SCC File No.: 40332

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

BETWEEN:

FRANCK YVAN TAYO TOMPOUBA

APPLICANT
(Appellant)

- and –

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

ATTORNEY GENERAL OF BRITISH COLUMBIA
940 Blanshard Street, 3rd Floor
P.O. Box 9245 Stn Prov Govt
Victoria, BC V8W 3E6

Rodney G. Garson, K.C.
Liliane Bantourakis
Tel: (250) 387-4481
Fax: (250) 387-4262
Email: rodney.garson@gov.bc.ca
liliane.bantourakis@gov.bc.ca

Counsel for the Respondent

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email: matthew.estabrooks@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent

POWER LAW
99 Bank Street, Suite 701
Ottawa, ON K1P 6B9

Jonathan Laxer
Caroline Magnan
Sara-Marie Scott

Tel: (613) 907-5652 / 604-260-4462
Fax: (613) 907-5652 / 604-260-4462
Email: jlaxer@powerlaw.ca
smsscott@powerlaw.ca

MARTIN + ASSOCIATES
863 Hamilton St.
Vancouver, CB V6B 2R7

Casey L. Leggett

MICHAEL KLEIN LAW
1050 – 777 Hornby St.
Vancouver, CB V6Z 1S4

Vicki Williams

Counsel for the Applicant

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. This application for leave to appeal should be dismissed because the Court of Appeal's decision largely represents a fact-driven application of principles addressed by this Court in previous decisions. To the extent the applicant has raised new issues that could theoretically have broader importance, this case does not provide a suitable factual record upon which to decide them, and there is no conflict or lack of clarity in the jurisprudence requiring resolution at this time. Accordingly, the proposed appeal raises no issue of public importance.

2. On his first issue, the applicant says that the Court of Appeal imposed a heavy onus on him in asserting his official language rights and took an unprecedented approach to which party bears the onus when s. 530 of the *Criminal Code* is invoked. However, this not so. The applicant raised s. 530 for the first time on appeal, in an effort to have his conviction overturned. Applying the usual burdens that apply on appeal and this Court's official language rights jurisprudence, the Court of Appeal considered questions such as when the applicant learned of his official language rights or the reasons for his delay in asserting them. These questions did not mark any shift in the jurisprudential landscape – rather, they were the very questions this Court's decision in *R. v. Beaulac*[1] suggested should be posed when s. 530 of the *Code* is invoked late in the day.

3. Unfortunately, the record here was silent on those basic factual questions and on the central question of whether the applicant had been deprived of a trial in his official language of choice, or not. The Court of Appeal's conclusion that the record before it was insufficient to make the factual findings the applicant asked it to make raises no question of public importance. It also strongly suggests that this case does not offer an appropriate factual foundation upon which to consider the issues being advanced.

4. On his second issue, the applicant says this case raises an important question about the availability of the curative proviso where there has been non-compliance with s. 530(3) of the

[1] [1999] 1 S.C.R. 768.

Code. However, there is no controversy in provincial appellate court jurisprudence on this issue, nor indeed at any level of court. To the contrary, the small number of reported cases to date that even raise a s. 530(3) issue have generally adopted a "consistent approach" to remedies, grounded in this Court's existing jurisprudence.[2] The respondent is aware of only two such cases decided at the provincial court of appeal level other than this one, and only one of those addresses the curative proviso.[3] If this point could raise an issue of public importance, it is not one that is yet ripe for determination.

5. Finally, the applicant's third issue is academic and raises no concrete point of dispute. He says the Court should grant leave to emphasize the constitutional underpinnings of s. 530(3) and the importance of that provision. Formulated, as they are, at such a high level of generality, these points do not appear to present any grounds for disagreement. Accordingly, they too fail to provide any basis for a grant of leave.

B. STATEMENT OF FACTS

6. The applicant was found guilty of one count of sexual assault. That outcome turned largely on admissions he made to police, in which he repeatedly said that he had sex with the complainant when he knew she was asleep. Despite his attempts to resile from those statements at trial, the judge was persuaded by the applicant's many spontaneous admissions against his own interest and convicted him.[4]

(1) The Applicant's Arrest and First Appearance in Provincial Court

7. Following his arrest in March of 2018, the applicant was released on a Promise to Appear and subject to an Undertaking given to a peace officer. He signed both documents. The Undertaking set out the following notice, immediately under the applicant's signature:[5]

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[2] *R. v. Tayo Tompouba*, 2022 BCCA 177 ["BCCA Reasons"], at para. 89.

