

# Linguistic Proficiency and Human Rights: The case for accent as a protected ground

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**Abstract.** *The goal of this paper is to argue for the inclusion of linguistic proficiency as a protected ground in human rights law generally and, in particular, under the British Columbia Human Rights Code. Specifically, I argue that L2 speakers are entitled to protection on the basis of their accent when they are required to operate in their L2. I outline the general law and policy with respect to human rights and argue that accent is analogous to those grounds explicitly protected in human rights legislation and should be protected as such. I outline the problems with the current approach from a linguistic perspective and show how the current approach is inconsistent with the goals of human rights law generally.*

**Keywords:** *Human rights, linguistic proficiency, accent, linguistic human rights, L2 acquisition.*

**Resumo.** *O presente artigo procura defender a inclusão da competência linguística como área protegida na legislação de direitos humanos, em geral, e no Código de Direitos Humanos da Colúmbia Britânica, em particular. Especificamente, defendendo que os falantes de L2 têm direito a proteção com base na sua pronúncia sempre que necessitarem de utilizar a sua L2. Descrevo sucintamente a legislação geral e as políticas relativas a direitos humanos e defendo que a pronúncia é análoga às áreas protegidas especificamente pela legislação de direitos humanos, devendo ser protegida como tal. Elenco os problemas existentes na abordagem atual numa perspectiva linguística e mostro como a abordagem atual é inconsistente com os objetivos da legislação de direitos humanos, em geral.*

**Palavras-chave:** *Direitos humanos, competência linguística, pronúncia, direitos humanos linguísticos, aquisição de L2.*

## Introduction

The goal of this paper is to argue for the inclusion of linguistic proficiency as a protected ground in human rights law and, in particular, under the British Columbia Human Rights Code (the ‘Code’).<sup>1</sup> Specifically, I argue that minority language speakers who are required to operate in a majority language, which is their L2, ought to be protected against discrimination on the basis of their proficiency in that L2. While the BC Human Rights Tribunal (the ‘Tribunal’) and the courts have explicitly rejected the invitation to

extend human rights protection to linguistic proficiency, I argue that such a rejection is inconsistent with the goals of human rights law and show that linguistic proficiency is analogous to those grounds explicitly protected by the legislation. I describe the benefits of human rights protection and show how the current approach to language discrimination fails to protect L2 English speakers.

The importance of human rights protection is that it prohibits the making of distinctions based on group membership rather than individual merit. In the case of linguistic proficiency, human rights protection would prevent L2 speakers from suffering adverse consequences based solely on their proficiency in their L2. However, it is equally important to understand what human rights protection does *not* do. For example, it does not require an employer to hire anyone with an accent who applies for a position, nor does it prevent an employer from ever terminating a worker because of their lack of proficiency. Rather, it means that refusing to hire someone or terminating someone *simply* because they lack native speaker competence is *prima facie* discriminatory.

Language rights have received significant attention in the linguistics literature (see, for example, Skutnabb-Kangas, 2012; Del Valle, 2003). These language rights have, as one of their aims, to ensure “that language is not an obstacle to the effective enjoyment of rights with a linguistic dimension, to the meaningful participation in public institutions and democratic processes, and to the enjoyment of social and economic opportunities that require linguistic skill.” (Rubio-Marín, 2003: 56) Much of the research in this area has focused on language policy and language planning in multilingual nations; that is, it considers the positive language rights a group ought to enjoy in order to protect and promote minority languages and their speakers. As Del Valle (2003: 144) observed, the issue of accent discrimination is not a pure issue of language rights because the protection of L2 speakers is not about the protection or promotion of the speaker’s minority language. Perhaps as a result, fewer linguistic studies have been devoted to the question of how best to protect minority language speakers when they are required to operate in the majority language when the majority language is their L2.<sup>2</sup>

Matsuda (1991), Del Valle (2003) and Lippi-Green (2012) have considered the protection of linguistic proficiency as a human right in the American context. Like in Canada, linguistic proficiency is not explicitly protected by the governing civil rights legislation;<sup>3</sup> Title VII protection extends only to race, colour, religion, sex and national origin. While the Equal Employment Opportunity Commission Guidelines recognize that national origin encompasses cultural and linguistic characteristics, linguistic proficiency is not independently worthy of protection, only as an example of national origin discrimination. Moreover, the Guidelines are not law and are not entitled to judicial deference. The case studies presented in Matsuda (1991), Del Valle (2003) and Lippi-Green (2012) show that American courts regularly reject accent discrimination claims, even when the complaint is founded under the protected ground of national origin.

