November 19, 2018

Resisting Assimilation: the Politique en matière de francophonie in Alberta, Bessette v British Columbia, and the Impact of Language Rights on Access to Justice

By: Alexandra Heine

Cases Commented On: *R v Bessette,* 2015 BCPC 230; *Bessette v British Columbia (Attorney General),* 2016 BCSC 2416; *Bessette v British Columbia (Attorney General),* 2017 BCCA 264; *Bessette v British Columbia (Attorney General),* 2018 BCCA 59; *Joseph Roy Éric Bessette v Attorney General of British Columbia,* Supreme Court of Canada, Docket: 37790

In June 2017, the Government of Alberta unveiled the *Politique en matière de francophonie* (Politique en matière de francophonie, Alberta Government) in an attempt to recognize the importance of protecting French minority communities. The goal of this policy is to substantiate the re-emergence of Francophone communities in Alberta by improving the accessibility and quality of services in French. Amongst other things, the government stated that they would communicate more often in French and add the Franco-Albertan flag to the list of provincial emblems. The government has also indicated that they will consider making the policy into a law.

Since the enactment of this policy, Franco-Albertans have observed certain changes. In March 2018, Ricardo Miranda (the Minister of Culture and Tourism responsible for the Francophone Secretariat) announced that the month of March would be the month of Francophonie in Alberta (Radio Canada, l'Alberta nomme son premier conseil consultatif pour la francophonie, June 2018). In June 2018, the Government of Alberta established the first conseil consultatif en matière de francophonie. The council was created to give Franco-Albertans a voice during the implementation of the *Politique en matière de francophonie.* On September 19, 2018, the Association canadienne-française de l'Alberta (ACFA) held a press release stating that one of their priorities would be to assist the conseil consultatif (Radio Canada, Marc Anal parle des priorités de l'ACFA, September 2018). The Franco-Albertan community is hopeful that this policy is a step closer to ensuring the preservation of language and culture. Some Franco-Albertans also hope that this policy will lead to better bilingual services in the healthcare and childcare system (Le Franco, Politique de services en français: un bon début!, June 2017). As a member of the Franco-Albertan community myself, I am awaiting the practical impacts of the policy on the justice system.

It may seem unclear why it is important for the justice system in Canada to provide services and be operational in both French and English. However, for more than two million Canadian citizens who speak the minority official language in their communities, these rights are foundational to their ability to access justice (*Access to Justice in Both Official Languages:*

Improving the Bilingual Capacity of the Superior Court Judiciary, Study by the Office of the Commissioner of Official Languages, 2013).

Alberta has one of the faster-growing francophone populations in Canada and the third-largest French-speaking population outside of Québec (as noted in the proclamation that March would be the month of the Francophonie in Alberta see The Alberta Gazette, March 2018). However, as it stands, the justice system in Alberta has limited bilingual operational capacity. This creates obstacles for the minority speaking citizens involved in the justice system and it impacts their ability to access justice. As Justice McLachlin stated, "The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical" (*Access to Justice: Meeting the Challenge, 2006-2007 Annual Report*, p.1). This limited operational capacity extends past the inability of most members of the judiciary, court staff, and crown prosecutors to speak both official languages. Indeed, Alberta does not publish its legislation and court forms in both languages and the Alberta Courts website was only recently changed to include information in French. Furthermore, Francophones are not guaranteed the rights to have French proceedings in Civil, Family, or Traffic matters; they are only guaranteed the right to an interpreter. To some, an interpreter may seem sufficient; however, the intended nuances of meaning are often lost in translation. For those who are already vulnerable due to low socio-economic status, immigration status, mental health issues, and addiction issues, the right to be heard and understood in their official language of choice can be integral their right to fair proceedings.

The issue of whether a person has the right to a French trial for a traffic offence was dealt with recently in British Columbia in the case of *Bessette v British Columbia (Attorney General)*, appeal to the Supreme Court of Canada (SCC) granted. The hearing was held on November 15, 2018. Before delving into this case, a brief history of language rights in Canada assists in understanding the potential importance of Mr. Joseph Bessette's case.

The SCC confirmed section 133 of the *Constitution Act*, 1867, in the case *Jones v Attorney General of New Brunswick*, 1974 CanLII 164 (SCC), [1975] 2 SCR 182, in 1975. Section 133 ensures that the Parliament of Canada would use both English and French. It was the first provision that guaranteed the "full and equal access to the legislatures, the laws and the courts for Francophones and Anglophones alike" (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1975] 1 SCR 721 at p. 739). The enactment of sections 16-23 of the *Charter* reaffirmed, amongst other things, the equal status of both languages in Parliament, federal government institutions, and in federal courts.