[3] *R. v. Caesar*, 2015 NWTCA 4; *R. v. MacKenzie*, 2004 NSCA 10.

[4] BCCA Reasons, at paras. 8, 27, 34.

[5] BCCA Reasons, at paras. 9 – 10.

NOTICE OF LANGUAGE RIGHTS AT TRIAL

You may apply, pursuant to section 530 of the Criminal Code, to have your trial in whichever of the two official languages of Canada (English or French) is your language.

If you would like your trial in French, you must apply to the Court before:

- Your trial date is set;
- At the time of your election; or
- At the time you are ordered to stand trial

8. An identical notice, this time in both official languages, was also set out on the second page of the Promise to Appear. On the first page, immediately below the applicant's signature, the following words were printed: "See notice of Language Rights at Trial on reverse / Voir au verso pour notification de vos droits de langue au procès."[6]

9. The applicant did not attend Court for his first appearance; his lawyer attended on his behalf. The was no mention of trial language rights or the time for applying for a French trial at that hearing, contrary to s. 530(3) of the *Code*. However, the applicant's lawyer did advise the Court that he would ensure the applicant knew the Undertaking was still in effect.[7]

(2) Proceedings in the Supreme Court of British Columbia

10. The applicant never made an application pursuant to s. 530 of the *Code*. The proceedings, including the trial, took place in English and all evidence was given in English without any request for language interpretation.[8] Though not perfect, the applicant's English demonstrated "excellent ability", fluency, comfort, nuance and vocabulary.[9]

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[6] *Ibid*.

[7] BCCA Reasons, at para. 12.

[8] BCCA Reasons, at para. 13.

[9] *R. v. Tayo Tompuba*, 2019 BCSC 1529 (BCSC Reasons for Judgment), at para. 84 / Application for Leave to Appeal, pp. 34 – 35; *R. v. Tayo Tompouba*, 2019 BCSC 2442 (BCSC Voir Dire Reasons), at paras. 11 – 13 / Application for Leave to Appeal, pp. 13 – 15.

11. The applicant is a native French-speaker. This point arose at trial when he challenged the admissibility of his police statement, pursuant to s. 10(b) of the *Charter.* In his statement to police, he made several inculpatory statements. Though he had been informed of his right to counsel and had received legal advice before making those inculpatory statements, he argued there were special circumstances that imposed a duty on police to take additional steps to ensure he was aware he had a right to consult with French-speaking counsel and that his statement should be excluded on this basis.[10]

12. The applicant testified in English on the *voir dire*. He said he did not ask for a French-speaking lawyer, among other reasons, because "[he] didn't really think about" it. He conceded that he had not tried to communicate in French with the francophone police officer who arrested him, communicating in English throughout. He agreed that he knew that French is an official language of Canada, that many services are available in French upon request and acknowledged that his trial was being conducted in English.[11]

13. The trial judge ruled there had been no special circumstances giving rise to a duty on the police to offer the applicant access to French-speaking counsel. That ruling was not challenged on the subsequent conviction appeal.[12]

(3) Proceedings in the Court of Appeal for British Columbia

14. Having been found guilty of sexual assault, the applicant appealed his conviction. For the first time on appeal, he argued his official language of choice for trial was French and that he ought to have been tried before a French-speaking judge.[13] He said his conviction should be set aside either because (1) the notice of language rights required by s. 530(3) of the *Code* to be given at the

[10] BCCA Reasons, at para. 17.

[11] *Ibid*.

[12] BCCA Reasons, at para. 21.