Matsuda (1991: 1348) describes the doctrinal puzzle of accent and discrimination as follows:

1. Title VII absolutely disallows discrimination on the basis of race and national origin.
2. A fortiori, Title VII absolutely disallows discrimination on the basis of traits, like accent, when they are stand-ins for race and national origin.

3. Title VII absolutely allows employers to discriminate on the basis of job ability.
4. Communication, and therefore accent, employers will insist, are elements of job ability.

The puzzle arises because, as Matsuda, Del Valle and Lippi-Green describe it, the question of whether or not accent is a stand-in for race or national origin (and is therefore protected) or an element of job ability (and therefore not protected) is part of a single legal test. This puzzle should not manifest in the Canadian context, where the two issues are kept separate in terms of the legal analysis; the decision maker is first tasked with determining whether *prima facie* discrimination exists and, if so, whether the impugned job requirement is reasonably necessary so as to justify that discrimination. However, as I show below, Canadian L2 English speakers fare no better in terms of human rights protection than L2 English speakers in America.

‘Linguistic proficiency’ is a broad term encompassing notions such as foreign/native accent, communicative ability, word choice, etc. and both American and Canadian courts appear to conflate these notions in their decisions. For the purposes of this paper, I use ‘linguistic proficiency’ specifically to mean ‘accent’ and use those terms interchangeably.<sup>4</sup> I adopt Lippi-Green’s (2012: 46) definition of ‘accent’ as the breakthrough of native language phonology into the target language. My reasons for limiting the discussion to phonological accent are threefold. First, as I motivate below, accents are highly salient to native and second language speakers (Munro, 2008) and are used to make negative judgments about speakers (Alford and Strother, 1990); this is precisely the sort of mischief human rights legislation is intended to prevent. Second, as Lippi-Green (2012: 54) observes, the idea of ‘communicative competence’ will often raise additional issues of cultural and stylistic appropriateness, discussion of which is beyond the goals of this paper. Finally, Matsuda, Del Valle and Lippi-Green all base their discussion of accent discrimination on phonological accent; I adopt the same definition in order to show that, while the Canadian legal tests are set up in a way that should better protect L2 speakers from discrimination, in practice they fail to do so.

Munro (2003) presents a background to accent discrimination in Canada, setting out a summary of issues and some discussion of the law. In this paper, I build on that primer and present a specific context in which language has been an obstacle to the enjoyment of economic opportunities; namely, the opportunities for employment and the lack of legal protection for workers who are not native speakers of English. I give an overview of the law with respect to human rights protection in British Columbia and show that, while accent is not explicitly protected by the Code, it ought nonetheless to be protected as being analogous to those grounds so protected. I describe the benefits of extending Code protection on the basis of accent and show how the current approach fails to adequately protect minority language speakers. Finally, I discuss some of the potential consequences for failing to recognize accent as a ground entitled to human rights protection.

### **Human rights law in British Columbia**

In British Columbia, human rights are governed by three pieces of legislation: the Code, the *Canadian Human Rights Act*,<sup>5</sup> and the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> The context in which the complaint arises determines which statute is operative; the

Code applies to provincially regulated activities, including employment and tenancy, the *Canadian Human Rights Act* applies to federally regulated activities occurring within the province, and the *Charter* protects individuals against discrimination by any level of government. All of these statutes have the same goals, which have been described by the Supreme Court of Canada<sup>7</sup> as

...to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. (paragraph 51)

These goals are reflected in the Code at Section 3, which sets out its statutory purposes as follows:

- (3) The purposes of this Code are as follows:
- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
  - (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
  - (c) to prevent discrimination prohibited by this Code;
  - (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code; [and]
  - (e) to provide a means of redress for those persons who are discriminated against contrary to this Code.

Thus, the Code's purposes include the prevention of the types of discrimination the Code prohibits. To understand what that entails, the Code and its resulting jurisprudence require further scrutiny.

