



**HEARING BY THE MILITARY JUDGE  
ASSIGNED TO PRESIDE AT THE COURT MARTIAL**

**Citation:** *R. v. Tuckett*, 2019 CM 3004

**Date :** 20190704

**Docket :** 201845

Preliminary Proceedings

Asticou Courtroom  
Gatineau, Quebec, Canada

**Between :**

**Master Corporal W.A. Tuckett, Applicant**

- and -

**Her Majesty the Queen, Respondent**

Preliminary application heard in Gatineau, Quebec on 23 May 2019.

Reasons delivered in Gatineau, Quebec on 4 July 2019

**Before :** Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

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**REASONS FOR A DECISION TO PROVIDE INTERPRETATION SERVICES**

[1] On 24 April 2019, the applicant, Master Corporal Tuckett, through his counsel, filed an application pursuant to section 187 of the *National Defence Act (NDA)* and article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*. Master Corporal Tuckett would like the judge assigned to preside at his court martial to order the provision, by the court, of simultaneous interpretation of the proceedings from one official language to another.

[2] With the agreement of both parties, I decided to proceed with a hearing on this specific application during the proceedings for another hearing involving the same parties and scheduled for a period of two weeks in the month of May. I then proceeded with a hearing for this application on 23 May 2019.

[3] The evidence is composed of the following Agreed Statement of Facts:

- (a) The accused, Master Corporal Tuckett, is a unilingual Anglophone. He does not understand French and will not be able to understand pleading or testimonies in French.
- (b) On 28 January 2019, the defence requested an early pre-trial conference to inform the Court, among other things, of the linguistic complexities involved in the upcoming trial.
- (c) During the pre-trial conferences that took place on 1 and 7 February 2019, the prosecution informed the defence and the Court that some of its witnesses will be testifying in French.
- (d) During the pre-trial conferences that took place on 1 and 7 February 2019, the defence informed the prosecution and the Court that it may have witnesses testifying in French and requested interpretation services.
- (e) The Translation Bureau is a federal institution within the Public Services and Procurement Canada portfolio.
- (f) The Translation Bureau offers translation, revision, terminology and interpretation services and language advice to:
  - i. Federal departments and agencies;
  - ii. Parliament and the Senate; and
  - iii. Private-sector firms that have a contract with the federal public service.
- (g) Services offered by the Translation Bureau include the making and revising of translation from one language into another of documents, including correspondence, reports, proceedings, debates, bills and Acts, and the interpretation, sign-language interpretation and terminology.
- (h) These services are offered in:
  - i. The two official languages;
  - ii. Many Indigenous languages in Canada
  - iii. Many foreign languages; and
  - iv. Visual signs and tactile languages.
- (i) The Translation Bureau maintains a pool of qualified interpreters whose services can be made available to clients upon request.

- (j) Requests for translation services are made via online requests addressed to the Translation Bureau.
- (k) Fees for translation services vary depending on the nature of the service required.
- (l) Requesting clients are required to pay for the services, which are managed through contractual agreements.
- (m) Both the Director of Defence Counsel Services (DDCS) and the Director of Military Prosecutions (DMP) organizations have used funds from their respective budgets to retain the services of interpreters to provide translation services in the course of court martial proceedings.
- (n) The funds used to pay for such services originate from budget line C125 – Contracting (Counsel, Experts, and Services).

[4] The situation before the Court regarding the need for interpretation services has been described by both parties as follows:

- (a) The prosecution will call witnesses in the course of the main trial in order to prove its case on both charges. Among them, one witness, who is the alleged victim on both charges, informed the prosecutor of her intent to testify in French, which is different from the language of trial chosen by the accused, which is English.
- (b) Accordingly, the need for interpreters, who will proceed with consecutive interpretation, has been identified. This need is recognized and clearly this witness will testify in the language of her choice, which is French.
- (c) However, defence counsel raised the fact that in order to defend his client efficiently, he would like to cross-examine this very witness in French. According to him, by proceeding in that way, the Court will get the evidence directly from the witness, without going through the interpreter. In that way, it would enforce the right of his client to full answer and defence, and at the same time, one of the witnesses to testify in the official language of her choice.
- (d) The prosecution is of the same opinion, and share with the Court its intent to examine-in-chief, and re-examine if need be, this witness in the French language, which is the language chosen by the witness for testifying before the Court.

