



**SUPREME COURT OF CANADA**

**CITATION:** Bessette v. British Columbia (Attorney General), 2019 SCC 31

**APPEAL HEARD:** November 15, 2018  
**JUDGMENT RENDERED:** May 16, 2019  
**DOCKET:** 37790

**BETWEEN:**

**Joseph Roy Éric Bessette**  
Appellant

and

**Attorney General of British Columbia**  
Respondent

- and -

**Commissioner of Official Languages of Canada and Fédération des associations  
de juristes d'expression française de common law inc.**  
Interveniers

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

**JOINT REASONS FOR JUDGMENT:** Côté and Martin JJ. (Wagner C.J. and Abella, Moldaver, (paras. 1 to 97) Karakatsanis, Gascon, Brown and Rowe JJ. concurring)

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BESSETTE v. BRITISH COLUMBIA (A.G.)

**Joseph Roy Éric Bessette**

*Appellant*

v.

**Attorney General of British Columbia**

*Respondent*

and

**Commissioner of Official Languages of Canada and  
Fédération des associations de juristes d'expression  
française de common law inc.**

*Interveners*

**Indexed as: Bessette v. British Columbia (Attorney General)**

**2019 SCC 31**

File No.: 37790.

2018: November 15; 2019: May 16.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Provincial offences — Trial — Language of accused — Right to be tried by provincial court judge who speaks official language of Canada that is language of accused — Accused charged with provincial driving offence in British Columbia — Provincial court judge dismissing application by accused for trial in French — Whether right to be tried by provincial court judge who speaks official language that is language of accused under Criminal Code extends to persons accused of certain provincial offences in British Columbia — Offence Act, R.S.B.C. 1996, c. 338, s. 133 — Criminal Code, R.S.C. 1985, c. C-46, s. 530.*

*Prerogative writs — Certiorari — Availability of remedy — Adequate alternative remedy — Superior court dismissing petition by accused for certiorari to quash order of provincial court judge dismissing application for trial in French — Whether determination of whether accused has right to trial in French amounts to jurisdictional issue giving rise to certiorari — Whether appeal following conviction by English-speaking court constitutes adequate alternative remedy to certiorari.*

The accused was charged with a provincial driving offence in British Columbia. He made an application to be tried in French, relying on s. 530 of the *Criminal Code*, which grants an accused the right to be tried by a provincial court judge who speaks the official language of Canada that is the language of the accused. The Crown contested the accused's application, arguing that English is the only language of provincial offence prosecutions in British Columbia according to an old

English statute received into the colonial law of the province (the “1731 Act”). The provincial court judge accepted the Crown’s argument and dismissed the accused’s application. The accused unsuccessfully petitioned the Supreme Court of British Columbia for *certiorari*. The court found that the petition was premature, as an appeal following conviction represented an adequate alternative remedy to *certiorari*. The Court of Appeal dismissed the accused’s appeal, holding that the decision to refuse to engage in *certiorari* review attracted deference as it was discretionary in nature.

*Held:* The appeal should be allowed and the order of the Provincial Court quashed. The accused is entitled to stand trial in French.

The issue of whether the accused is entitled to be tried in French raises a jurisdictional question, and *certiorari* review is therefore available before the trial is heard. Superior courts generally do not intervene in ongoing criminal or quasi-criminal proceedings in the provincial courts. This is because criminal appeals are statutory and, with limited exceptions, there are no interlocutory appeals. Interlocutory appeals are circumscribed in part because of concerns about judicial economy, delay, and the fragmentation of proceedings. For parties to criminal or quasi-criminal proceedings, pre- or mid-trial *certiorari* is available for an alleged jurisdictional error by a provincial court judge. A jurisdictional error occurs where a court fails to observe a mandatory provision of a statute or acts in breach of the principles of natural justice. Whether the alleged error by the provincial court judge constitutes a jurisdictional error is a question of law reviewable for correctness.

Section 530 of the *Criminal Code* is a mandatory statutory provision. It dictates that the judge “shall grant” a French trial on application of the accused, provided the application is brought within the requisite time. If the provincial court judge erred in concluding that s. 530 does not apply to provincial offence prosecutions, the effect was that the judge failed to observe a mandatory statutory provision and thereby lost jurisdiction over the accused’s proceedings. As the accused’s petition to the superior court alleged a jurisdictional error by the provincial court judge, *certiorari* review by the superior court was available to the accused.

Superior courts retain a residual discretion to refuse *certiorari* review, even in the face of alleged jurisdictional errors. One of the discretionary grounds for refusing to engage in *certiorari* review is the existence of an adequate alternative remedy. Because *certiorari* review is a discretionary remedy, the court’s decision not to undertake it is entitled to deference on appeal. To interfere with the judge’s decision, the appellate court must be satisfied that the decision fails to give weight to all relevant considerations, rests on an error in principle, or is plainly wrong.

In the instant case, the superior court judge erred in exercising his discretion not to engage in *certiorari* review and consider the substantive issues raised in the accused’s petition. Had he properly recognized the jurisdictional nature of the dispute, the impact of his decision on the accused’s language rights, and the desirability of deciding the language of trial question before the start of the trial, he should have concluded that an appeal from conviction would not represent an

adequate alternative remedy to *certiorari* review. As the violation of the accused's trial language right is a harm in itself, an appeal following a conviction by an English-speaking court cannot represent an adequate alternative remedy to deciding, before the trial has taken place, whether the accused is in fact entitled to this fundamental right. Had the accused been acquitted after an English trial, he would have had no opportunity to have his claimed language rights vindicated, as there is no right to appeal an acquittal under the *Offence Act*. Putting the accused through a trial which may well be a nullity also risks putting the accused to undue legal expense as it gives rise to a potential ground of appeal and the prospect of the appeal court having to order a new trial. As there was no basis for the superior court to exercise its discretion to decline *certiorari* review, it ought to have decided the merits of the accused's petition.

Section 530 of the *Criminal Code* applies to the accused's prosecution. Section 133 of British Columbia's *Offence Act* incorporates s. 530 of the *Criminal Code* without heed to the *1731 Act*. Because the *Offence Act* applies to proceedings under the *Motor Vehicle Act*, and neither the *Motor Vehicle Act* nor the *Offence Act* make provision for the language of trials, s. 530 of the *Criminal Code* applies as if it were enacted in and formed part of the *Offence Act* itself. By virtue of its incorporation into the *Offence Act*, s. 530 enjoys the same status in that Act as it does in the *Criminal Code*. Therefore, s. 530 of the *Criminal Code* implicitly repeals the *1731 Act* in respect of *Offence Act* trials.

The wording of ss. 3(1) and 133 of the *Offence Act* cannot reasonably be read as prioritizing other, more removed legislation, such as the *1731 Act*. These two provisions have clear functions. Section 3(1) sets the scope of the *Offence Act* as applying to “proceedings”, “[e]xcept where otherwise provided by law”. The terms “[e]xcept where otherwise provided by law” refer to situations where other, more particularized legislation displaces the application of the *Offence Act*. They do not mean that a particular provision of the *Offence Act* will not apply to “proceedings” if that particular provision contradicts another law in effect in British Columbia. For its part, s. 133, or the incorporation provision, dictates that any gaps in the *Offence Act* are to be filled with the provisions of the *Criminal Code*, adapted to fit the *Offence Act* context. It is only where the *Offence Act* or the particularized legislation creating the offence fully provides for a matter that incorporation of *Criminal Code* provisions is precluded. Put in terms of hierarchy or order of operations, ss. 3(1) and 133 of the *Offence Act* direct courts to (1) look to the particularized legislation creating the offence in question (in this case, the *Motor Vehicle Act*); (2) provided the particularized legislation does not direct otherwise, apply the *Offence Act*; (3) where the *Offence Act* is silent on the matter in question (or makes only partial provision for the matter), look to the *Criminal Code*; and (4) if the matter is not addressed in any of the preceding legislation, turn to other sources of law, including other British Columbia legislation. In this case, these steps lead directly to the incorporation of s. 530 of the *Criminal Code* into the *Offence Act*.