'Discrimination' is not defined in the Code; therefore, the types of conduct that constitute discrimination are those that have been developed by the Tribunal and the courts. In *Law Society of B.C. v. Andrews*,<sup>8</sup> the Supreme Court of Canada interpreted 'discrimination' to mean:

... a distinction, whether intentional or not, but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. (paragraph 37)

Where a distinction is made on the basis of membership of a group, rather than on individual merit, that distinction will be discriminatory.<sup>9</sup>

The Code, however, is only intended to prevent the types of discrimination it explicitly prohibits. Therefore, in order to determine whether discrimination will run afoul of

the Code, it is important to determine the context in which the discriminatory conduct arises and the grounds on which the conduct discriminates. The Code explicitly prohibits discrimination in eight specific contexts, namely: in publications (s. 7), services regularly available to the public (s. 8), the purchase of property (s. 9), tenancy (s. 10), employment advertising (s. 11), wages (s. 12), employment (s. 13) and by unions and associations (s. 14). Any discriminatory conduct falling outside of these specific areas will not violate the Code.

The Code explicitly protects against discrimination on 15 grounds: physical disability, mental disability, sex (including sexual harassment and pregnancy), race, place of origin, colour, ancestry, age (19 and over), family status, marital status, religion, sexual orientation, political belief, unrelated criminal conviction, and lawful source of income (collectively, the “Enumerated Grounds”). Unless the ground is explicitly designated as protected by the Code, the Tribunal or court will only grant the Code’s protection where it can be convinced the ground is ‘analogous’ to the Enumerated Grounds.

The ‘analogous grounds’ test has emerged primarily in response to the failure or refusal to adequately protect sexual orientation in human rights legislation. Where legislators have failed or refused to explicitly designate sexual orientation as a protected ground, the courts have intervened and extended human rights protection on the basis that sexual orientation is ‘analogous’ to those grounds explicitly protected. The test for determining whether a ground is ‘analogous’ was developed in the context of Section 15(1) of the *Charter* in *Egan v. Canada*,<sup>10</sup> where L’Heureux-Dubé J., held in dissent

...it is first necessary to identify the group which is affected. It is true that in some cases it may be useful to determine whether or not the affected group forms a “discrete and insular minority” which is lacking in political power and, thus, vulnerable to having its interests overlooked or its rights to equal concern and respect violated. Yet, that search is not really an end in itself. While historical disadvantage or a group’s position as a discrete and insular minority may serve as indicators of an analogous ground, they are not prerequisites for finding an analogous ground. They may simply be of assistance in determining whether the interest advanced by a claimant is the sort of interest that s. 15(1) was designed to protect. The fundamental consideration underlying the analogous ground analysis is whether the basis of the distinction may serve to deny the essential human dignity of the Charter claimant. Since one of the aims of Section 15(1) is to prevent discrimination against groups which suffer from social or political disadvantage, it follows that it may be helpful to see if there is any indication that the group in question has suffered discrimination arising from stereotyping, historical disadvantage or vulnerability to political or social prejudice. (paragraph 171)

That test was subsequently adopted by the majority of the Supreme Court of Canada in *Vriend v. Alberta*<sup>11</sup> and the current test for establishing analogous grounds, regardless of which statute the claim arises under.

### **The current approach to linguistic proficiency in British Columbia**

Linguistic proficiency is not explicitly protected by human rights legislation in British Columbia; it is not designated for protection in the Code, the *Canadian Human Rights Act* or in Section 15(1) of the *Charter of Rights and Freedoms*. Moreover, attempts to argue its inclusion as an analogous ground have been unsuccessful. Rather, the Tribunal

has held linguistic proficiency is “not a ‘free standing’ prohibited ground of discrimination requiring positive steps to ensure that disadvantaged groups benefit equally from services;”<sup>12</sup> like in the United States, to the extent that linguistic proficiency is protected at all, it is only where language is established as an aspect of race, ancestry or place of origin.<sup>13</sup>

The current approach is set out in *Fletcher Challenge Canada Ltd. v. British Columbia (Council of Human Rights)* (“Fletcher Challenge”) and arises in the context of Section 13, employment.<sup>14</sup> In that case, the complainant, a Punjabi speaking man, applied for and was refused a basic labourer’s position at the respondent sawmill on a number of occasions over a two-year period. The respondent employer justified its refusal to hire the complainant on the basis of his limited proficiency in English. The Tribunal concluded the respondent employer refused to employ the complainant because of his English language deficiency and that constituted discrimination on the basis of race, colour, ancestry and/or place of origin; because of its findings with respect to discrimination, it did not need to determine whether linguistic proficiency itself could be a protected ground.

The respondent employer appealed the Tribunal’s decision through the judicial review process. That appeal was successful; the court overturned the Tribunal’s decision, concluding that discrimination on the basis of linguistic ability will not always be evidence of discrimination on the basis of a protected ground. In doing so, the court specifically rejected the complainant’s analogous ground argument, concluding:

There is no question that language is the conveyor of culture. It shapes and is shaped by culture. A culture cannot survive without the ability of its people to give expression to themselves and the way in which they see the world through the articulation of thought in language. History teaches us that one of the oppressor’s most effective tools for maintaining power is the eradication of the language of the oppressed.