[13] BCCA Reasons, at para. 40.

first appearance had not been given; or (2) s. 530(4) imposed a duty on the trial judge to remand him before a French-speaking judge, because he was a native French-speaker.[14]

15. The applicant asked the Court of Appeal to make the following findings of fact: (a) that he had not been aware of his right to a French trial (he did not specify which time period he wished this finding to be made for, but presumably he intended that it should cover the entire trial-level process), (b) that his counsel had failed to give him advice regarding his right to a French trial (again, no time period specified, but presumably he intended that it be for the entire trial-level process), and (c) that his official language for the purposes of trial would have been French.[15]

16. The applicant was not prepared, however, to attest to any of these facts by way of fresh evidence, and the record was silent on those points.[16]

17. In deciding the appeal, the Court of Appeal relied heavily on this Court's decision in *Beaulac*, which addresses s. 530 of the *Code* and, in particular, which factors will be considered when an accused makes a late assertion of official language for trial (i.e. later than the time contemplated in s. 530(1) of the *Code*).[17] It also relied on this Court's more recent decisions in *R. v. Besette*[18] and *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*[19] The Court of Appeal emphasized the substantive nature of official language rights, that language rights must be interpreted in a broad and purposive manner, and that remedies for breach of language rights must be responsive to the violation in issue.[20]

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[14] BCCA Reasons, at paras. 36 – 37, 116 – 119.

[15] BCCA Reasons, at paras. 37, 123 – 124, 126.

[16] BCCA Reasons, at paras. 121 – 125.

[17] BCCA Reasons, at paras. 42 – 46, 53 – 56, 64 – 73, 95 – 97, 102.

[18] 2019 SCC 31.

[19] 2018 SCC 50; BCCA Reasons, at paras. 42 – 43, 48, 50, 57 – 61, 71 – 73, 87, 113.

[20] BCCA Reasons, at paras. 3, 42 – 45, 53 – 55, 60, 68 – 73, 90 – 94, 105 – 106.

18. The Court found that, generally, the appellate remedy for breach of s. 530 in the trial court should be a new trial.[21] It considered the small number of reported cases involving non-compliance with s. 530(3), noting that, with the exception of one dated lower court decision that contained no analysis and had subsequently been called into question, those cases illustrated a "consistent approach to granting remedies for breaches of s. 530(3)" which was founded on *Beaulac*'s admonition that language rights be interpreted purposively and consistent with *Mazraani*'s guidance that that remedies be proportionate to the language rights violation.[22]

19. The Court of Appeal also noted that the Crown bears the ultimate onus when resisting a s. 530 application at the trial level.[23] However, both at trial and on appeal there is an evidentiary threshold the accused must cross where language of choice is asserted late and there are salient facts the Court is required to consider that the applicant alone is in a position to clarify (see *Beaulac*, e.g. at paras. 37 and 42). In many cases, those facts will be apparent on the record, or can be inferred from it. In others, they might not be, and fresh evidence will be required.[24]

20. Here, unfortunately, the record did not allow the Court to ascertain the necessary facts. Though there had been non-compliance with s. 530(3), the evidentiary record was silent on what followed, such as when the applicant had first learned of his language rights, why he waited to assert them until after he was convicted, or whether he would have chosen a trial in French.[25] In the circumstances, the court did not have the necessary basis to conclude that the trial had been conducted in violation of the applicant's official language rights and the curative proviso applied to the earlier s. 530(3) breach.[26]

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[21] BCCA Reasons, at paras. 90, 72.

[22] BCCA Reasons, at paras. 89 – 90.

[23] BCCA Reasons, at paras. 45, 102.

[24] BCCA Reasons, at paras. 100 – 103.

[25] BCCA Reasons, at paras. 119 – 126.

[26] BCCA Reasons, at para. 126.

21. As for the applicant's s. 530(4) claim, that was also unsupported by the record. There were no circumstances at play that might have suggested to the judge that he should inquire into the applicant's chosen language. Being fluent in both official languages, the applicant could have chosen either. He was represented by counsel, communicated proficiently in English throughout the trial and his dealings with police, and gave no indication of a desire to do so in French. In these circumstances, the judge had no reason to question the issue.[27]

PART II – QUESTIONS IN ISSUE

22. This application for leave to appeal should be dismissed because it raises no issue of public importance considering both the highly fact-driven nature of the decision below, and the lack of any current controversy in the jurisprudence.

PART III – STATEMENT OF ARGUMENT

A. NO QUESTION OF PUBLIC IMPORTANCE REGARDING ONUS ON APPEAL

23. The first proposed issue on appeal, regarding a convicted appellant's onus to justify an entitlement to be retried, raises no issue of public importance. The applicant's submissions in this regard are premised on the notion that the Court of Appeal departed from *Beaulac* or purported to change the law in this area when it did not. The outcome here did not turn on any jurisprudential shift or legal controversy, but rather on an unusual set of facts and sparse record. Just as the insufficiency of the factual record was the primary driver of the analysis and outcome before the Court of Appeal for British Columbia, so too would it be before this Court. This fact-driven case does not present a suitable record upon which to decide the issues being advanced.