## **Cases Cited**

**Applied:** *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804; **distinguished:** *R. v. Prince*, [1986] 2 S.C.R. 480; **considered:** *Moore v. The Queen*, [1979] 1 S.C.R. 195; **referred to:** *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774; *R. v. Corbett*, 2005 BCSC 1437, 24 M.V.R. (5th) 310; *R. v. Laflamme*, B.C. Prov. Ct., No. 19739, February 17, 1997; *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *R. v. Johnson* (1991), 3 O.R. (3d) 49; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *R. v. Awashish*, 2018 SCC 45; *R. v. Plummer*, 2018 BCSC 513; *Doyle v. The Queen*, [1977] 1 S.C.R. 597; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601; *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; *R. v. Arcand* (2004), 73 O.R. (3d) 758; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] S.C.R. 754; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615; *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138; *Anderson v. Victoria (City)*, 2002 BCSC 1466, 9 B.C.L.R. (4th) 75; *Central Okanagan (Regional District) v. Ushko*, [1998] B.C.J. No. 2123; *Vancouver (City) v. Wiseberg*, 2005 BCSC 1377; *R. v. Ambrosi*, 2012 BCSC 409; *R. v. 0721464 B.C. Ltd.*, 2011 BCPC 90; *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51; *Application to Destroy the Dog Tuppence*, 2004 BCPC 27; *Little v. Peers* (1988), 22 B.C.L.R. (2d) 224; *R. v.*

*Singh*, 2001 BCCA 79, 149 B.C.A.C. 215; *Commissioner of Official Languages (Can.) v. Canada (Minister of Justice)*, 2001 FCT 239, 194 F.T.R. 181; *R. v. Trow* (1977), 5 B.C.L.R. 133; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537.

### **Statutes and Regulations Cited**

*An Act for consolidating in One Act certain Provisions usually contained in Acts for regulating the Police of Towns* (U.K.), 47, 10 & 11 Vict., c. 89.

*An Act for further improving the Police in and near the Metropolis* (U.K.), 1839, 2 & 3 Vict., c. 47.

*An Act for the Establishment of County and District Constables by the Authority of Justice of the Peace* (U.K.), 1839, 2 & 3 Vict., c. 93.

*An Act respecting Summary Proceedings (Summary Convictions Act, 1955)*, S.B.C. 1955, c. 71, s. 102.

*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, preamble.

*An Act to amend the Act for the Establishment of County and District Constables* (U.K.), 1840, 3 & 4 Vict, c. 88.

*An Act to amend the Acts relating to the Metropolitan Police* (U.K.), 1856, 19 Vict., c. 2.

*An Act to provide for the Regulation of Municipal Corporations in England and Wales* (U.K.), 1835, 5 & 6 Will IV, c. 76.

*An Act to render more effectual the Police in Counties and Boroughs in England and Wales* (U.K.), 1856, 19 & 20 Vict., c. 69.

*Application of Provincial Laws Regulations*, SOR/96-312, Part VIII, s. 3.

*Armoured Vehicle and After-Market Compartment Control Act*, S.B.C. 2010, c. 8, s. 12(9).

*Canadian Charter of Rights and Freedoms*.

*Contraventions Act*, S.C. 1992, c. 47.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 450(2), 530, 810, 849(3).

*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 74(3).

*Interpretation Act*, R.S.B.C. 1996, c. 238, ss. 1 “enactment”, 32, 44.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 11.

*Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(1).

*Justices of the Peace Act* (U.K.), 1361, 34 Edw. 3, c. 1.

*Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 2.

*Legal Profession Act*, S.B.C. 1998, c. 9, s. 85(4).

*Motor Vehicle Act*, R.S.B.C. 1996, c. 318, s. 95(1).

*Offence Act*, R.S.B.C. 1996, c. 338, ss. 1 “proceedings”, 2, 3(1), 5, 102, 109, 132(2)(a.4), 133.

*Summary Convictions Act*, R.S.B.C. 1960, c. 373, ss. 4(1), 101, 102.

*Voluntary Blood Donations Act*, S.B.C. 2018, c. 30, s. 21(1).

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British Columbia. *Debates of the Legislative Assembly*, 2nd Sess., 29th Parl., March 10, 1971, p. 646.

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Goepel and Fenlon JJ.A.), 2017 BCCA 264, 351 C.C.C. (3d) 448, [2017] B.C.J. No. 1358 (QL), 2017 CarswellBC 1871 (WL Can.), affirming a decision of Blok J., 2016 BCSC 2416, 372 C.R.R. (2d) 54, [2016] B.C.J. No. 2727 (QL), 2016

CarswellBC 3656 (WL Can.), dismissing an application for *certiorari* against a decision of Gulbransen Prov. Ct. J., 2015 BCPC 230, [2015] B.C.J. No. 1837 (QL), 2015 CarswellBC 2440 (WL Can.). Appeal allowed.

*Jennifer Klinck, Sara Scott, Darius Bossé and Casey Leggett*, for the appellant.

*Rodney G. Garson and Rome Carot*, for the respondent.

*Isabelle Bousquet and Élie Ducharme*, for the intervener the Commissioner of Official Languages of Canada.

*Francis Lamer*, for the intervener Fédération des associations de juristes d'expression française de common law inc.

The judgment of the Court was delivered by

CÔTÉ AND MARTIN JJ. —

## I. Overview

[1] Mr. Bessette was charged with a provincial driving offence in British Columbia. Before the start of his trial in Provincial Court, he asked to be tried in

French. Were he being prosecuted for a *criminal* offence in the very same court, the *Criminal Code*, R.S.C. 1985, c. C-46, would unquestionably have given him the option of being tried in English or French. This appeal asks whether the *Criminal Code* provision for trials in either official language of Canada extends to persons accused of certain provincial offences in British Columbia.

[2] Based on a principled interpretation of the relevant statutory provisions, we conclude that accused persons in Mr. Bessette's position are entitled to be tried in either official language. We are also of the view that this important question merited proper consideration at the outset of the trial. As such, the provincial court judge's decision not to honour Mr. Bessette's request for a trial in French was immediately reviewable by the superior court on a petition for *certiorari*.

[3] We would therefore allow the appeal, quash the order of the Provincial Court, and order that Mr. Bessette is entitled to be tried in French.

## II. Context

### A. *Facts*

[4] The appellant, Mr. Bessette, was charged with "driving while prohibited", an offence under s. 95(1) of British Columbia's *Motor Vehicle Act*, R.S.B.C. 1996, c. 318.

[5] Prior to the anticipated start of his trial in Provincial Court, Mr. Bessette made an application to be tried in French, relying on s. 530 of the *Criminal Code*. That provision grants an accused the right to be tried by a provincial court judge who speaks the accused's official language. Mr. Bessette argued that s. 530 applies to his prosecution because the *Motor Vehicle Act* and British Columbia's *Offence Act*, R.S.B.C. 1996, c. 338, are silent as to the language of trials. Meanwhile, s. 133 of the *Offence Act* dictates that gaps in that Act are to be filled with the provisions of the *Criminal Code* relating to offences punishable on summary conviction. Section 530 is one such provision of the *Criminal Code*.

[6] The Crown contested Mr. Bessette's application, arguing that English is the language of provincial offence prosecutions according to *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 ("*1731 Act*"). This English statute forms part of British Columbia law by virtue of s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, [2013] 2 S.C.R. 774, at para. 41; see also paras. 14-17). As its full title says, the *1731 Act* directs that proceedings in British Columbia courts be conducted in English.

[7] The provincial court judge accepted the Crown's argument and dismissed Mr. Bessette's application, holding that British Columbia law does not provide for French-language trials of provincial offences.

[8] Instead of proceeding to trial in English, Mr. Bessette brought a petition in the Supreme Court of British Columbia (i.e., British Columbia's superior court) for judicial review of the provincial court judge's decision. (In British Columbia, an application for judicial review takes the form of a petition: *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(1)). He asked the superior court judge to quash the provincial court judge's ruling and order that his trial be conducted in French.