One could hardly disagree with the Member Designate that language is directly related to race, colour, ancestry and/or place of origin. But it cannot be said that it is necessarily related. Apart from its capacity to convey culture, language is also a communication skill that may be learned, and the ability to learn any language is not dependent on race, colour or ancestry.

So too in a work environment, language may simply be a means of communicating to accomplish a task. In that context the important aspect of language is not the expression of culture, but simply a means to communicate. Language is in this context a skill, not unlike the ability to operate a machine. It is the process by which job related information is passed back and forth from employee to employee and/or from employee to anyone he or she meets in the course of performing his or her duties.

Language then, has a dual aspect. It is inextricably bound with culture in one sense, but in another it is a means of communication unrelated to culture. When one examines the prohibited grounds set out in s. 8 [now s. 13], specifically those of race, colour, ancestry and place of origin it is clear that the legislature has prohibited discrimination on the basis of inherent characteristics that a person acquires or carries with him or her from birth – matters over which an individual

usually has no choice. I cannot think of any situation where discrimination on the basis of grounds would ever be justified. . .

I am of the view then that because of the dual nature of language it is not included as a prohibited ground per se in s. 8 of the Human Rights Act [now Code]. Applying the principles set out earlier, I find that the interpretation given to s. 8 of the Act is not one which the words can reasonably bear.

This is not to say however, that discrimination on the basis of language may not in some cases, when scrutinized, be found to actually be based on race, colour, ancestry or place of origin. If, for example, Mr. Grewal was denied employment at Fletcher Challenge because he spoke Punjabi, no other inference could be drawn other than the fact that he was being denied employment on the basis of race, colour, ancestry or place of origin. Discrimination can and usually does, take on more subtle forms. Refusal to employ someone on the stated basis of a language deficiency, when the ability to communicate in a particular language is not necessary to perform the job, would obviously be a veiled attempt to discriminate on the basis of race, colour, ancestry or place of origin. To put it another way, the stated reason for refusing employment would be a deceit, the real reason would be discrimination on the basis of ancestry or one of the other prohibited grounds. In such cases it may be said that language and ancestry are inextricably bound.

For a tribunal hearing such a case it will be a matter of examining the evidence to determine whether a language requirement is legitimate, that is, whether it is rationally connected to the performance of the job, or whether it is merely an attempt to discriminate on a prohibited ground. (QL 10-11)

The court concluded that, though language is inextricably bound with culture, it is also a learnable skill, not unlike operating a machine. Therefore, linguistic ability was not beyond the speaker's control; language was not entitled to protection in and of itself, but only where it could be used to support a claim for discrimination on the basis of race, colour, ancestry or place of origin.

### **Inherent limitations in adult language acquisition**

The current approach to discrimination on the basis of accent results from the court's failure to appreciate the nature of human language and, in particular, adult L2 acquisition. The court understood that the ability to acquire any language is not dependent on race, colour or ancestry. Indeed, unless they are born with a specific or general language impairment, humans exposed to any language as children will acquire that language with native speaker fluency. However, the court failed to understand or recognize the diminished ability to acquire an L2 as an adult. That diminished capacity is an inherent characteristic that the person carries with him or her from birth and is a matter over which an individual has no control. The court erred in concluding otherwise.

Linguistic research has shown that the ability to acquire a non-accented L2 depends on the age at which the L2 is acquired; the later in life the L2 is acquired, the more likely it is to be perceived as accented (see for example, Ioup, 2008; Flege *et al.*, 1997).<sup>15</sup> Some researchers attribute the diminished capacity for language learning in adults to

the Critical Age Hypothesis. According to Lenneberg (1967), language learning develops readily for the first few years of life, after which language acquisition is more difficult and less successful. The critical age is generally thought to end around the time of puberty. Scovel (1988) observed that phonological performance is particularly affected in late L2 learners; although adults can acquire the syntax and vocabulary of an L2 with very successfully, their phonological performance will not match that of a native speaker. He attributed the age effects on phonological performance to the fossilization of neuro-muscular programming that occurs around the age of puberty.