24. Section 530 of the *Criminal Code* delineates the right to be tried before a judge who speaks the accused's official language of choice, or to be tried before a bilingual judge. If an accused applies under that section in a timely manner, the court "shall grant" the application (s. 530(1)). If they do not apply in a timely manner, the trial court *may* grant the application if it is in the best interests of justice to do so (s. 530(4)). In the words of this Court, "the rule is the automatic access

[27] BCCA Reasons, at paras. 127 – 128.

to a trial in one's official language when an application is made in a timely manner, and a discretionary access when such an application is not timely."[28]

25. Where access is discretionary (i.e. when s. 530 is invoked late), this Court has explained that the "first inquiry […] is directed at the knowledge of the right by the accused. When was he or she made aware of his or her right? Did he or she waive the right and later change his or her mind? Why did he or she change his or her mind? Was it because of difficulties encountered during the proceedings?"[29]

26. Once the reason for the delay has been examined, the trial judge will also consider several factors that relate to the conduct of the trial in assessing whether it is in the "best interests of justice" to grant the accused's request to be tried in the other official language. The Crown bears the ultimate burden in opposing a s. 530 application at the trial level.[30] However:

> …. it remains that the later the application is made in the trial process, the better must be the reason for the delay in order for the application to be accepted. If the accused makes his or her application in the middle of the trial and can provide no reason for his or her lateness, it may not be accepted, depending on the circumstances.[31]

27. Reasoning that similar considerations apply where s. 530 is invoked for the first time on appeal (i.e. even later than the "middle of trial" and in an effort to overturn conviction), the Court of Appeal turned to *Beaulac*'s "first inquiry" – "the knowledge of the right by the accused. When was he […] made aware of his or her right? Did he […] waive the right and later change his […] mind? Why did he […] change his or her mind?" It also asked itself, like in *Beaulac*, what were the "reasons for delay" more broadly, considering this Court's indication that "delays constitute

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[28] *Beaulac*, at paras. 28, 37.

[29] *Beaulac*, at para. 37.

[30] *Beaulac*, at paras. 38 – 43.

[31] *Beaulac*, at para. 43.

important factors to be weighed".[32] The record in this case did not disclose any answers and the applicant was not willing to provide them.[33]

28. The applicant's submission that the Court of Appeal adopted an "unprecedented" approach, a "new test", a "presumption" or a "heavy burden" contrary to *Beaulac*,[34] is therefore unsupported and does not raise a question of public importance. The issue here was that the record did not provide the "factual context within which to analyse the issues"[35] *Beaulac* suggested were relevant. That would equally be true on an appeal before this Court.

29. A convicted appellant who alleges an error of law or miscarriage of justice in the trial court, and seeks to have a duly entered conviction set aside on that basis, must persuade the appellate court that a legal error or miscarriage of justice has occurred per s. 686(1)(a) of the *Criminal Code*.[36] Here, the appellant said that an error had been committed in the provincial court, and that the Court of Appeal should, on this basis, infer additional facts sufficient to establish legal error or miscarriage of justice in the superior (trial) court. However, on the record before it, the Court was simply not able to draw those factual inferences.[37]

30. Though this was not an argument he made below, it appears that the applicant may now also be saying that the questions this Court posed in *Beaulac* should not be asked where there has been non-compliance with s. 530(3). If that is the case, this likewise is not the record upon which to address the issue.

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[32] *Beaulac*, at para. 51; BCCA Reasons, at paras. 95 – 106.

[33] BCCA Reasons, at paras. 123 – 126.

[34] Applicant's Memorandum, at paras. 18, 21, 22, 25.

[35] BCCA Reasons, at para. 101.

[36] See e.g. in various contexts: *R. v. Wong*, 2018 SCC 25, at para. 65; *R. v. Tran*, [1994] 2 S.C.R. 951 at 978–980; *R. v. Lohrer*, 2004 SCC 80, at paras. 1 – 6; *R. v. G.F.*, 2021 SCC 20, at para. 79. Conversely the law is also clear that the Crown bears the burden in invoking the curative proviso under s. 686(1)(b).