Initially, Canadian courts interpreted language rights in Canada largely and liberally. Then, in 1986, the SCC rendered three decisions that significantly narrowed the interpretation of language rights: *MacDonald v City of Montréal*, 1986 CanLII 65 (SCC), [1986] 1 SCR 460, *Société des Acadiens du Nouveau-Brunswick Inc v Association des Parents*, 1986 CanLII 66 (SCC), [1986] 1 SCR 549, and *Bilodeau v Attorney General of Manitoba*, 1986 CanLII 64 (SCC), [1986] 1 SCR 449. In these cases, the SCC held that the rights guaranteed by section 133 were enacted as a result of political compromise and therefore should be interpreted with restraint. The SCC also stated that the language rights guaranteed by the *Charter* should also be interpreted restrictively. It was held that the right to use one's language of choice does not impose any obligations on the state. In *Société des Acadiens, supra*, Chief Justice Dickson

dissented from the majority, stating that all constitutionally guaranteed rights have historically been interpreted purposively by the courts (para 7). He stated that section 133's purpose was equality, not compromise (paras 15, 20, 22).

In *R v Beaulac*, 1999 CanLII 684 (SCC), [1999] 1 SCR 768, *Ford v Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 SCR 712, *Mahe v Alberta*, 1990 CanLII 133 (SCC), [1990] 1 SCR 342, *Reference re Public Schools Act (Man)*, 1993 CanLII 119 (SCC), [1993] 1 SCR 839 and *Reference Re Manitoba Language Rights*, 1992 CanLII 115 (SCC), [1992] 1 SCR 212, the SCC modified the position it took in the three 1986 judgments and reaffirmed the importance of maintaining equality between French and English and held that language rights in Canada ought to be interpreted broadly, liberally, and purposively (para 25). The SCC stated the importance of maintaining equality between French and English (para 34). Specifically, the SCC in *Reference Re Public Schools Act (Man), supra* held that language rights should encourage the flourishing and preservation of French-language minorities (para 18). Further, interpretation of these rights should be construed remedially and take into consideration the previous injustices that French-speaking minorities have faced (para 34).

Language rights extend beyond section 133 of the *Constitution Act, 1867* and sections 16-23 of the *Charter*. In the context of Criminal Law matters, the court has a special obligation to hear matters in the accused's official language of choice. This is not included in the court's duty to provide an interpreter. The court must function without the aid of an interpreter, meaning the judge, the clerk, the jury, the crown and defence counsel must be functional in the chosen official language of the accused. This right is entrenched in sections 530-533 of the *Criminal Code*, RSC 1985 c C-46. The SCC in *R v Beaulac* held that the purpose of section 530 is to "provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity" (para 34). In the House of Commons, the Minister of Justice at the time explained the purpose of section 530 when he introduced the Act to amend the *Criminal Code* in 1977. He stated that:

> It seems to me that all persons living in a country which recognizes two official languages must have the right to use and be understood in either of those languages when on trial before courts of criminal jurisdiction. I repeat that a trial before a judge or jury who understand the accused's language should be a fundamental right and not a privilege… (House of Commons Debates, vol V, 3rd sess 30th Parl, at p 5087, cited in *R v Beaulac*, at para 23).

The leading decision that interpreted sections 530-533 is *R v Beaulac.* In 1988, the accused was charged with first-degree murder. In 1990, sections 530-533 came into full force and effect in British Columbia. The accused underwent three separate trials and made multiple applications pursuant to section 530 to have his trials in French, all of which were denied. The matter went to the SCC, who allowed the appeal and ordered a new trial to be held before a judge and jury who spoke both official languages of Canada (para 57).

Despite the clear principles stated by Justice Bastarache and the clear importance of upholding the right of an accused person to have his or her trial in the official language of choice, courts are inconsistently granting applications under section 530. The result is that minority speaking people are denied access to justice.

This was one of the main issues addressed by the Ontario Court of Appeal (ONCA) in *R v Potvin*, 2004 CanLII 22752 (ONCA), and *R v Munkonda*, 2015 ONCA 309 (CanLII). These cases demonstrate how, despite the long-standing judgments by appellate level courts regarding the interpretation of language rights and the interpretation of section 530, lower level courts are failing to properly uphold language rights.