The Critical Age Hypothesis has been the focus of rigorous debate in the linguistics literature. However, as Munro observed, “whether or not one accepts the existence of a critical period for speech learning, the available evidence leads to the inescapable conclusion that having a foreign accent is a common, normal aspect of late second language acquisition” (2008: 194). To the extent that language is a communication skill that can be acquired, the ability to acquire it in an L2 is diminished for older language learners. This diminished capacity is inherent to all language learners and, while a few late language learners are able to learn to speak an L2 with native or near-native pronunciation, they are very much the exception not the rule (Munro, 2008). Therefore, for adult L2 learners, the inability to acquire L2 without an accent is an inherent characteristic that he or she carries from birth.

Further, language learners will generally have no control over what language(s) they are exposed to for the purpose of acquiring language with native speaker fluency. Regardless of whether the age effects of phonological performance are attributed to biology (Scovel, 1988), age of learning (Flege *et al.*, 1995), or age of arrival (Flege *et al.*, 1999), children are more likely to acquire language with native fluency. However, a child will not acquire native fluency without being exposed to the language and children generally have no control over which languages they are exposed to. Children simply cannot make all their own choices.<sup>16</sup> So, the fact a speaker did not acquire the majority language as an L1 or as an early learner of L2 will generally be a matter beyond their control.

Therefore, the fact that an adult L2 learner speaks with an accent is the result of an inherent characteristic carried from birth and a matter over which the speaker has no control and the court erred in concluding otherwise. In any event, because of its erroneous findings with respect to the nature of language, the court failed to consider whether L2 learners suffer social and political disadvantage, which forms the basis of the analogous grounds test set out in *Egan and Vriend*.

### **Societal or political disadvantage**

In determining whether a ground is analogous to those enumerated in the Code, the court must consider whether members of the group who share that ground have suffered societal or political disadvantage as a result and, therefore, have been denied the essential human dignity that human rights legislation is designed to protect. In the case of linguistic proficiency, minority language speakers required to operate in their L2 suffer negative social and economic consequences as a result of their limited L2 proficiency.

Accents are highly salient to native and second language speakers (Munro, 2008: 195). Speaking with a non-native accent entails a variety of possible consequences for L2 users, including accent detection, diminished acceptability, diminished intelligibility, and negative evaluation (Munro, 2008; Flege, 1988). Moreover, individuals readily make



judgments on the basis of language, using it as a cue to classify others into groups; when speakers know little about an individual, they tend to attribute to that person features they associate with the groups to which they assume the individual belongs (Alford and Strother, 1990).

Purnell *et al.* (1999) showed that the ability to discern a non-standard dialect is sufficient to determine ethnicity and, as a result, speakers can suffer discrimination on the basis of their speech alone without any visual cues. In that study, a tri-dialectal speaker contacted potential landlords over the telephone in order to inquire about apartments for rent. The speaker was more successful when using the standard dialect than using either of the non-standard dialects. Similarly, Anisfeld *et al.* (1962) showed that, when a speaker used Jewish-accented English, they were rated less positively on personality characteristics than when the same speaker used Standard English. In the specific context of work, communicative differences may lead to judgments that speakers with non-native accents are unqualified, which may in turn lead to exclusion from social and occupational cliques, thereby creating an isolation that makes it difficult to achieve full and equal participation in the workforce and in society as a whole (Fleras and Elliott, 2003).

Sociological and sociolinguistic studies have established that individuals excel at detecting foreign accents, that they use those foreign accents to make judgments about the speaker on the basis of their own perceptions, and that those judgments result in negative consequences for the speaker. Therefore, linguistic proficiency satisfies the test as set out in *Egan and Vriend* and ought to be treated as an analogous ground worthy of the Code's protections.

### **The benefit of human rights protection**

The current approach to language discrimination set out in *Fletcher Challenge* arose in the context of employment discrimination, as have the majority of cases in which linguistic proficiency has subsequently been considered as a protected ground. As such, the focus of this section is on the prohibition against discrimination in the context of employment.

Unless the workplace is unionized, BC workers enjoy very few rights with respect to their employment; they can be terminated at any time, for any reason, provided that the notice requirements of the *Employment Standards Act*<sup>17</sup> are met. The Code, which prohibits an employer from terminating a worker on the basis of the prohibited grounds for discrimination, is the primary source of protection for minority workers in a non-unionized environment. The Code prohibits an employer from refusing to employ or terminating an employee on the basis of any of the Enumerated Grounds.