- (e) Both counsel are of the opinion that the Court, which is a Standing Court Martial, meaning a trial presided by a military judge alone, has the capacity to hear and understand French without any problem. In fact, both counsel are bilingual as is the military judge presiding at the court martial. Both counsel are of the opinion that it would be the proper way to proceed in this matter with this witness and any other witnesses who would choose to testify in French before the Standing Court Martial.
- (f) Accordingly, defence counsel, with the explicit agreement of his client, who is the accused in this matter, suggested that, in order for Master Corporal Tuckett to fully understand the testimony that would be provided by the alleged victim and any other witness who would like to testify in the French language, simultaneous interpretation be provided to the accused by interpreters accepted by the military judge presiding at this court martial.

[5] Since the matter of interpreters has been raised by both parties during pre-trial conference calls, I clearly said that the court martial will uphold the right of witnesses to testify in French and to do the same for the accused, Master Corporal Tuckett, who chose to be tried in the English language. The proposal made by counsel to the Court about using simultaneous interpretation for the benefit of the accused is accepted by me because it gives effect at the same time to the substantial language rights of the witness and those of the accused to use the official language of their choice before the court martial, and also respect the right of Master Corporal Tuckett to a fair trial and to a full answer and defence at the same time.

[6] In addition, as a matter of fairness, I proposed to both parties to have the simultaneous interpretation recorded in order to have it included on the transcript if an appeal is made. This suggestion was accepted by both parties and I will make an order accordingly.

[7] Then, the question put by the defence counsel to the Court is not about upholding the substantive language rights of the witnesses or the accused, but how they will be discharged by the Court.

[8] Actually, for a court martial, interpreters' services are contracted by either the defence counsel or prosecution services. Usually, it goes with the party requesting the need for an interpreter. Usually, it is the practice for a party to ensure in what language a witness called by it will testify. If it is different from the one chosen by the accused for the trial, then the administrative process of contracting services with the Translation Bureau is initiated by the party calling that witness to the stand. The budget for contracting these services rests with DDCS or DMP.

[9] Here, in this case, the need for simultaneous interpretation, being for the benefit of the accused, appears that it would normally be for defence counsel to contract such services for these court martial proceedings.

[10] However, defence counsel submitted to the Court, in accordance with the decision of the Supreme Court of Canada (SCC) in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50, that it is the responsibility of the court martial to discharge this duty giving effect to the language rights of the accused, and not to the accused himself or his defence counsel.

[11] In that decision, Gascon and Côté JJ., for a unanimous court, discussed what are the language rights at the federal court and the role of counsel and the judge in such context.

[12] After reviewing the constitutional roots that led to the existence and application of such rights, the SCC clearly indicated in *Mazraani* that language rights are personal and individual rights, and also fundamental rights as they guarantee the access to the parties and their witnesses in the official language of their choice at the court. The court went further by saying that language rights in the *Official Languages Act (OLA)* are quasi-constitutional in nature, such as those provided at sections 14 and 15 of the same Act.

[13] Sections 14 and 15 of the *OLA* read as follows:

**14** English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

**15 (1)** Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.

**(2)** Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.

**(3)** A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

[14] Subsection 3(2) of the same Act reads as follows:

In this section and in Parts II and III, *federal court* means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament.

[15] It is clear to me that a court martial is a tribunal that carries out adjudicative functions and is established pursuant to the *NDA*, which is an Act of Parliament. Consequently, sections 14 and 15 of the *OLA* do apply to a court martial.

[16] For efficiency reasons, as mentioned earlier in this decision, the accused has asked, with the agreement and support of the prosecution, that the court martial proceedings be conducted in both official languages when the alleged victim would testify. In order to proceed, the accused requested that simultaneous interpretation of the proceedings be authorized by the Court to ensure that he is able to understand and follow such testimony.

[17] Being satisfied that I, the court reporter and counsel are able to understand both languages without the assistance of an interpreter, I agreed that simultaneous interpretation be provided to the accused. The alleged victim will then be able to testify in the official language of her choice, which is French, and the accused will be able to understand and follow her testimony with the assistance of simultaneous interpretation, considering that he understands only English.