[37] BCCA Reasons, at paras. 37, 118 – 119, 124 – 126.

31. As the Court of Appeal noted, "[i]n most decided cases involving language rights, the language rights issue was raised in the court below or a substantive violation was apparent on the face of the record [on appeal]".[38] That is, in "most" cases, there is an evidentiary context within which language rights issues can properly be determined. This case, however, was what the Court of Appeal called one of the "rare instances"[39] in which that was not so.

32. If this Court is inclined to consider the implications on a subsequent trial judgment of provincial court non-compliance with s. 530(3) at the accused's first appearance, it should not do so in a case where an unusual set of facts leaves unanswered the fundamental question of whether the asserted right is even engaged. Rather, it should only do so where the language right is engaged on the facts, and features of the record allow the Court to explore what, if any, "evidentiary threshold" must be satisfied where a convicted appellant invokes s. 530 for the first time on appeal.

B. NO QUESTION OF PUBLIC IMPORTANCE REGARDING THE CURATIVE PROVISO

33. The applicant also says that this case raises a question of public importance about whether the curative proviso is available where there has been non-compliance with s. 530(3) of the *Code*. However, this issue, even if it could have broader importance, is not ripe for determination by this Court. Only a small number of cases have considered the remedial implications of non-compliance with s. 530(3) to date and, thus far, they do not disclose any controversy or uncertainty.

34. As noted by this Court in *Mazraani*, while a new hearing will generally be an appropriate remedy for most language rights violations, this will not always be the case.[40] The Quebec Court of Appeal made similar comments in *R. v. Dhingra*,[41] which the applicant cites with approval, noting that "[not] any breach of language rights will necessarily result in a new trial. The standard is not perfection. Rather, only sufficiently serious and substantial breaches may lead to a judicial

[38] BCCA Reasons, at para. 104.

[39] *Ibid*.

[40] *Mazraani*, at paras. 48, 52 – 53.

[41] 2021 QCCA 1681.

reparation on appeal. There will always be challenges in implementing s. 530 and s. 530.1 and a degree of flexibility is thus required."[42]

35. The question the applicant appears to pose here is whether non-compliance with s. 530(3) in particular should necessarily result in a new trial and should never attract the curative proviso. However, the remedial implications of a s. 530(3) breach appear to have arisen only rarely in the jurisprudence. As the Court of Appeal noted here, only a "handful"[43] of s. 530(3) non-compliance cases have arisen since *Beaulac* was decided.

36. In his memorandum, the applicant refers to only two s. 530(3) cases decided by provincial courts of appeal,[44] and only a further four decided by lower courts,[45] for a total of six in the 23 years since *Beaulac* was decided.[46] Of the four lower court decisions, two involved accused who had not yet been tried, and who exercised their official language rights at the trial level despite non-compliance with s. 530(3), having learned of those rights by other means.[47]

37. Further, of the above-noted decisions relied on by the applicant, only one involved the application of the curative proviso or indeed any serious consideration of its potential application. Like the present case, it involved an unusual set of facts – in that case, an apparent English-speaker who had been tried in English and who claimed his conviction should be set aside because he had not received the notice required by s. 530(3).[48]

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[42] *Ibid*., at paras. 59 – 60.

[43] BCCA Reasons, at para. 71.

[44] *R. v. Caesar*, 2015 NWTCA 4; *R. v. MacKenzie*, 2004 NSCA 10.

[45] *R. c. Beaudin*, 2018 NBPC 6; *R. v. Ohelo*, [2009] O.R. (3d) 788 (ONSC); *R. v. Deveaux*, [1999] 181 NSR (2d) 81 (NSSC); *R. v. Vaillancourt*, 2019 ABQB 859.

[46] Applicant's Memorandum at paras. 10, 20, 31.

[47] See *Beaudin* and *Vaillancourt*, above note 45.

[48] *Caesar*, at paras. 8 – 10.