In order to succeed with a complaint, the complainant must first establish that they were discriminated against on a *prima facie* basis. A *prima facie* case of discrimination is established where the complainant shows that they are a member of a protected group, that they have been adversely treated, and that there is a nexus between the adverse treatment and their membership of the protected group.<sup>18</sup> Where a *prima facie* case of discrimination is made out, the onus then shifts to the employer to establish that it is a *bona fide* occupational requirement (a "BFOR") for the position that the incumbent possess a certain level of communicative proficiency. A workplace rule or standard will only constitute a BFOR where the respondent can show

- (1) that it adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must demonstrate that it is impossible to accommodate an individual employee sharing the characteristics of the complainant without imposing undue hardship upon the employer.<sup>19</sup>

Where the employer is unable to establish that the discriminatory rule or standard is a BFOR, then the complaint will succeed and a finding of discrimination will be made.

### **Problems with the current approach**

Because accent is not a protected ground, speakers with accents will never be part of a protected group. A *prima facie* case of discrimination will never be made out on the basis of accent and, because the BFOR test is only invoked as a defence to a *prima facie* case, it will theoretically never come in to play in complaints of accent discrimination. Moreover, because language rules or standards will never be inherently discriminatory under the Code, they will never be subject to scrutiny under the BFOR test; an employer is never required to establish that a language standard is rationally connected to the position in issue, that it adopted the standard in good faith and that the standard is reasonably necessary to accomplish its legitimate goal.

The exception to this is where the complainant attempts to use the language rule to establish a *prima facie* case of discrimination on the basis of race, ancestry or place of origin; that is, where accent is a stand-in for race, ancestry or place of origin. There, the Tribunal will consider whether the language standard is rationally connected to the position for the purpose of determining whether a case of *prima facie* discrimination has been made out.<sup>20</sup> This approach is unsuccessful in protecting L2 speakers of the majority language on the basis of race, ancestry, and place of origin.

Consider the Tribunal's decision in *Zahedi v. Xantrax Technology Inc.*<sup>21</sup> There, the complainant identified as a person of Persian ancestry, from Iran, who spoke Farsi and who spoke English with an accent. He alleged his employer imposed work requirements on him and limited his opportunities to advance because of his English skills and his accent so as to constitute discrimination on the basis of race, ancestry and place of origin. Specifically, the complainant alleged that he was advised orally and in writing that his English was insufficient, he was chastised for having an accent, and was emailed a link directing him to a college ESL accent class. His performance evaluations indicated his written English skills were a challenge and he needed to continue to work to develop his written English skills. He alleged his performance was regularly praised, but he was continually told he needed to improve his accent.

The employer sought to have the complaint dismissed on the basis it had no prospect of success. In an application to dismiss, the Tribunal will assume the facts alleged in the complaint are proven in deciding whether a *prima facie* case has been established. In this case, the Tribunal concluded the allegations about the complainant's written English skills and his accent were insufficient to establish a nexus between the adverse treatment he suffered and his race, ancestry or place of origin. It concluded the complaint had no reasonable chance of success on those grounds and dismissed that aspect

of the complaint. This case did not involve the imposition of a language standard or rule, *per se*. As a result, the Tribunal did not consider whether the employer's criticisms were rationally connected to the complainant's work; it simply held the employer's criticisms were not indicative of discrimination on the basis of race, ancestry or place of origin. Whether the employer could have established a BFOR defence, we cannot know because the employer was never required to lead the evidence necessary to do so.

If linguistic proficiency were a protected ground, the analysis would have evolved differently. Arguably, the complainant would have established a *prima facie* case of discrimination; on the facts alleged, the complainant spoke English with a Farsi accent, he suffered adverse treatment when he was denied the opportunity to advance in the company and there was a nexus between the protected ground and the adverse treatment; the employer's criticisms are evidence that his linguistic proficiency was partially to blame for his failure to advance. That is sufficient to constitute *prima facie* discrimination. The onus would then shift to the employer to establish that the standard it set for linguistic proficiency was a BFOR; that the language standard was rationally connected to the work to be done, that it imposed the standard in good faith and that the standard was reasonably necessary to accomplish the workplace goal.

If the employer can establish that the language standard against which it measured the complainant is legitimate and reasonably related to the work he was required to do, then it is less likely that the language standard is in reality a strategy to discriminate on the basis of race, ethnicity or place of origin. If the standard is *bona fide* and the complainant fails to meet it, then there is less concern that the complainant is being discriminated against in a way that violates the Code. Where there is no evidence the language standard is legitimate or even necessary to do the job in question, the complainant has a stronger argument for discrimination on the basis of race, colour or ancestry. By failing to make an employer accountable for the legitimacy of the language standards it adopts, the current approach fails to adequately protect against language discrimination on the basis of race, ethnicity and place of origin.

Moreover, the court took an unduly restrictive view of language by tying linguistic proficiency specifically to race, ancestry and place of origin. Indeed, language can be tied to other protected grounds; American Sign Language speakers may be discriminated without invoking race, colour or ancestry in any way. And while L2 speakers may be discriminated against on the basis of race, ancestry or place of origin, Purnell *et al.* (1999), as reported above, showed that discrimination also occurs on the basis of standard versus non-standard dialects. There, the speaker was fluent in three different dialects of American English: African American Vernacular English, Chicano English and Standard American English. Similarly, Appalachian English is a non-standard variety of American English that is regularly stigmatized and yet not protected by 'national origin' (Lippi-Green, 2012: 151). While a particular dialect may reflect race or ancestry, it may also reflect socio-economic status, social class and communities of practice. None of these are protected by human rights legislation and yet they may cause or contribute to the type of discrimination shown in Purnell *et al.* (1999).

The effect of including linguistic proficiency as a protected ground is to shift the burden from the complainant to the respondent. It means that, where a complainant can establish they suffered an adverse consequence as a result of their linguistic proficiency, the respondent must prove the language standard was legitimate and reasonably

necessary. While this will not always be a significant burden, it nonetheless offers some protection to complainants who might otherwise suffer significant economic disadvantage as a result of their linguistic abilities.

## Conclusion

By failing to protect linguistic proficiency as an analogous ground, the Tribunal and the courts fail to protect people who suffer adverse consequences as a result of a characteristic inherent to individuals and over which individuals have no control. These individuals form an identifiable group who have suffered social and political disadvantage as a result of their group membership. Moreover, the current approach permits the very mischief the court warned against in *Fletcher Challenge*; it permits a discriminator to avoid liability by choosing their words carefully in the circumstances. This is entirely inconsistent with the goals of human rights as identified by the judiciary and by statute. Linguistic proficiency meets the analogous grounds test in *Egan* and *Vriend* and should be protected accordingly.

## Notes

<sup>1</sup>R.S.B.C. 1996, c. 210.

<sup>2</sup>It is useful here to distinguish between the protection of L2 speaker rights *within* the legal system itself (see Eades, 2003, for example, for discussion) and the protection of L2 speaker rights *by* the law. The latter assumes the existence of L2 speaker rights that the law is required to protect; the goal of this paper is to advocate for that position.

<sup>3</sup>Title VII of the Civil Rights Act of 1964.

<sup>4</sup>This is not to say that other aspects of linguistic proficiency are not similarly deserving of human rights protection. However, I leave discussion of that issue to future research.

<sup>5</sup>R.S.C., c. H-6.

<sup>6</sup>Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

<sup>7</sup>*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

<sup>8</sup>[1989] 1 S.C.R. 143.

<sup>9</sup>*Re Insurance Corporation of British Columbia and Heerspink et al.* (1978), 91 D.L.R. (3d) 520 (B.C.C.A.), affd. (1981), 121 D.L.R. (3d) 464 (B.C.C.A.).

<sup>10</sup>[1995] 2 S.C.R. 513.

<sup>11</sup>[1998] 1 S.C.R. 493.

<sup>12</sup>*Yang v. British Columbia (Human Rights Tribunal)*, 2008 BCSC 1456 (S.C.) (“Yang”), at para. 138.

<sup>13</sup>*Yang; Bosco v. Smart Ant Solutions Ltd.*, 2014 BCHRT 234; *Chestacow v. Mount St. Mary Hospital*, 2013 BCHRT 96; *Norikova v. Thomson Rivers University*, 2013 BCSC 2156; *Medel and another v. De Lange*, 2012 BCHRT 144; *Bao v. St. James Community Service Society*, 2011 BCHRT 337; *Katayeva v. Vancouver Island Health Authority*, 2010 BCHRT 40; *Zahedi v. Xantrex Technology Inc.*, 2009 BCHRT 214; *Jones v. In 2 Business*, 2008 BCHRT 460; *Berezoutskaia v. British Columbia Human Rights Tribunal*, 2005 BCSC 1170; *Clau v. Uniglobe Pacific Travel Limited*, [1995] B.C.H.R.T.D. No. 1; *Guillen v. R. Dufour Enterprises Ltd.*, [1995] B.C.C.H.R.D. No. 24; *Fletcher Challenge Canada Ltd. v. British Columbia (Council of Human Rights)*, (1992), 73 B.C.L.R. (2d) 335; 97 D.L.R. (4<sup>th</sup>) 550.

<sup>14</sup>(1992), 73 B.C.L.R. (2d) 335; 97 D.L.R. (4<sup>th</sup>) 550.

<sup>15</sup>Courts and tribunals have limited their discussion of linguistic proficiency primarily to “accent”. For this reason, I have similarly focused my discussion on “accent” and not L2 grammar more generally.

<sup>16</sup>*Brown v. Brown*, [1988] B.C.J. No. 205, at QL 5.

<sup>17</sup>R.S.B.C. 1996, c. 113.

<sup>18</sup>*Wu v. Ellery Manufacturing Ltd.*, 2000 BCHRT 53.

<sup>19</sup>*British Columbia v. BCGSEU (Meiorin)*, [1999] 3 S.C.R. 3, paragraph 54.

<sup>20</sup>The question remains whether the court's approach in *Fletcher Challenge*, which requires a consideration of whether a language requirement is rationally connected to the position as part of the *prima facie* discrimination test, reverses the onus and requires the worker to establish the absence of a rational connection. I leave this question to future research.

<sup>21</sup>*Supra*.

## References

- Alford, R. L. and Strother, J. B. (1990). Attitudes of native and nonnative speakers toward selected regional accents of U.S. English. *TESOL Quarterly*, 24, 479–495.
- Anisfeld, M., Bogo, N. and Lambert, W. E. (1962). Evaluation reactions to accented English speech. *Journal of Abnormal and Social Psychology*, 65, 223–231.
- Del Valle, S. (2003). *Language Rights and the Law in the United States: Finding our Voices*. Clevedon: Multilingual Matters.
- Eades, D. (2003). Participation of second language and second dialect speakers in the legal system. *Annual Review of Applied Linguistics*, 23, 113–133.
- Flege, J., Munro, M. and MacKay, I. (1995). Factors affecting strength of perceived foreign accent in a second language. *Journal of The Acoustical Society of America*, 97(5), 3125–3134.
- Flege, J. E. (1988). The production and perception of speech sounds in a foreign language. In H. Winitz, Ed., *Human communication and its disorders: A review*. Norwood, NJ: Ablex.
- Flege, J. E., Bohn, O.-S. and Jang, S. (1997). Effects of experience on non-native speakers' production and perception of English vowels. *Journal of Phonetics*, 25, 437–470.
- Flege, J. E., Yeni-Komshian, G. H. and Liu, S. (1999). Age Constraints on Second-Language Acquisition. *Journal of Memory and Language*, 41(1), 78–104.
- Fleras, A. and Elliott, J. (2003). *Unequal relations: An introduction to race and ethnic dynamics in Canada*. Toronto: Prentice Hall, 4 ed.
- Ioup, G. (2008). Exploring the role of age in the acquisition of a second language phonology. In J. G. H. Edwards and M. L. Zampini, Eds., *Phonology and Second Language Acquisition*. Amsterdam: John Benjamins.
- Lenneberg, E. H. (1967). *Biological foundations for language*. New York: John Wiley & Sons.
- Lippi-Green, R. (2012). *English with an accent; language, ideology and discrimination in the United States*. New York: Routledge.
- Matsuda, M. (1991). Voices of America; accent, antidiscrimination law, and a jurisprudence for the last reconstruction. *The Yale Law Journal*, 100(5), 1329–1407.
- Munro, M. (2003). A primer on accent discrimination in the Canadian context. *TESL Canada Journal*, 20(2), 38–51.
- Munro, M. J. (2008). Foreign accent and speech intelligibility. In J. G. H. Edwards and M. L. Zampini, Eds., *Phonology and Second Language Acquisition*. Amsterdam: John Benjamins.
- Purnell, T., Idsardi, W. and Baugh, J. (1999). Perceptual and phonetic experiments on American English dialect identification. *Journal of Language and Social Psychology*, 18(1), 10–30.
- Rubio-Marín, R. (2003). Language rights: Exploring the competing rationales. In W. Kymlicka and A. Patten, Eds., *Language rights and political theory*. Oxford: Oxford University Press.

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Scovel, T. (1988). *A time to speak: A psycholinguistic inquiry into the critical period for human speech*. Cambridge: Newbury House.

Skutnabb-Kangas, T. (2012). Linguistic Human Rights. In P. M. Tiersma and L. M. Solan, Eds., *Oxford Handbook of Language and Law*. Oxford: Oxford University Press.