In *R v Potvin*, the accused brought an application under section 530 to be tried before a judge and jury who spoke French. Although this application was granted, the preliminary motions were heard in English and the judge intervened in English. During the trial, the witnesses spoke English and the judge intervened in English. Counsel for the defence reiterated throughout the preliminary motion and the trial that the accused had applied for a trial in French and that the accused could not understand what was happening in the courtroom. The accused was convicted and appealed his convictions. The ONCA stated that it is not enough for judges and prosecutors to understand French or to have the proceedings translated in real time (para 32). This would be no different than the right conferred by section 14 of the *Charter*: the right to an interpreter (para 32). The court held that the accused rights conferred by section 530 had been infringed and accordingly, they quashed the conviction (para 41).

In *R v Munkonda*, a Francophone was accused in Ontario of trafficking offences. The accused exercised his right to have his preliminary hearing and trial held in French, pursuant to section 530. Despite this application, the preliminary hearing was mostly held in English. The accused appealed for *certiorari*, but the *certiorari* judge said that although he recognized that the accused's language rights had been violated, they were not major violations and no remedy was awarded. The ONCA unanimously overturned the decision of the *certiorari* judge and quashed the committal for trial and awarded costs (paras 150-151). All in all, the ONCA found that the objective of section 530 speaks for itself (para 43).

These two cases show that the justice system does not prioritize language rights. This may be due to a lack of understanding or to a lack of resources. In any event, access to justice demands changes to this approach. The SCC's decision for Mr. Bessette's appeal will hopefully provide direction on whether language rights can be expanded. This, in turn, would impact access to justice positively. This commentary will now look at Mr. Bessette's proceedings in their entirety, starting at the Provincial Court level and ending at the Supreme Court level.

At the British Columbia Provincial Court (BCPC) level (*R v Bessette* 2015 BCPC 230 (CanLII)), Mr. Bessette sought an order that his trial for an offence under the *Motor Vehicle Act*, RSBC 1996, c 318 be held in French. Mr. Bessette claimed that he had a right to a French trial by virtue of section 133 of the *Offence Act*, RSBC 1996, c 338 ("section 133"), which he argued should include sections 530-533 of the *Criminal Code of Canada* RSC 1985, c C-46 ("sections 530-533") (para 1). The *Offence Act* governs matters under provincial statutes, which includes the *Motor Vehicle Act.* Section 133 states that if express provisions have not been made in the *Offence Act*, then the provisions of the *Criminal Code* for offences punishable on summary conviction can apply. The Crown argued that the mere absence of a provision does not necessarily mean that *Criminal Code* provisions are incorporated into the *Offence Act* (para 2).

The BCPC dismissed the application (para 23) and relied on the 1997 BCPC decision *R v Laflamme* (no citation found, decided in Prince Rupert on February 17, 1997 by the late Judge

Agnes Krantz) (para 10). According to the BCPC, the court in *Laflamme* stated that the purpose of section 133 is to provide procedural assistance, not substantive rights (paras 10-12). The BCPC found that granting Mr. Bessette a French trial would be a "political decision rather than a legal one" (para 19). In *obiter dicta,* the BCPC commented that Canada is a bilingual country and provinces should support the ability of its citizens to participate in court proceedings in the official language of their choice (para 21). However, the BCPC specified that the decision to pass a law to that effect is the provincial government's jurisdiction (paras 21-22). The BCPC ultimately held that the absence of a law granting the right to a quasi-criminal trial in French does not result in the incorporation of sections 530-533 into the *Offence Act* (paras 22-23).

Mr. Bessette filed a petition for judicial review of the BCPC's interlocutory ruling before the British Columbia Supreme Court (BCSC) (*Bessette v British Columbia (Attorney General)*, 2016 BCSC 2416). Mr. Bessette's petition sought:

> 1) an order setting aside the dismissal of his application to have a French trial by the BCPC; and
> 2) an order having the effect of *certiorari* and *mandamus* (prerogative writs), ordering the BCPC to conduct the trial in French (para 7).