[18] The result is that the court martial agrees to provide simultaneous interpretation services at the request of the accused, and allows the alleged victim to testify in the official language of her choice, all in accordance with the *OLA*.

[19] Further in the decision of *Mazraani*, the SCC discussed the roles of judge and counsel. It clearly stated that it is to the judge of the federal court to uphold these rights and to the court which he or she belongs for discharging this duty in light of the *OLA*, especially if there is no specific rule for the court to follow. As the SCC said in *Mazraani* at paragraph 31:

That being said, the absence of rules to facilitate the exercise of the rights provided for in the *OLA* does not mean that those rights do not exist. On the contrary, the *OLA* requires that in every case the TCC, a federal court, provide interpretation services at the request of a party and allow every person to speak in the official language of his or her choice.

[20] I am of the opinion that the exact same reasoning shall apply to a court martial.

[21] That being said, this SCC decision has certainly not considered how it could be achieved in the context of a court martial, which is an *ad hoc* tribunal, i.e. without any permanent status and existence. A court martial comes into existence only once convened by the Court Martial Administrator (CMA) and it ceases to exist once the trial is terminated by the presiding military judge. The most obvious problem in the actual context is the fact that there is no permanent administrative support for the Court to provide such services. Some pre-trial administrative concerns for a court martial have been addressed through some provisions of the *NDA* and the QR&O, but the specific issue on interpreters has not been yet dealt with.

[22] There are few references to language rights and interpreters in the QR&O, but there is nothing about the Court's obligation to discharge these fundamental rights. In addition, the issue is not addressed in the administrative rules of practice for a court martial.

[23] It would explain why, in the court martial system, a practice was developed over the years where it is to the party who is claiming the need for an interpreter to discharge the duty of enforcing the language rights of its own witness or witnesses it has called or the one of the accused, by retaining and paying for interpretation services.

[24] Obviously, as raised by the accused in its application, such practice is not in accordance with what has been said in *Mazraani* on that very issue at paragraph 33:

Second, the courts are responsible for discharging this duty in light of the very words of ss. 14 and 15 of the OLA. Section 14 does not require that a specific request be made or that a special procedure be followed so that one language or the other can be used in the court in question. It merely decrees that the two official languages have equal status in the sense that any person can use one or the other in the federal courts. This means that individuals should have to do no more than speak in the official language of their choice in order to exercise their right. Moreover, s. 15 provides that it is incumbent on the *court* to ensure that the rights of the parties and the witnesses are upheld. This responsibility is intentionally assigned to the court in the *OLA*: s. 2(c) provides that one of the Act's purposes is in fact to "set out the powers, duties and functions of federal institutions with respect to the official languages of Canada". This role is particularly important in the case of witnesses, given that, even though they are called by one of the parties, they do not necessarily have the same interests as that party and will therefore not always be informed of their rights by the party's counsel, whose priority is to defend his or her client's interests and to win the case.

[Emphasis in original; my emphasis underlined]

[25] Clearly, it belongs to the court martial to discharge the duty for retaining and contracting interpretation services. Then, through what person or what official would the court martial be able to discharge such duty, considering its *ad hoc* status?

[26] Chapter 111 of the QR&O is about the convening of the courts martial and pre-trial administration in such context.

[27] It clarifies the legal duties and responsibilities of the CMA coming from the *NDA* in relation to the convening of courts martial, the choice of the type of court martial by the accused when applicable, the procedure for the appointment of members and alternate members of a court martial panel, summoning and delivering documents to an accused person, summoning witnesses and the issuance of administrative instructions.

[28] In addition to these formal and legal duties to convene the court in accordance with the type of court martial chosen by an accused person or the mandatory one imposed by the *NDA*, and the one related for summoning an accused person and witnesses, the CMA shall, in accordance with QR&O article 101.17, manage the Office of the Chief Military Judge (OCMJ) and supervise personnel, other than military judges,

within that office; assign a court reporter for each court martial or other hearing before a military judge; control and maintain the schedule for courts martial and other hearings before a military judge; maintain a file in respect of each court martial or other hearing before a military judge; and retain the audio recordings and minutes of proceedings.

[29] The latter duty implies that, pursuant to QR&O article 112.66, when requested for the purposes of an appeal or a review before the Court Martial Appeal Court (CMAC), or on his or her own request, minutes of proceedings shall be prepared within the prescribed delay under the responsibility of the CMA. In terms of an appeal before the CMAC, then the CMA is responsible pursuant to the CMAC rules to timely prepare and forward the record and appeal book after a Notice of Appeal has been served.

[30] The CMA has also assumed other responsibilities coming out from his or her duties for supporting the court martial, such as for publishing military judges' decisions on the OCMJ's website.

[31] Further to that review, it is easy for me to conclude that the CMA is the official who administratively supports and administers courts martial and other judicial hearings. The CMA has essential pivotal prescribed roles in the administration of courts martial and acts as the principal interface between the designated military judge, the prosecutor and defence counsel.

[32] Considering the situation as a whole, it is the logical conclusion that it would be to the CMA to retain simultaneous interpretation services from the Translation Bureau in order for this Court to discharge its legal duty to do such thing.

[33] That being said, as a matter of paying for these services, the Crown money is actually with DMP and DDCS. Logically, it would be proper that this money planned to be used for this very purpose becomes accessible to the CMA. As such, the request being made by the representative of the accused, a defence counsel from DDCS, then it is to DDCS to provide the CMA with the financial information in order for her to make things happen.

[34] For practical reasons, if the CMA concludes that her duty to perform this specific task must be carried out by the court reporter assigned to this case, I do not see any problem with that. However, I leave in her hands to decide who shall actually carry it out

[35] In addition, I want my decision to be notified by the CMA to the Judge Advocate General (JAG), the DMP and DDCS in order for them to consider a way to settle this matter from a legislative perspective. Actually, my decision is valid for and limited to this specific court martial. Any party involved in other court martial proceedings have no other choice but to present a preliminary application for this very purpose to a military judge presiding at each court martial, while the law is clear on the implementation by a court martial of the *OLA*. Effectively and efficiently addressing

permanently this pre-trial administrative support issue would reflect positively on the court martial and the military justice system as a whole.

**FOR ALL THESE REASONS, AS THE MILITARY JUDGE ASSIGNED TO PRESIDE AT THE COURT MARTIAL, I**

[36] **GRANT** the application made by Master Corporal Tuckett.

[37] **DECLARE** that English and French are the languages chosen by the parties for the proceedings conducted before this court martial, considering that I, the court reporter and counsel are able to understand both languages without the assistance of an interpreter, and it will respect the right of the accused to a fair trial and to a full answer and defence at the same time.

[38] **ORDER** that simultaneous interpretation be provided to Master Corporal Tuckett when the French language will be used either by a witness or any other actor during the proceedings conducted before this court martial, considering that, despite the fact he expressly agreed that English and French be used as the languages chosen for the proceedings conducted before this court martial in order to ensure respect of his rights to a fair trial and to a full answer and defence, he is able to understand only English.

[39] **ORDER** that simultaneous interpretation be recorded by a court reporter in order to have it included in writing on a transcript if minutes of proceedings are prepared by the CMA.

[40] **ORDER** the CMA to make arrangement with the Translation Bureau for retaining the service of interpreters for simultaneous interpretation from French to English and for having the necessary logistical services requested by the provision of such type of interpretation, for the entire period planned for this court martial, which is from 15 to 26 July 2019 inclusively, at the location described in the Convening Order she signed for this court martial on 22 May 2019, considering that I identified the CMA as the official for performing the legal obligation on behalf of this court martial for discharging the duties coming out from sections 14 and 15 of the *OLA*.

[41] **ORDER** the DDCS to provide, without delay, to the CMA the necessary financial information for her to use funds from his budget to retain the services of interpreters in order to provide interpretation services in the course of these court martial proceedings.

[42] **ORDER** the CMA to notify in writing the JAG, the DMP and the DDCS with a copy of the present decision.

“Lieutenant-Colonel L.-V. d’Auteuil”  
Deputy Chief Military Judge

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**Counsel :**

Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for the applicant, Master Corporal W.A. Tuckett

The Director of Military Prosecutions as represented by Major L. Langlois and Lieutenant(N) J. Besner, Counsel for the respondent