[9] A judge of the Supreme Court of British Columbia dismissed Mr. Bessette's petition on the grounds that there were no exceptional circumstances warranting departure from the general rule against pre- or mid-trial intervention by superior courts in criminal or quasi-criminal matters. In essence, the court held that his petition was premature and that he should instead wait to challenge the language of his trial through an appeal of the trial decision if he was ultimately convicted.

[10] Mr. Bessette appealed. The Court of Appeal for British Columbia held that the superior court judge's decision was entitled to deference and dismissed Mr. Bessette's appeal.

[11] The Supreme Court of British Columbia and the Court of Appeal for British Columbia therefore did not consider it necessary or appropriate to decide the

substantive question of whether a person accused of a provincial offence in British Columbia has the right to be tried in French. They disposed of the case on the basis that the provincial court judge’s decision (that British Columbia law does not provide for French-language trials of provincial offences) was not the type of decision which should be reviewed by a superior court on an interlocutory basis.

[12] Mr. Bessette now appeals to this Court. Among other relief, he asks for an order that his trial, which has yet to take place, be conducted in French.

#### B. *Relevant Statutory Provisions*

[13] At the centre of this dispute is the British Columbia *Offence Act*, as it governs prosecutions of offences under provincial statutes such as the *Motor Vehicle Act* (*Offence Act*, ss. 1 (definition of “proceedings”), 2, 3(1) and 5; see also *R. v. Corbett*, 2005 BCSC 1437, 24 M.V.R. (6th) 310, at paras. 3-4; *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 1 (definition of “enactment”)). Both the *Motor Vehicle Act* and the *Offence Act* are silent on the language of trials. Because of this silence, s. 133 of the *Offence Act* becomes the focal point of this dispute. That provision incorporates certain *Criminal Code* provisions where a matter is not provided for in the *Offence Act*. Section 133 and other relevant provisions of the *Offence Act* state as follows:

#### **Definitions**

**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;

...

### **Offence punishable on summary conviction**

**2** An offence created under an enactment is punishable on summary conviction.

### **Application to proceedings**

**3** (1) Except where otherwise provided by law, this Act applies to proceedings as defined in section 1.

...

### **General offence**

**5** A person who contravenes an enactment by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence against the enactment.

...

### **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.

[14] The two statutes competing to govern the language of *Offence Act* trials are the *Criminal Code*, which provides for trials in the accused’s official language of

choice, and the *1731 Act*, which provides only for English trials. Their relevant provisions are:

### **Language of accused**

**530 (1)** On application by an accused whose language is one of the official languages of Canada, made not later than

(a) the time of the appearance of the accused at which his trial date is set, if

(i) he is accused of an offence mentioned in section 553 or punishable on summary conviction,

...

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.

(*Criminal Code*, s. 530)

... [T]o protect the lives and fortunes of the subjects of that part of Great Britain called England, more effectually than heretofore from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language, be it enacted . . . that . . . 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, courts baron, and customary courts, and all copies thereof, and all proceedings whatsoever in any courts of justice . . ., and which concern the law and administration of justice, shall be in the english tongue and language only, and not in Latin or French, or any other tongue or language whatsoever . . .

(*1731 Act*, preamble)

As set out above, there is no dispute that the *1731 Act* remains in force in British Columbia. It applies because of s. 2 of British Columbia's *Law and Equity Act*, which states as follows:

### **Application of English law in British Columbia**

- 2 Subject to section 3, the Civil and Criminal Laws of England, as they existed on November 19, 1858, so far as they are not from local circumstances inapplicable, are in force in British Columbia, but those laws must be held to be modified and altered by all legislation that has the force of law in British Columbia or in any former Colony comprised within its geographical limits.

### III. Judicial History

- A. *Provincial Court of British Columbia (Gulbransen Prov. Ct. J.) — 2015 BCPC 230*

[15] The provincial court judge dismissed Mr. Bessette's application for a trial in French. He held that s. 530 of the *Criminal Code* could not be incorporated into the *Offence Act* to displace the *1731 Act* because this latter Act already forms part of British Columbia law. The judge adopted the reasoning of an earlier decision of the Provincial Court of British Columbia, *R. v. Laflamme*, B.C. Prov. Ct., No. 19739, February 17, 1997, which held that it is settled law that English is the language of the courts in British Columbia; s. 133 of the *Offence Act* is intended to incorporate procedural provisions of the *Criminal Code*, not substantive ones; and to read s. 133 as allowing for trials in French would be a "political" decision. The judge hearing Mr. Bessette's application also expressed some discomfort with the idea that a federal

statute like the *Criminal Code* could impose language obligations on a purely provincial matter (namely, the prosecution of provincial offences).

B. *Supreme Court of British Columbia (Blok J.) — 2016 BCSC 2416, 372 C.R.R. (2d) 54*

[16] The Supreme Court of British Columbia dismissed Mr. Bessette’s petition for prerogative relief on the basis that it was premature. In its view, the provincial court judge’s decision would, if necessary, be reviewable by way of appeal after trial. Put differently, an appeal represented an adequate alternative remedy to *certiorari* — the prerogative writ which permits the superior court granting it to review the decision of the judge below. As explained in *Skogman v. The Queen*, [1984] 2 S.C.R. 93, at pp. 98-100, to grant *certiorari* is to undertake judicial review (or “*certiorari* review”).

[17] In coming to this conclusion, the superior court judge made the following assessments (based on the factors set out in *R. v. Johnson* (1991), 3 O.R. (3d) 49 (C.A.)): (a) the Provincial Court had the competence to make the ruling it did; (b) it was not apparent that the ruling resulted in an “ongoing significant” infringement of Mr. Bessette’s rights; (c) judicial economy, and the principles against delay and fragmentation of proceedings, strongly militated against considering the merits of Mr. Bessette’s petition; (d) the Provincial Court was not implicated in the alleged rights violation, but had simply made a ruling on a disputed question of law; and (e)

the decision was not so “obviously wrong” (if indeed wrong at all) to merit immediate intervention.

C. *Court of Appeal for British Columbia (Saunders, Goepel and Fenlon J.J.A.)* — 2017 BCCA 264, 361 C.C.C. (3d) 448

[18] A unanimous panel of the Court of Appeal held that the Supreme Court of British Columbia’s decision attracted deference as it was a discretionary decision about whether the interests of justice favoured granting *certiorari*. The court held that it was open to the superior court judge to conclude that an appeal from conviction represented an adequate alternative remedy and that there were no circumstances warranting departure from the general rule against interlocutory appeals in criminal and quasi-criminal matters.

#### IV. Issues

[19] There are two questions before this Court:

1. The threshold question: Was the Provincial Court’s decision not to grant Mr. Bessette his trial in French immediately reviewable by the Supreme Court of British Columbia on a petition for *certiorari*, and, if so, did the Supreme Court err in declining to consider the merits of Mr. Bessette’s petition?

2. The substantive question: Does s. 133 of the *Offence Act* incorporate s. 530 of the *Criminal Code* and thereby grant persons accused of certain provincial offences the right to be tried in French?

[20] It is not contested that Mr. Bessette made his application before the Provincial Court at the appropriate time under s. 530(1)(a) of the *Criminal Code*, and therefore meets the procedural requirements for obtaining a French-language trial. There is also no dispute that the Provincial Court must have the capacity to provide trials in French; indeed, because it hears *Criminal Code* matters, it is required to be institutionally bilingual (*R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 28).

## V. Analysis

### A. *The Threshold Question: Availability of Certiorari*

[21] In our view, whether Mr. Bessette is entitled to be tried in French raises a jurisdictional question, and *certiorari* review is therefore available before the trial is heard. Although superior courts retain a residual discretion to refuse *certiorari* review, even in the face of alleged jurisdictional errors, no such refusal is warranted in the circumstances.