Mr. Bessette acknowledged that a superior court does not generally intervene in such matters but argued that the matter was a special circumstance that allowed the BCSC to intervene (para 10). The Crown argued that these extraordinary forms of relief would be inappropriate in a case where relief can be sought through an appeal after the trial (paras 8-9). The Crown also argued that this relief is generally limited to jurisdictional errors, which was not an issue in this case as the BCPC had clear jurisdiction to hear the matter (para 9). The Court dismissed Mr. Bessette's petition (para 38). The Court stated that the situation did not warrant their intervention (paras 36-37). The BCSC looked to the case of *R v Duvivier,* 1991 CanLII 7174 (ONCA) for guidance (para 12). In *Duvivier,* five situations were identified where a superior court could find special circumstances that would allow them to intervene:

> 1) where the superior court is the only court competent to grant the essential relief requested;
> 2) where the applicant is suffering an ongoing significant *Charter* infringement;
> 3) where refusing to consider the merits of the judicial review application will result in a substantial delay before the applicant may assert the *Charter* rights alleged;
> 4) where the trial court is implicated in the alleged *Charter* violation); or
> 5) where the *Charter* violation could be said to be "palpable" or "clearly threatened" (para 13).

The BCSC found at paragraphs 20-34 that:

> 1) it is not the only court competent to grant the relief requested because the BCPC was competent to make the ruling it did;
> 2) Mr. Bessette had a remedy by way of an appeal and a re-trial;

3) dealing with the issue on judicial review at a superior court may result in further appeals, then in the actual trial, which would cause a substantial delay;
4) the trial court did not cause and was not implicated in the alleged violation; and
5) the BCSC concluded, without providing reasons or an analysis, that the violation was not palpable or clearly threatened.

Mr. Bessette was not alleging any *Charter* violations. However, the BCSC expanded the scope of the court's direction in *Duvivier* by adding "or other" beside the *Charter* specific language (para 13). The BCSC dismissed the petition for the reasons set out above (para 38).

Mr. Bessette appealed this decision to the British Columbia Court of Appeal (BCCA) (*Bessette v British Columbia (Attorney General)* 2017 BCCA 264 (CanLII)). Mr. Bessette argued that the standard of review to be applied is correctness (para 20). He relied on the case *R v Howells*, 2009 BCCA 460 (CanLII), where the issue was whether the reviewing judge erred in holding that the inquiry judge had committed a jurisdictional error (paras 20-21). In that case, the standard of review on appeal from an order in the nature of *certiorari* was correctness. The BCCA distinguished *Howells* and cited two SCC cases that held that the standard of review is dictated by the nature of prerogative writs and that judicial review by way of prerogative writs has always been discretionary (paras 23, 24). The BCCA held that the standard of review was deference (para 25).

The BCCA looked at *R v MPS*, 2014 BCCA 338 (CanLII), which stated that prerogative relief is usually refused on the basis of prematurity if the lower court has not finished its proceedings (paras 27-28). The BCCA gave the BCSC deference for its finding that the adequate alternative remedy principle applies even where the case involves jurisdictional error (paras 29-30). Further, there were no special circumstances that warranted immediate intervention, and judicial economy favoured deciding the language rights issue in an appeal after the trial was concluded (para 31). Ultimately, the BCCA unanimously dismissed the appeal (para 32).

Mr. Bessette applied for leave to the appeal to the SCC. He made an application for a stay of proceedings pending the decision of the SCC for leave (*Bessette v British Columbia (Attorney General)*, 2018 BCCA 59 (CanLII)) (paras 1-3). The BCCA held that they had jurisdiction to make an order for a stay of proceedings pursuant to section 65.1(1) of the *Supreme Court Act*, RSC, 1985, c S-26, pending the determination from the SCC (para 23). The BCCA then looked at the merit of Mr. Bessette's application using the three-part test from *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117, [1994] 1 SCR 311 (SCC) (para 24):

1) that there is merit to the appeal in that a serious question is to be determined;
2) that irreparable harm to the applicant would be occasioned if the stay was refused; and
3) that the inconvenience to the applicant would be greater than the inconvenience to the respondent if the stay was granted.

The BCCA at paras 26-30 found that:

1) the issues raised by Mr. Bessette are serious (this is a low threshold and is easily met);

2) the irreparable harm criterion applies to this case because absent a stay of proceedings, Mr. Bessette's trial will be conducted in English which would render his leave to appeal to the SCC nugatory;
3) the inconvenience or "potential harm" to either the applicant or respondent is low (paras 26-30)

The BCCA therefore granted the stay of proceedings application (para 31).

Leave to appeal to the SCC was granted to Mr. Bessette on May 15, 2018. The hearing was held November 15, 2018. In his application for leave to appeal at the SCC (Mémoire du demandeur, Joseph Roy Éric Bessette), Mr. Bessette argued that section 133 (as well as the analogous provisions in Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) was a matter of national importance because:

1) it has not been resolved;
2) section 133 is the only basis for a right to a French trial for a provincial offence in British Columbia;
3) the Nova Scotia Court of Appeal interpreted an analogous provision to section 133 and ruled that it incorporated section 530, creating conflicting jurisprudence that requires clarification; and
4) interpreting section 133 provides the SCC with an opportunity to clarify the effect of section 16(1) and 23(1) of the *Charter* (paras 10-21).