38. On the infrequent occasions where s. 530(3) has become an issue, lower courts have generally adopted "a consistent approach to granting remedies"[49], guided by *Beaulac*'s exhortation that language rights be interpreted purposively. That jurisprudence is also generally consistent with this Court's recent additional guidance on remedial issues in *Mazraani* that "courts should favour the existence of effective remedies for violations" of language rights, while recognizing that remedies should also not be disproportionate to the scale of the violation.[50]

39. The applicant is therefore incorrect when he says "La jurisprudence émanant des cours d'appel démontre un désaccord a l'égard de cette question".[51] In support of this proposition, he says only that *R. v. Deveaux*[52] and *R. v. Caesar*[53] are inconsistent. But *Deveaux*, which was decided over 20 years ago, is a superior court decision,[54] not the decision of a provincial court of appeal. It also addressed the remedial issue "without analysis"[55] and partially on the subsequently discredited premise that non-compliance with s. 530(3) of the *Code* necessarily imported a violation of ss. 15, 16, and 19 of the *Charter*. *Deveaux* does not appear to have been followed in the many years since it was decided, and its *Charter* findings were rejected by its own Court of Appeal only a few years later.[56] *Deveaux* therefore does not illustrate any meaningful disagreement.

40. Finally, contrary to the applicant's suggestion, there is no question of public importance regarding the onus that applies where the curative proviso is invoked.[57] The Court of Appeal did not impose a burden on the applicant to countermand the application of the curative proviso. As explained above, it simply found the record was insufficient to conclude there was an error of law or miscarriage of justice in the trial court. Further, and in any event, the jurisprudence is already

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[49] BCCA Reasons, at para. 89.

[50] *Mazraani*, at paras. 48, 50 – 53.

[51] Applicant's Memorandum, at paras. 10, 30 – 31.

[52] Above, note 45.

[53] Above, note 44.

[54] Albeit on a summary conviction appeal.

[55] BCCA Reasons, at para. 74.

[56] *MacKenzie*, at paras. 17 – 68.

[57] Applicant's Memorandum, at paras. 37 – 39.

clear that the Crown bears the onus on the application of the curative proviso.[58] Even if the Court of Appeal somehow erred on this front (and it did not), an isolated error on a settled point like this would not justify a grant of leave; this Court is not a court of error.

C. NO DISPUTE ABOUT THE IMPORTANCE OF SECTION 530

41. The third question the applicant proposes is academic and raises no concrete point of dispute. He says leave should be granted so this Court can confirm that s. 530 of the *Code* has constitutional underpinnings and make "une déclaration sans equivoque […] quant à l'importance du respect du paragraph 530(3)".[59] This court already addressed the constitutional underpinnings of s. 530 of the *Code* in *Beaulac* and no confusion arises in that regard.[60] Further, there is no doubt that compliance with s. 530(3), a mandatory provision of the *Criminal Code*, is important.[61] The respondent certainly does not dispute either point in principle.

42. In reality, the applicant's submissions under this heading suggest primarily that he disagrees with how the Court of Appeal formulated its reasons. He believes, first, that it should have said more about the importance of s. 530(3) and, second, that it should have said less about the applicant's relative *bona fides*.[62] The lower court's reasons, however, leave no doubt that it fully grasped the pivotal role played by provisions such as s. 530 in preserving the linguistic and cultural identity of official language communities.[63] Its concerns about good faith are also understandable on the record and reflect considerations this Court has said may legitimately be taken into account.[64] Further, and in any event, questions about the applicant's *bona fides* are specific to him. Accordingly, they raise no question of public importance.

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[58] See e.g. *R. v. Sarrazin*, 2011 SCC 54, at paras. 25, 28.

[59] Applicant's Memorandum, at paras. 41 – 42.

[60] *Beaulac*, at paras. 13 – 25.

[61] See e.g. *Bessette*, at paras. 25 – 27.

[62] Applicant's Memorandum, at paras. 42 – 43.

[63] BCCA Reasons, at paras. 43 – 44, 55

[64] *Mazraani*, at paras. 38, 52.

PART IV – SUBMISSIONS ON COSTS

43. The applicant does not seek costs, and the respondent makes no submissions as to costs.

PART V – ORDER SOUGHT

44. The respondent requests that the applicant's application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver, British Columbia this 29th day of September 2022.

Rodney Garson, K.C.
Counsel for the Respondent

Liliane Bantourakis
Counsel for the Respondent

PART VI– TABLE OF AUTHORITIES & STATUTORY PROVISIONS

Case Law:	**Paragraph References**
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