#### (1) Jurisdictional Error: Failure to Comply With a Mandatory Statutory Provision

[22] Superior courts generally do not intervene in ongoing criminal proceedings in the provincial courts. As was recently explained by this Court in *R. v. Awashish*, 2018 SCC 45, criminal appeals are statutory and, with limited exceptions, there are no interlocutory appeals. Indeed, the *Offence Act* provisions governing appeals from “order[s]” (ss. 102 and 109) have been interpreted by the British Columbia courts as authorizing only appeals from *final* orders (see *R. v. Plummer*, 2018 BCSC 513, 35 M.V.R. (7th) 117, at para. 16). Criminal trials should not routinely be fragmented by interlocutory proceedings as these may be based on an incomplete record, take on a life of their own, or result in significant delay and the inefficient use of judicial resources (*Awashish*, at para. 10; *Johnson*, at p. 54).

[23] For parties to criminal proceedings, pre- or mid-trial *certiorari* is available “for a jurisdictional error by a provincial court judge” (*Awashish*, at para. 20). In the criminal context, a jurisdictional error occurs “where the court fails to observe a mandatory provision of a statute or where a court acts in breach of the principles of natural justice” (*Awashish*, at para. 23). The court that makes such an error loses jurisdiction over the accused (*Doyle v. The Queen*, [1977] 1 S.C.R. 597, at pp. 603 and 607; see also *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at paras. 12, 18-19, 33 and 37-38). Whether the alleged error by the trial judge constitutes a jurisdictional error, making *certiorari* review available, is a question of law reviewable for correctness.

[24] The parties agree that the law governing the availability of *certiorari* review in the criminal context applies in this quasi-criminal context. Both parties argued their case on this basis. However, they dispute whether the Provincial Court’s decision not to grant Mr. Bessette a trial in French was immediately reviewable by the superior court for constituting a failure to observe a mandatory statutory provision.

[25] On its face, s. 530 of the *Criminal Code* is clearly a mandatory statutory provision. It dictates, in no uncertain terms, that the judge “shall grant” a French trial on application of the accused (provided the application is brought within the requisite time). “Shall” is mandatory language (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 11; *Beaulac*, at para. 31).

[26] In *R. v. Munkonda*, 2015 ONCA 309, 126 O.R. (3d) 646, the Court of Appeal for Ontario expressly decided that not complying with s. 530 of the *Criminal Code* constitutes a jurisdictional error that is susceptible to review on *certiorari* (at paras. 131-33):

It is settled law that an accused can bring *certiorari* to quash a committal for trial where there is a lack or loss of jurisdiction (*R. v. Forsythe*, [1980] 2 S.C.R. 268, [1980] S.C.J. No. 66, at p. 271). A magistrate will lose jurisdiction if he or she “fails to observe a mandatory provision of the *Criminal Code*” (*Forsythe*, at pp. 271-72).

The Quebec courts have held that ss. 530 and 530.1 of the *Criminal Code* are mandatory provisions. For example, the Superior Court of Quebec concluded that [TRANSLATION] “the interpretation of sections 530 and 530.1 raises a jurisdictional issue, and so any error by the justice of

the peace on that point will affect his or her jurisdiction” (*R. c. Edwards*, [1998] R.J.Q. 1471 (S.C.), at para. 60).

In my opinion, the failure of the judge in this case to ensure that the requirements of ss. 530 and 530.1 were met resulted in a loss of jurisdiction, and we have the authority to quash the committal for trial. [Emphasis added.]

[27] We agree that failing to ensure that the requirements of s. 530 of the *Criminal Code* are met constitutes a jurisdictional error. As such, the court that fails to comply with s. 530, where it applies, loses jurisdiction over the proceedings. This is consistent with this Court’s decision in *Beaulac*, in which Bastarache J. said the following (at para. 11):

... the order under s. 530(4) governs the judicial process itself, rather than the conduct of the parties, such that traditional concerns as to certainty and the need for the orderly administration of justice are not brought into play. The order would have been subject to review if it had been made by the trial judge, and the appellant should not be penalized for having brought the application in a timely manner prior to the trial rather than at the trial proper. [Emphasis added.]

[28] The Attorney General of British Columbia rightly concedes the mandatory nature of s. 530. However, he maintains that, because the applicability of s. 530 to *Offence Act* trials is the very question in dispute, the provincial court judge’s determination that s. 530 does not apply cannot constitute the failure to follow a mandatory statutory provision. Put differently, the Attorney General submits that the provincial court judge was not deciding whether to follow a mandatory statutory provision; he was deciding whether a mandatory statutory provision indeed applied to him — a matter of statutory interpretation and a question of law. In the Attorney

General's view, the provincial court judge would only have committed a jurisdictional error if he had concluded that s. 530 applied to Mr. Bessette's trial but nonetheless failed to follow it.

[29] With respect, we disagree. Whether the Provincial Court is bound to comply with a mandatory statutory provision does not become a non-jurisdictional question simply because the court decides that it is not bound by the provision. In this regard, the Attorney General's position contradicts this Court's approach to identifying jurisdictional issues amenable to *certiorari* review in the course of criminal proceedings set out in *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804. In *Russell*, the Court (per McLachlin C.J.) concluded that the preliminary inquiry judge's committal of Mr. Russell for trial was reviewable on *certiorari* because the *kind of error alleged* by Mr. Russell went to jurisdiction (*Russell*, at paras. 21-22 and 30).

[30] In *Russell*, the evidence at the preliminary inquiry suggested that Mr. Russell had forcibly confined one person and then killed another. The preliminary inquiry judge held that Mr. Russell should be tried on the charge of first degree murder, as murder is first degree when done "while committing" certain enumerated offences, including forcible confinement (*Criminal Code*, s. 231(5)). In making Mr. Russell stand trial for first degree murder, the preliminary inquiry judge held that the victim of the predicate offence (forcible confinement) did not need to be

the same as the victim of the murder for the latter offence to be done “while committing” the former. Mr. Russell sought *certiorari* to quash the committal.

[31] When the matter reached this Court, it held that the preliminary inquiry judge had properly interpreted “while committing” and had therefore not exceeded jurisdiction in deciding that Mr. Russell should stand trial for first degree murder. Nonetheless, the judge’s decision had been amenable to *certiorari* review since, *had the judge erred in his interpretation, he would have exceeded his jurisdiction in committing Mr. Russell to stand trial.*

[32] Applying *Russell*, if the provincial court judge erred in his interpretation of s. 133 of the *Offence Act* (as Mr. Bessette asserts and as we find below), the effect was that he failed to observe a mandatory statutory provision (namely s. 530 of the *Criminal Code*) and thereby exceeded (or lost) his jurisdiction. Because Mr. Bessette complied with the statutory requirements of s. 530 for requesting a trial in French, if s. 530 applies, a provincial court judge does not have the jurisdiction to conduct Mr. Bessette’s trial in English. Indeed, if a trial in English was erroneously ordered, the proceeding would be a nullity from the outset. As such, the error Mr. Bessette alleged before the superior court was amenable to *certiorari* review.

[33] To be clear, our conclusion that *certiorari* review was available in this case is not predicated on our conclusion that s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code*. *Certiorari* review would have been available even if s. 133 did not incorporate s. 530. The determinative question is not whether the error alleged

on a petition for *certiorari* is in fact established. Rather, it is whether the error alleged would result in a loss of jurisdiction over the proceedings. This, in turn, depends upon the nature, effects and consequences of the decision. Such an approach is logical; it permits the reviewing court to determine whether the petition can be adjudicated *before* deciding the merits of that petition.

[34] On an application by a party for *certiorari* in the course of a criminal (or, as is the case here, quasi-criminal) trial, the alleged error will be jurisdictional in nature if making it results in a failure to comply with a mandatory statutory provision or a breach of natural justice. Here, the interpretation of s. 133 of the *Offence Act* related to a mandatory statutory provision, such that a misinterpretation of s. 133 would have resulted in a loss of jurisdiction over the proceedings. As such, the proper interpretation of s. 133 is itself jurisdictional for the purposes of *certiorari* review.

(2) Discretion to Undertake *Certiorari* Review

[35] Even where *certiorari* review is available, superior courts retain the discretion to refuse to conduct that review (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 37). One of the discretionary grounds for refusing to engage in *certiorari* review — the ground invoked by the superior court in this case — is the existence of an adequate alternative remedy (*Strickland*, at para. 40; *R. v. Arcand* (2004), 73 O.R. (3d) 758 (C.A.), at para. 13). Because *certiorari* review is a discretionary remedy, the court's decision not to undertake it is entitled to deference on appeal (*Strickland*, at para. 39). To interfere with the judge's decision,

the appellate court must be satisfied that the decision fails to give weight to all relevant considerations (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 43), rests on an error in principle, or is plainly wrong (*Cowper-Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 46; see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at p. 64 (per Sopinka J., dissenting, but not on this point of law)).

[36] In our view, the superior court judge erred in exercising his discretion not to engage in *certiorari* review and consider the substantive issues raised in Mr. Bessette's petition. Specifically, the superior court erred in concluding that (a) whether s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code* is a ruling which does not engage the Provincial Court's "competence" or jurisdiction; (b) there was no "ongoing significant" infringement of Mr. Bessette's rights at stake; and (c) Mr. Bessette's right to a trial in French was a question best left on appeal following his trial. Had the superior court judge recognized the jurisdictional nature of the dispute, the impact of his decision on Mr. Bessette's claimed language rights, and the desirability of deciding the language of trial question before the start of the trial, he should have concluded that an appeal from conviction would not represent an adequate alternative remedy to *certiorari* review.

[37] As explained above, whether Mr. Bessette had a right to a French-language trial for the provincial offence for which he was charged was a jurisdictional question. This factor ought to have weighed heavily against deferring the question

until the end of the trial; the prospect of conducting a trial without jurisdiction is a serious matter with important consequences.

[38] Second, this Court has recognized that the right to a trial in the official language of one's choice, where it applies, is "fundamental". The right is substantive, not merely procedural. It is not concerned with trial fairness, but with affirming the accused's linguistic and cultural identity, which is inherently "personal". The violation of the right is a "substantial wrong" (*Beaulac*, at paras. 23, 25, 28, 34, 45, 47 and 53-54).

[39] The Attorney General builds on the reasoning of the Court of Appeal (at para. 30), and cites *Beaulac* (at para. 57), to argue that a new trial can represent a suitable remedy for a language rights violation. The fact that "a new hearing will generally be an appropriate [after-the-fact] remedy for most language rights violations" (*Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, at para. 48) does not mean that a new hearing represents an *adequate* alternative remedy from the outset. What a court may order in response to damage done does not speak to what a court should order when given the opportunity to identify and *prevent* similar damage. In this regard, we note that the relatively short time estimated for Mr. Bessette's trial (an hour) has no import on the analysis; a violation cannot reasonably be quantified by its duration (see *Mazraani*, at para. 51).

[40] As the violation of the accused's trial language right is a harm in itself, an appeal following a conviction by an English-speaking court cannot represent an

adequate alternative remedy to deciding, before the trial has taken place, whether the accused is indeed entitled to this fundamental right. Further, Mr. Bessette rightly points out that, had he been acquitted after an English trial, he would have had *no* opportunity to have his language rights vindicated. This is because an accused does not have the right to appeal an acquittal under the *Offence Act* (s. 102).

[41] The superior court judge declined to consider the substantive aspects of Mr. Bessette's petition in part because Mr. Bessette indicated that he might raise another distinct language issue as a defence at his trial (namely, whether he was entitled to receive notice of his driving prohibition in French). The superior court judge considered it "undesirable" to deal with Mr. Bessette's petition on the merits as doing so "could result in two language-rights appeals, one via the current judicial review route (to deal with the language at trial) and the other by way of an ordinary appeal following the trial (to deal with the language issue concerning the notice of prohibition)" (para. 29). While the judge's view may have some practical merit, it ultimately fails to recognize the distinct nature of the trial language claim. An application for a trial in French asks the court to conduct *future* proceedings in a manner which respects the accused's language rights. The possibility that the accused's rights were violated in the past (by a prohibition notice infringing the accused's language rights) cannot be used to justify additional, preventable infringements.

[42] Finally, we are not persuaded by the Attorney General's argument that the case of *R. v. Prince*, [1986] 2 S.C.R. 480, supports declining *certiorari* review in Mr. Bessette's case. The rationale for declining *certiorari* review in *Prince* is simply not germane to the issues raised in Mr. Bessette's case. In *Prince*, Dickson C.J. stated:

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; pp. 507-8.]

[43] In our view, Dickson C.J. was not stating that *certiorari* review should be declined when jurisdictional errors are alleged. To the contrary, he was opining that, in light of the particular challenges they pose, and *despite* their jurisdictional nature, alleged *Kienapple* errors should, exceptionally, await adjudication at the end of trial.

[44] In any event, deciding whether a person is entitled to a trial in his or her official language of choice cannot be analogized to applying the *Kienapple* principle against multiple convictions. The latter is inherently fact-specific, record-dependant, and poses the risk (in Dickson C.J.'s view) of becoming a frequent and fertile source of appeals. The same cannot be said of deciding whether the *Offence Act* offers trials in either official language, which is a question of law that does not depend on any

evidentiary record. In addition, and as set out above, where the law does indeed provide the accused with a choice to proceed to trial in either official language, that choice is the accused's to make for his or her own reasons. Provided the accused is able to instruct counsel and follow the proceedings in the language selected, no evidentiary record is necessary to justify the accused's stated choice (*Beaulac*, at paras. 34 and 56).

[45] Further, and crucially, the Attorney General acknowledged in oral submissions that a Supreme Court of British Columbia decision on the language of *Offence Act* trials would serve as binding precedent for the statutory courts hearing such trials in the province (transcript, at p. 59). Thus, had the Supreme Court judge decided the merits of Mr. Bessette's petition, his decision would have *discouraged* further interlocutory appeals on the same ground, rather than encouraging them.

[46] As set out above, interlocutory appeals are circumscribed in part because of concerns about judicial economy, delay, and the fragmentation of proceedings. However, in this case, these considerations militate in favour of adjudicating the merits of Mr. Bessette's petition before the start of his trial. Modern courts are busy and work to avoid delay. When a *pre-trial* petition alleges a jurisdictional error by the trial court that would render the proceedings a nullity, it is difficult to imagine how it could be preferable for the superior court to refuse to rule on that alleged error and compel a full trial on the merits. To do so would give rise to a potential ground of appeal which might result in the appeal court having to order a new trial. This second

trial, which would inevitably take place at some later time further down the road, might have been avoided entirely had the petition been dealt with on the merits when it was first brought. Such successive proceedings cost not only the justice system — crucially, they also cost the accused. Putting the accused through a trial which may well be a nullity risks putting the accused to undue legal expense. This risk should not be taken lightly.

[47] Had Mr. Bessette not appealed the superior court’s decision, it would have resulted in a trial in English being conducted without jurisdiction, and a significant infringement of Mr. Bessette’s language rights. By failing to recognize this prospect, the superior court made a decision which failed to give weight to all relevant considerations, erred in principle and was, respectfully, “plainly wrong” in the result. In our view, there was no basis for the superior court to exercise its discretion to decline *certiorari* review. The court ought to have decided the merits of Mr. Bessette’s petition.

[48] It is to those merits that we now turn.

B. *The Substantive Question: Language of Offence Act Trials*

[49] As a preliminary point, we would note that while some language rights receive constitutional protection, the language of trials held pursuant to the *Offence Act* is, in this case, simply a question of statutory interpretation. Mr. Bessette has not

alleged any infringement of his rights arising under the *Canadian Charter of Rights and Freedoms* or challenged the constitutionality of the statutory scheme in question.

[50] Rather, he and the Attorney General divide over which statute the *Offence Act* designates as determining the language of trials. Mr. Bessette says that the *Criminal Code* governs on this point and provides for trials in either official language. The Attorney General says that the question is answered in the *1731 Act*, which mandates English-only trials. The task of this Court is therefore to interpret the relevant provisions of the *Offence Act* and determine the proper interrelationship between that Act, the *Criminal Code*, and the *1731 Act* in respect of the language of *Offence Act* trials. As set out above, of the courts below, only the Provincial Court of British Columbia addressed this substantive issue. Having the benefit of the parties' developed submissions on interpreting the *Offence Act*, we focus on those submissions instead of the Provincial Court's reasons.

[51] To reiterate, the *Offence Act* provisions at issue state the following:

#### **Application to proceedings**

3 (1) Except where otherwise provided by law, this Act applies to proceedings as defined in section 1.

...

#### **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.

[52] The parties have provided two very different readings of these provisions and, as a result, dispute the “hierarchy of laws” or “order of operations” created by the *Offence Act*.

[53] The Attorney General says that the wording of ss. 3(1) and 133 conveys that other British Columbia law (such as the *1731 Act*) takes precedence over the provisions of both the *Offence Act* and the *Criminal Code*. In his view, the words “[e]xcept where otherwise provided by law” in s. 3(1) indicate that the *Offence Act* applies to proceedings *only insofar* as other British Columbia law does not already apply. Similarly, the words “and so far as applicable” in s. 133 indicate that *Criminal Code* provisions must be incorporated in a manner that is consistent with existing British Columbia law. Since the *1731 Act* already states the law on the language of proceedings in British Columbia, the *Offence Act* — and, by extension, the *Criminal Code* — cannot govern on this point.

[54] We disagree with this reading. In our view, it is not supported by the guiding rule of statutory interpretation, which has been reiterated many times by this Court:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, citing Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; see also *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 26; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 48; and *R. v. Steele*, 2014 SCC 61, [2014] 3 S.C.R. 138, at para. 23)

[55] On their face and read in context, ss. 3(1) and 133 have clear functions; the former sets the scope of the *Offence Act* — as applying to “proceedings” — and the latter clearly dictates that any gaps in the *Offence Act* are to be filled with the provisions of the *Criminal Code*, adapted to fit the *Offence Act* context. These provisions cannot reasonably be read as prioritizing other, more removed legislation over both the provisions of the *Offence Act* itself and other legislation to which the *Offence Act* specifically refers. Put in terms of “hierarchy” or “order of operations”, as Mr. Bessette says, ss. 3(1) and 133 of the *Offence Act* direct the following:

- (1) look to the particularized legislation creating the offence in question  
(in this case, the *Motor Vehicle Act*) (s. 3(1));
- (2) provided the particularized legislation does not direct otherwise, apply  
the *Offence Act* (s. 3(1));
- (3) where the *Offence Act* is silent on the matter in question (or makes  
only partial provision for the matter), look to the *Criminal Code* (s.  
133); and

(4) if the matter is not addressed in any of the preceding legislation, turn to other sources of law, including other British Columbia legislation.

[56] Mr. Bessette argues that this roadmap leads directly to the incorporation of s. 530 of the *Criminal Code* into the *Offence Act* via s. 133 of the latter Act. We agree. In what follows, we explain why the Act’s language and purpose support Mr. Bessette’s interpretation of the *Offence Act*.

(1) Section 3(1) of the *Offence Act* — the Scope Provision

[57] Located in the opening provisions of the *Offence Act*, s. 3(1) plays a straightforward role familiar to legislation: it sets out the Act’s scope. It instructs that, unless another enactment directs otherwise (“[e]xcept where otherwise provided by law”), “this Act applies to proceedings as defined in section 1” (see, for example, *Anderson v. Victoria (City)*, 2002 BCSC 1466, 9 B.C.L.R. (4th) 75, at paras. 14-15). Put differently, all provincial offence “proceedings” are governed by the *Offence Act* unless they (or aspects of them) are expressly removed from the ambit of the Act by another provincial enactment — typically the particularized legislation creating the offence.

[58] On this plain and logical interpretation of s. 3(1), the phrase “[e]xcept where otherwise provided by law” does not mean that a *particular* provision of the *Offence Act* will not apply to “proceedings” if that particular provision contradicts *another law* in effect in British Columbia (such as the *1731 Act*). Rather, the *Offence*

*Act* “applies to proceedings as defined in section 1”, “[e]xcept” if it is expressly “provided by [another] law” that the *Offence Act*, in whole or in part, does *not* apply to proceedings to which it would normally apply.

[59] Both the history and application of s. 3(1) support this interpretation. The legislative predecessor to s. 3(1) of the *Offence Act*, s. 4(1) of the *Summary Convictions Act*, R.S.B.C. 1960, c. 373, read as follows:

Subject to any special provision otherwise enacted with respect to such offense, act or matter, this Act shall apply to:

Every case in which any person commits, or is suspected of having committed, any offence or act over which the Legislature has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty, or other punishment:

Every case in which a complaint is made to any Justice in relation to any matter over which the Legislature has Legislative authority, and with respect to which such Justice has authority by law to make any order for the payment of money or otherwise. [Code, s. 706.]

The language of “special provision” bolsters our conclusion that “[e]xcept where otherwise provided by law” in s. 3(1) means “except where other particularized legislation displaces the application of the *Offence Act*”.

[60] Examples of provincial enactments which displace the *Offence Act* in the manner contemplated by s. 3(1) include the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 74(3); the *Voluntary Blood Donations Act*,

S.B.C. 2018, c. 30, s. 21(1); the *Armoured Vehicle and After-Market Compartment Control Act*, S.B.C. 2010, c. 8, s. 12(9); and the *Legal Profession Act*, S.B.C. 1998, c. 9, s. 85(4). These statutes provide expressly that s. 5 of the *Offence Act* — which makes it an “offence” under the *Offence Act* to do an act that the statute forbids, or to omit to do an act that the statute requires to be done — does *not* apply to the statute in question.

[61] Finally, as Mr. Bessette notes, the Attorney General’s proposed interpretation of “[e]xcept where otherwise provided by law” in s. 3(1) would give rise to an absurd consequence: it would render the *Offence Act* provisions subordinate to all other laws which might touch on *Offence Act* “proceedings”. In other words, the *Offence Act* would make itself residual. This interpretation is contrary to both the purpose of the Act and the remaining text of s. 3(1), which states that “this Act applies to proceedings”.

[62] Section 3(1) therefore gives us the first two steps in our legislative hierarchy or interpretive roadmap. First, it directs us to look to particularized legislation (here, the *Motor Vehicle Act*) to determine whether that legislation ousts or alters the application of the *Offence Act*. Second, if that legislation does not affect the *Offence Act*, s. 3(1) tells us that the provisions of the *Offence Act* apply. The *Motor Vehicle Act* contains a number of references to the *Offence Act*, none of which purport to displace that Act either as a whole or with respect to the language of trials. As such, the provisions of the *Offence Act* apply.

(2) Section 133 of the *Offence Act* — the Incorporation Provision

[63] One such *Offence Act* provision is s. 133, which directly contradicts the Attorney General's contention that the *1731 Act* dictates the language of *Offence Act* trials. Section 133 clearly states that the provisions of the *Offence Act* and, residually, the *Criminal Code*, govern "proceedings" in priority to other legislation.

[64] If there were any doubt about the meaning of s. 3(1), s. 133 reaffirms that the place to look for the law governing proceedings is "in this Act", not in any and all other British Columbia law. Had the legislature instead chosen more general wording such as "in an enactment", the Attorney General's proposed approach of giving precedence to the *1731 Act* on the matter of trial language might have had merit. However, the wording of s. 133 is very specific, and reflects a clear intention that the law be ascertained by looking within the four corners of the *Offence Act*.

[65] Then, if no provision for a matter has been made in the *Offence Act*, s. 133 states that "the provisions of the *Criminal Code* relating to offences punishable on summary conviction apply", thus placing the *Criminal Code* next in the order of operations. Section 133 provides for the incorporation of the *Criminal Code* in broad terms, as its provisions relating to summary conviction offences apply both in instances where "express provision has not been made" in the *Offence Act* and where "only partial provision has been made".

[66] This Court has recognized that the incorporation of *Criminal Code* provisions is not restricted to situations where the *Offence Act* and the provincial enactment creating the offence are silent on a matter. In *Moore v. The Queen*, [1979] 1 S.C.R. 195, the accused was charged with obstructing a peace officer by refusing to identify himself after violating the *Motor Vehicle Act* by proceeding against a red light on his bicycle. The *Motor Vehicle Act* made partial provision for the circumstances, as it included provisions requiring motor vehicle drivers (but not cyclists) to identify themselves upon request by a peace officer, and provisions authorizing a peace officer to make an arrest without a warrant. This Court incorporated into the *Summary Convictions Act*, 1960, via its s. 101 (now s. 133 of the *Offence Act*) an arrest power contained in s. 450(2) of the *Criminal Code*, and concluded that, since a constable had the power to arrest Mr. Moore to establish his identity pursuant to s. 450(2), Mr. Moore had committed the offence of obstructing that constable in the performance of his duties when he refused to accede to the constable's identification request.

[67] In *Moore*, the fact that the *Motor Vehicle Act* clearly made partial provision for the matter did not preclude the incorporation of the relevant *Criminal Code* provisions (see also *Central Okanagan (Regional District) v. Ushko*, [1998] B.C.J. No. 2123 (S.C.); *Vancouver (City) v. Wiseberg*, 2005 BCSC 1377, at paras. 28-36 (CanLII); *R. v. Ambrosi*, 2012 BCSC 409, at paras. 31-32 (CanLII); *R. v. 0721464 B.C. Ltd.*, 2011 BCPC 90, at paras. 20-27 (CanLII)). Therefore, it is only where the

*Offence Act* or the particularized legislation creating the offence fully provides for a matter that incorporation of *Criminal Code* provisions is precluded.

[68] Contrary to the Attorney General’s suggestion that the words “and so far as applicable” indicate that *Criminal Code* provisions must be incorporated around other valid law (such as the *1731 Act*), the ordinary meaning of the phrase “with the necessary changes and so far as applicable” is that the incorporated provisions will be adapted to fit the *Offence Act* context. As above, the comparison between the previous and current versions of this provision supports this interpretation:

Where, 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 upon summary conviction apply, mutatis mutandis, as if the provisions thereof were enacted in and formed part of this Act.

(*Summary Convictions Act*, 1960, s. 101)

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.

(*Offence Act*, s. 133)

[69] This comparison demonstrates that “with the necessary changes and so far as applicable” is merely a re-wording of “mutatis mutandis.” This Latin expression means “[w]ith the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to

names, offices, and the like” (*Black’s Law Dictionary* (6th ed. 1990), at p. 1019; see also the British Columbia *Interpretation Act*, s. 44 (“mutatis mutandis”) and *Samograd v. Collison* (1995), 17 B.C.L.R. (3d) 51 (C.A.)). “[W]ith the necessary changes and so far as applicable” therefore cannot be stretched to mean “to the extent that another source of law does not contradict the *Criminal Code*”.

[70] Further, as with s. 3(1), the Attorney General’s proposed interpretation of s. 133 creates illogical consequences. The Attorney General’s approach invites the court applying s. 133 to search for other applicable legislation, including imperial legislation received into British Columbia law, before looking to the *Criminal Code*. Respectfully, this flies in the face of the plain wording and purpose of s. 133, as well as the overall scheme of the Act.

[71] Following the Attorney General’s logic, this Court would have erred in *Moore* by considering for incorporation through s. 101 of the *Summary Convictions Act*, 1960 (now s. 133 of the *Offence Act*) an arrest power contained in s. 450(2) of the *Criminal Code*, before and instead of looking for English laws on constabulary powers in place in 1858 which might have been applicable. To illustrate the implications of the Attorney General’s position, it is worth noting that the parties and the Court would have had to study, in priority to the *Criminal Code*, English laws such as: *An Act to provide for the Regulation of Municipal Corporations in England and Wales* (U.K.), (1835), 5 & 6 Will IV, c. 76; *An Act for further improving the Police in and near the Metropolis* (U.K.), (1839), 2 & 3 Vict., c. 47; *An Act for the*

*Establishment of County and District Constables by the Authority of Justices of the Peace* (U.K.) (1839), 2 & 3 Vict., c. 93; *An Act to amend the Act for the Establishment of County and District Constables* (U.K.), (1840), 3 & 4 Vict., c. 88; *An Act for consolidating in One Act certain Provisions usually contained in Acts for regulating the Police of Towns* (U.K.), 47, 10 & 11 Vict., c. 89; *An Act to amend the Acts relating to the Metropolitan Police* (U.K.), (1856), 19 Vict., c. 2; and *An Act to render more effectual the Police in Counties and Boroughs in England and Wales* (U.K.), (1856), 19 & 20 Vict., c. 69.

[72] Similarly, the Attorney General's position implies that in *Application to Destroy the Dog Tuppence*, 2004 BCPC 27, at paras. 46-47 (CanLII), the court should have looked to the English *Justices of the Peace Act* (U.K.) (1361), 34 Edw. 3, c. 1, instead of s. 810 of the *Criminal Code*, contrary to the express instruction set out in s. 133.

[73] Finally, we would reject the Attorney General's submission that s. 133 cannot incorporate s. 530 of the *Criminal Code* because language rights are substantive in nature and the focus of s. 133 is the incorporation of missing *procedural* sections. As set out above, the language of s. 133 provides for a generous incorporation of certain provisions of the *Criminal Code*. That language does not support creating a distinction between substantive and procedural sections of the *Criminal Code*. Moreover, s. 133 has previously been held to incorporate substantive

provisions (see *Moore; Little v. Peers* (1988), 22 B.C.L.R. (2d) 224 (C.A.); *R. v. Singh*, 2001 BCCA 79, 149 B.C.A.C. 215).

[74] In light of the foregoing, there can be no doubt that s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code* without heed to the *1731 Act*. Because the *Offence Act* applies to *Motor Vehicle Act* proceedings, and neither the *Motor Vehicle Act* nor the *Offence Act* makes provision for the language of trials, s. 530 of the *Criminal Code* applies “as if [it] were enacted in and formed part of [the *Offence Act*]”.

(3) Partial Provision for French: Section 132(2)(a.4) of the *Offence Act*

[75] The Attorney General argues that the *Offence Act* is *not* in fact silent as to the language of proceedings, as it does provide for the use of French in a limited fashion at s. 132(2)(a.4) and provides forms in English only (in a Schedule to the Act). This, in the Attorney General’s submission, demonstrates the limited role that the legislature intended the French language to play in *Offence Act* proceedings, and establishes that the broader provisions of s. 530 do not apply.

[76] Section 132(2)(a.4) of the *Offence Act* states:

Without limiting subsection (1), the Lieutenant Governor in Council may, on the recommendation of the Attorney General, make regulations as follows:

...

only for the purposes of an agreement between the Province and Canada under the *Contraventions Act* (Canada), exercising the authority under paragraphs (a.1), (a.2), (a.3) and (g) in both the English and French languages;

[77] Essentially, the Attorney General argues that if s. 133 incorporates the language provisions of the *Criminal Code*, then s. 132(2)(a.4) and the associated federal regulation (discussed below) would be redundant.

[78] We reject the significance the Attorney General places on s. 132(2)(a.4). At most, this provision and the English forms scheduled to the *Offence Act* prevent the incorporation of s. 849(3) of the *Criminal Code*, which states:

Any pre-printed portions of a form set out in this Part, varied to suit the case, or of a form to the like effect shall be printed in both official languages.

[79] Further, and more crucially, s. 132(2)(a.4) and the scheduled forms deal only with the language of forms. Accordingly, they cannot preclude the incorporation of s. 530 of the *Criminal Code* — which deals with the language of *trials*. To the extent that the forms speak to the role of the French language under the *Offence Act* generally, they make “partial provision” for French, permitting the incorporation of s. 530.

[80] Relatedly, the Attorney General submits that s. 3 of the federal *Application of Provincial Laws Regulations*, SOR/96-312, Part VIII (Province of

British Columbia (“federal regulation”)) demonstrates that s. 133 of the *Offence Act* is understood *not* to already incorporate s. 530 of the *Criminal Code*. Section 3 of the federal regulation makes s. 530 applicable in respect of prosecutions under the *Offence Act* of contraventions under the federal *Contraventions Act*, S.C. 1992, c. 47.

[81] This argument must similarly be rejected. The apparent rationale for the federal regulation is the federal government’s responsibility to ensure that prosecutions under the *Contraventions Act* provide for the use of both official languages (see *Canada Commissioner of Official Languages (Can.) v. Canada (Minister of Justice)*, 2001 FCT 239, 194 F.T.R. 181). Moreover, the *federal* regulation cannot and should not be treated as an interpretive aid for the British Columbia *Offence Act*. We therefore fail to see how the incorporation by a federal regulation of s. 530 of the *Criminal Code* into the *Offence Act* for the specific purpose of the prosecution of contraventions under a federal enactment can preclude the incorporation of s. 530 of the *Criminal Code* into the *Offence Act* via s. 133.

[82] In short, the provisions accounting for the prosecution of *Contraventions Act* offences under the *Offence Act* (s. 132(2)(a.4) and Part VIII of the federal regulation), and the *Offence Act* forms, neither inform nor prevent the incorporation of s. 530 of the *Criminal Code* by way of s. 133 of the *Offence Act*.

(4) The Chronological Interpretation

[83] The Attorney General also relies on the timing of the enactments of s. 133 of the *Offence Act* and s. 530 of the *Criminal Code* to support his position that the former cannot incorporate the latter. The predecessor to s. 133 of the *Offence Act* was first passed in 1955 as part of *An Act respecting Summary Proceedings (Summary Convictions Act, 1955)*, S.B.C. 1955, c. 71, s. 102. This provision was substantially similar to the current s. 133. Section 530 of the *Criminal Code* (then s. 462.1) became law on June 30, 1978, and was declared in force in British Columbia on January 1, 1990. Given that s. 530 came into force 35 years after the predecessor to s. 133 was enacted, the Attorney General argues that it cannot be incorporated.

[84] This position quite simply ignores s. 32 of British Columbia's *Interpretation Act*, as it was worded prior to January 1, 2019, which states:

In an enactment a reference to another enactment of the Province or of Canada is a reference to the other enactment as amended, whether amended before or after the commencement of the enactment in which the reference occurs.

[85] Indeed, the courts in British Columbia have held that s. 133 of the *Offence Act* “refer[s] to the *Criminal Code* as amended from time to time” and that “section 133 of the *Offence Act* should not be given a static interpretation but should incorporate contemporary sections of the *Criminal Code* as required” (*Wiseberg*, at paras. 32-35; *R. v. Trow* (1977), 5 B.C.L.R. 133 (S.C.), at p. 136).

[86] Relatedly, the Attorney General emphasizes the fact that, in 1971, the British Columbia legislature abandoned legislation which would have granted British

Columbia courts the discretion to conduct proceedings in French. The Attorney General argues that this abandonment illustrates that, absent further legislative action, there is no ability for British Columbia courts to conduct trials in French (*Debates of the Legislative Assembly*, 2nd Sess., 29th Parl. March 10, 1971, at p. 646).

[87] Even if the legislature's reasoning for abandoning this legislation could be ascertained, this decision was made nearly 50 years ago. As such, it cannot reasonably have any bearing on this Court's interpretation of the *Offence Act* as that statute reads today. It goes without saying that an *enactment* tells us a great deal more about a legislature's intent than that legislature's *failure to enact* something. Any meaning that could be ascribed to the legislature's inaction in 1971 cannot compete with the plain meaning of s. 133. Section 133 sets out the applicable law; silence or inaction does not.

[88] The plain intent of s. 133 of the *Offence Act* is to allow for incorporation of certain *Criminal Code* provisions in broad and general terms. We cannot glean from the words of s. 133 a specific intent to exclude s. 530 of the *Criminal Code*. To insist on such an exclusion of s. 530 is to demote the importance of language rights, or to assume that the province does not intend to make provision for the French language in its courts. This intention is clearly not present in s. 133 or elsewhere in the *Offence Act*.

[89] As a final point, we note that both the Attorney General and the provincial court judge rely on the division of powers between the provinces and the

federal government to suggest that the language of provincial offence trials in British Columbia should not readily be determined by the *Criminal Code*, a federal statute. While it is true that the language used in courts is a matter falling under provincial powers, British Columbia has exercised that power in favour of granting French trials for provincial offences, by legislating to incorporate s. 530 of the *Criminal Code* into the *Offence Act*. Interpreting s. 133 of the *Offence Act* as incorporating s. 530 of the *Criminal Code* does not equate to imposing or inserting a federal provision into a British Columbia Act. Rather, by virtue of their incorporation, the language provisions found under s. 530 *form part of* the *Offence Act* itself.

(5) Implied Repeal

[90] In their submissions before this Court, the parties agreed that if s. 133 of the *Offence Act* were found to incorporate s. 530 of the *Criminal Code*, the *1731 Act* would be implicitly repealed in respect of *Offence Act* prosecutions. The Attorney General conceded this point in oral submissions (transcript, at pp. 75-76.)

[91] We agree. By virtue of its incorporation into the *Offence Act*, s. 530 enjoys the same status in that Act as it does in the *Criminal Code*. Therefore, just as s. 530 of the *Criminal Code* implicitly repealed the *1731 Act* in respect of criminal trials (*Conseil scolaire francophone*, at para. 48), it implicitly repeals the *1731 Act* in respect of *Offence Act* trials.

[92] Section 2 of the *Law and Equity Act* lends further support to this conclusion. It states that “the Civil and Criminal Laws of England . . . must be held to be modified and altered by all legislation that has the force of law in British Columbia”. As s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code*, s. 530 is, in effect, a provision of the *Offence Act* itself and therefore constitutes “legislation that has the force of law in British Columbia”. As such, the imperial *1731 Act* must give way to the *Offence Act*’s provision for trials in either official language.

## VI. Conclusion

[93] For the above reasons, we conclude that s. 133 of the *Offence Act* incorporates s. 530 of the *Criminal Code* and that this incorporation implicitly repeals the *1731 Act* in respect of *Offence Act* proceedings. The provincial court judge erred in holding otherwise and in denying Mr. Bessette his right to a trial in French. This failure to comply with s. 530 constituted a jurisdictional error, resulting in the Provincial Court’s loss of jurisdiction over Mr. Bessette’s trial. The Supreme Court of British Columbia failed to recognize the jurisdictional nature of the provincial court judge’s ruling, its serious effects on Mr. Bessette’s language rights, and the clear benefits of adjudicating the matter pre-trial. This failure caused it to err in declining to entertain Mr. Bessette’s petition for prerogative relief. The Court of Appeal for British Columbia similarly erred in upholding the Supreme Court’s decision.

[94] We would therefore allow the appeal, quash the order of the Provincial Court, and order that Mr. Bessette be allowed to stand trial in French.

## VII. Costs

[95] Mr. Bessette has requested that costs be awarded to him, both in this Court and the courts below. Cost awards in criminal cases are very rare, particularly in the absence of any *Charter* violation (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575). Costs are typically awarded as a consequence of acts of bad faith or intentional misconduct on the part of the Crown (*Munkonda*, at para. 142; *M. (C.A.)*, at para. 97). This was the case in *Munkonda*, where the prosecution failed in several ways to respect the appellant's language rights, and afforded superior treatment to the accused who had chosen to have their preliminary inquiry held in English than to the accused who had chosen to proceed in French (para. 146).

[96] There may be unique circumstances in which an accused should recover his or her legal costs even where there is no evidence of bad faith on the part of the Crown. In *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, costs were awarded to the accused as a result of delays occasioned by the words and actions of the trial judge which gave rise to an apprehension of bias (para. 13).

[97] In our view, the circumstances which might justify awarding costs against the Crown are not present in Mr. Bessette's case. Consequently, we would allow the appeal without costs.

*Appeal allowed.*

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*Solicitor for the respondent: Attorney General of British Columbia, Victoria.*

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