Mr. Bessette also argued that the SCC must clarify whether the denial of an accused's language rights at trial warrants the intervention of a superior court by way of a petition for a prerogative writ (paras 43-48). Mr. Bessette maintained that directions from the SCC are necessary to determine whether the unique nature of language rights can influence the analysis of the adequate alternative remedy principle (paras 49-54). Furthermore, Mr. Bessette stated that this is an opportunity for the SCC to address whether denying an accused his language rights during a trial is a harm that can be effectively remedied by an acquittal or an appeal following the trial (paras 55-60).

The main questions that the SCC will likely focus on is whether the provincial government of British Columbia has jurisdiction over the issue as well as whether section 133 should be interpreted to incorporate sections 530-533. The SCC will likely address the procedural issues, like whether a superior court can intervene on a matter such as this one before the trial has been completed. The issue with the approach taken by the Attorney General on this question is that if Mr. Bessette sought remedy by way of an appeal, he would have had to undergo the trial in English, thereby going against the foundation for the proceedings. The SCC may decide whether these were special circumstances that warranted the intervention of the BCSC, and therefore, whether the remedies of *certiorari* and *mandamus* are appropriate.

In Alberta, a similar case to *R v Bessette* 2015 BCPC 230 (CanLII) was brought before the Alberta Provincial Court (ABPC). The issue of whether a person charged with a provincial infraction has a right to a French trial was addressed in *R v Pooran*, 2011 ABPC 77 (CanLII) (see also Brian Seamen's ABlawg: French Language Rights in Alberta Get a Boost).

In 2011, Sonia Pooran and Guy Vaillant were charged under the *Traffic Safety Act*, RSA 2000, c T-6. They argued that they had a right, pursuant to section 4 of the Alberta *Languages Act*, RSA 2000, c L-6, to have their trial held in French with a French-speaking judge and prosecutor. The main issue addressed by the ABPC was whether section 4 should be interpreted to guarantee the right to a French trial for a quasi-criminal charge. Section 4 of the *Languages Act* states that "Any person may use English or French in oral communication in proceedings before the Provincial Court of Alberta." The applicants argued that this section should be interpreted broadly and purposively to allow French proceedings in instances of quasi-criminal or regulatory offence trials. The Crown argued that section 4 only gave the applicants the right to an interpreter.

The ABPC looked at the history of Alberta. Before it became a separate province, it was part of the Northwest Territories and the statute governing this region was the *Northwest Territories Act.* This Act stated that English and French could be used in debates of the territorial Legislative Assembly; that either language could be used in courts; that enactments made under the Act had to be printed in both languages; and finally that all records and journals of the Assembly had to be printed in both languages. The ABPC considered the historical context in light of *R v Beaulac supra,* section 133 of the *Constitution Act,* and sections 16-23 of the *Canadian Charter of Rights and Freedoms*, and found that the applicants had a right to a French trial in the quasi-criminal context. A powerful quote from this decision encompasses the issues that surround language rights in Alberta:

> If litigants are entitled to use English or French in oral representations before the courts yet are not entitled to be understood except through an interpreter, their language rights are hollow indeed. Such a narrow interpretation of the right to use either English or French is illogical, akin to the sound of one hand clapping, and has been emphatically overruled by *Beaulac*.
>
> The Crown Respondent assertion that the rights in the *Languages Act* are met by the provision of an interpreter amounts to a sloughing of the language rights of the litigant to the *Charter* legal right to due process, natural justice and a fair trial.

The Crown did not appeal the decision leaving interesting and important questions unanswered.

Depending on how the SCC approaches the issues raised by Mr. Bessette, this decision could be momentous for language rights. The right to a trial in the official language of choice can impact access to justice for minority speaking citizens. Personally, I am excited to see the outcome of the SCC's decision and whether this will impact jurisprudence in Alberta. I am also looking forward to seeing whether the *Politique en matière de la francophonie, supra* and whether the conseil consultatif will impact access to French services in the justice system.

This post may be cited as: Alexandra Heine, “Resisting Assimilation: the Politique en matière de francophonie in Alberta, Bessette v British Columbia, and the Impact of Language Rights on Access to Justice” (November 19, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/11/Blog_AH_Resisting_Assimilation_November2018.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg