation and that each province has a role to play in the protection and advancement of the country's official languages. This is evident from ss. 16 to 20, which require bilingualism in the federal government, in Parliament, in courts established by Parliament, and in the province of New Brunswick. The Charter does not require any province other than New Brunswick to provide for court proceedings in both official languages. In addition, s. 16(3) provides that the legislatures may act to advance the use of English and French. In my view,

> therefore, while it is true that the *Charter* reflects the importance of language rights, it also reflects the importance of respect for the constitutional powers of the provinces. Federalism is one of Canada's underlying constitutional principles: *Reference re Secession of Quebec*, at paras. 55-60. Thus, it is not inconsistent with *Charter* values for the British Columbia legislature to restrict the language of court proceedings in the province to English.
>
> [57] This being said, in light of s. 16(3) of the *Charter*, which specifically provides that provincial legislatures may advance the equality of status of English and French, it would be open to the British Columbia legislature to enact legislation, like that proposed in 1971, to authorize civil proceedings in French. Such legislation would no doubt further the values embodied in s. 16(3), which protects legislative initiatives intended to increase the equality of the official languages but does not, as this Court has already held, confer any rights. However, given the absence of any such initiative by the British Columbia legislature, it is not possible for this Court to impose one on it.
>
> [Emphasis added]

125. The interpretative use of constitutional principles only applies where there "is genuine ambiguity as to the meaning of a provision": *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 612, at paras. 12, 16. In this case, s. 133 is not ambiguous. Section 133 does not provide for any language rights and does not have to – the language of court proceedings in British Columbia is established by the *1731 Act*. As such there is no need to resort to express or unwritten constitutional principles.

126. The authorities cited by the appellant are about constitutional language provisions, bilingual federal legislation or provincial language laws where they exist – not about general provincial obligations and especially not about provisions like s. 133 that make no reference to language:

- *Beaulac*, at para. 13 ["interpretation of official language provisions"], para. 23 [s. 530 "meant to form part of the unfinished edifice of fundamental language rights"], para. 25 ["language rights ... in all cases" but dealing with cases under federal law]

- *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 208 D.L.R. (4th) 577 (Ont. C.A.) [Concerned the reduction of availability of health care services in French to the francophone population in a region designated as bilingual under the *French Language Services Act*, R.S.O. 1990, c. F.32]

127. *MacKenzie* is cited in para. 118 of the appellant's factum, along with *Lalonde,* for the proposition that "[l]e principe constitutionnel non écrit de la protection des minorités s'applique spécifiquement à la protection des minorités linguistiques et, dans ce contexte, doit guider

l'interprétation de la législation." However, the Nova Scotia Court of Appeal concluded in the next paragraph (67):

> [67] These authorities support the conclusions that there is an unwritten principle of the Constitution governing the protection of minority language rights, and this principle has normative force. I need not consider the ambit or degree of the normative force. From the passages I have quoted (*Secession Reference***,** para. 53, *Charlebois*, para. 58, *LaLonde*, para. 121) it is clear that the principle does not amend the text of the *Charter of Rights*.

128. AGBC adds that these principles need not be resorted where the text of s. 133 of the *Offence Act* is clear in not incorporating s. 530 of the *Criminal Code*.

129. The ruling in *Conseil Scolaire Francophone* respected and deferred to provinces' choices on language within their own jurisdiction. This approach has been affirmed in two even more recent decisions of this Court: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 at para. 68 and *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511 at paras. 5-6, and 103.

130. To the extent that "constitutional values" have a role to play in interpretation, those values must include this Court's repeated affirmation of the constitutional rights of provinces in deciding what scope to give linguistic rights.

**PART IV – SUBMISSIONS ON COSTS**

131. The appellant seeks costs against the respondent AGBC despite the general rule that costs in criminal matters are awarded in only exceptional circumstances. The respondent submits that each party should bear its own costs as there is no basis upon which to depart from the general rule.

132. With respect, there is no basis to conclude that the costs incurred by the appellant "découlent de problèmes systémiques indépendants de [s]a volonté" (Appelant's factum, para. 125). Contrary to the assertion of the appellant, there was no differential treatment of language rights by courts in British Columbia, either in relation to the interpretation of s. 133 of the *Offence Act* or in relation to the appropriateness of prerogative relief.

133. The cases relied on by the appellant (*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 and *R. v. Munkonda*, 2015 ONCA 309) each depended on findings of unusual and serious conduct on the part of the judges and the prosecution. In *Curragh* it was a reasonable apprehension of judicial bias while *Munkonda* involved significant judicial and prosecutorial failures to implement and respect s. 530 language rights that were of unquestioned applicability to the criminal case. The instant case bears none of these features, or any remotely similar.

134. Given the appellant's stated personal interest in this case and the absence of any conduct by the AGBC beyond asserting arguable points of law by way of response, there is no basis to depart from the ordinary rule that each party bear their own costs. Doherty J.A. in *R. v. Garcia* (2005), 194 C.C.C. (3d) 361 (Ont. C.A.) endorsed this view even where the Crown is the appellant (at para. 26):

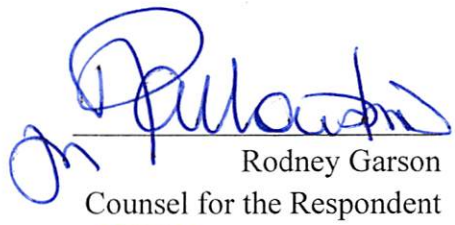
> [26] In deciding whether the public interest at stake in an appeal justifies a costs order against the Crown under s. 826, the summary conviction appeal court must consider both the public importance of the legal issue raised on the appeal and the significance of the outcome of the appeal to the individual respondent. Where the public interest is high and the appeal has little or no significance to the particular respondent, a costs order against the Crown may be appropriate regardless of the outcome of the appeal. Where, however, there is a significant public interest in the legal issue raised on the appeal and the respondent has a significant personal interest, it is not unfair to follow the general rule and require each side to bear its own costs.
>
> [Emphasis added]

## PART V – NATURE OF ORDER SOUGHT

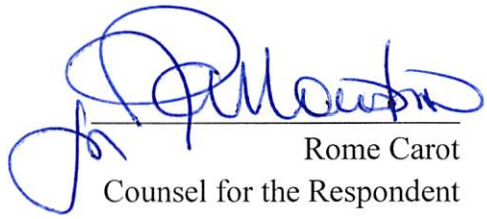
135. The respondent submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 9th day of October, 2018, at Victoria, British Columbia.



Rodney Garson
Counsel for the Respondent



Rome Carot
Counsel for the Respondent

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