



COURT MARTIAL

Citation: *R. v. Thibeault*, 2014 CM 3022

Date: 20141127

Docket: 201407

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Captain J.R.N.J. Thibeault, Applicant

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

REASONS FOR DECISION ON LANGUAGE OF TRIAL

(Orally)

[1] Captain Thibeault is charged with one offence punishable under section 130 of the *National Defence Act* for having allegedly committed a sexual assault contrary to section 271 of the *Criminal Code*. This court was convened on 30 October 2014 to commence on 1 December 2014.

[2] I received an application, as the judge assigned to preside at this Standing Court Martial as it is now. The application was for an order for a bilingual trial presented by Captain Thibeault. The hearing for this application took place on 7 November 2014. The hearing was adjourned by me to 12 November 2014 and again to today, 27 November 2014.

[3] What has been put before me as evidence is the notice of application, the affidavit of Danielle Lever, assistant of Mr Brown, and the convening order.

[4] Essentially, the language of trial chosen by Captain Thibeault for this trial is English. As a matter of fact, this trial is a new trial ordered by the Court Martial Appeal Court in a recent decision further to a full trial that took place in the French language. I did not preside at it but I have been told that was the case.

[5] Captain Thibeault's mother tongue is French. He has a fair level of understanding in English, but his ability in speaking English is qualified by his own counsel as poor; he struggles to communicate clearly in the English language. Defence counsel, Mr Brown, is a unilingual Anglophone, neither understanding nor speaking French.

[6] Further to an inquiry I made in court, I confirmed those facts, particularly, that Captain Thibeault does understand the English language being able to follow the proceedings of this hearing but has great difficulty expressing himself in English. In fact, exchanges between Captain Thibeault and myself took place mainly in the French language with the approval of his own counsel.

[7] Furthermore, when I raised the issue of simultaneous interpretation the accused, Captain Thibeault, indicated to me that he would appreciate receiving this service, if possible. Basically, I raised the issue of him understanding the evidence provided by different witnesses, including his own witnesses testifying in English. My understanding is that he would appreciate having a French translator to facilitate understanding of witnesses' testimony.

[8] The judge and the prosecutor are both able to understand and speak both official languages. Both have been involved in a number of bilingual trials over the last three or four years; in my case, more than that. I have been informed that witnesses for the prosecution will testify in English and defence witnesses, other than the accused, will also testify in English. Basically, all evidence will be provided in English except if Captain Thibeault, the accused in this trial, testifies. If he does so, he would like to testify in the French language.

[9] So the issues raised by the application are:

- (a) if the court can direct that the trial take place in both official languages;
- (b) order a bilingual trial, in order to allow Captain Thibeault to testify in the French language and be understood directly by the judge of facts in his own language; and
- (c) that an interpreter, in such a context, be provided to his defence counsel.

[10] Throughout the proceedings concerning this application, I have expressed many concerns over many situations resulting in many exchanges with both counsel who shared different perspectives and different ideas concerning this fundamental matter as a matter of proceedings. First, in his application, it was suggested by Captain Thibeault

that section 530 of the *Criminal Code* would apply in a court martial context. I would disagree with him. I do not see this provision and others related in the *Criminal Code* concerning the language of trial as having any application to this trial.

[11] My understanding of the situation is through the *Official Languages Act*, which is a federal act and would apply to this tribunal, a court martial, because my understanding is that the court martial is a federal tribunal, a federal court in the sense that it's a court enacted by a federal act. So, provisions of the *Official Languages Act* would apply and, also as a matter of fact, the *Constitution* would find application to the court martial especially sections 19, 14, and 7 of the *Canadian Charter of Rights and Freedoms*.

[12] I closely reviewed various scenarios concerning this situation.

- (a) First, if I look at the context of a bilingual trial, the judge and the prosecutor would be able to proceed, as they are bilingual, and the witnesses would be able to testify in their own language, without the need of an interpreter. Defence counsel would be unilingual Anglophone, witnesses would testify in English, and if the accused does testify, he would do it in French.
- (b) Then, there is the question of requiring an interpreter, not for the accused testifying in French, but rather for allowing the defence counsel to understand the testimony of his own client. This context relies on the interpretation of section 14 of the *Charter*. Does section 14 apply in the situation where an interpreter be provided for defence counsel, in representing the accused? I rely primarily on the decision of *Cormier v. Fournier*, a decision rendered by Justice Godin on 23 May 1986 (1986 CanLII 92 (NB QB)), at page 20. "Section 14 has no application to lawyers." Protection under section 14 is mainly for the accused and cannot be expanded to a lawyer representing the accused. So, if I order a bilingual trial in the circumstances, providing an interpreter for defence counsel, Mr Brown, as is my understanding, would not be possible.
- (c) If we were to proceed with a French trial, as it was done for the first trial, the judge has the ability to speak and understand French, as does the prosecutor; defence counsel would not have the ability to understand nor speak French; witnesses would provide their evidence in English and an interpreter would be provided in accordance with section 14 of the *Charter*; the accused would be able to testify in his own language, which is French. There, again, the issue would be the requirement for an interpreter for defence counsel. The court would likely respond as in the context of a bilingual trial, that is, the right to an interpreter for counsel, an officer of the court, such as defence counsel of the accused, would not be allowed.

- (d) So, I am turning now to the third possibility which is the actual one before me. My understanding is that, in the military justice system, when a charge is laid, the accused must indicate in which language he would like the trial to take place before any service tribunal. In this case, Captain Thibeault has indicated that his language of choice for his trial is English. An English trial would mean, therefore, in this case, that again the judge and both counsel have the ability to speak and understand English, as do the witnesses. The accused, however, would be in a different position. The question is, considering the context presented to me: can the accused be provided with an interpreter when he is presumed to understand and speak the language in which the proceedings are conducted? In this case, I must conclude that the accused is not presumed to understand nor speak English, the language of the trial.

[13] I am taking a practical approach to this issue. I am governed by, and my main concern is that, throughout this entire trial and all its proceedings, the benefit of a fair trial for the accused, including his ability to make a fair and full defence in these proceedings in accordance with his right entrenched in section 7 of the *Charter*. To understand the meaning of that right, I looked at *R. v. Tran*, [1994] 2 S.C.R. 951, a Supreme Court of Canada decision, which although different in facts (in *Tran*, the accused was unable to speak either French or English), provided inspiration to this court in finding a solution for this matter. The accused chose to have his trial in English for several reasons. First, the evidence, apart from the accused's own testimony, is in English. Second, the accused chose to be represented by a unilingual (English) defence counsel, which raises the issue of choice of counsel. Those rights (the fairness of trial, choice of counsel) are established in section 7 of the *Charter*. To simplify understanding of this unique situation, the areas of concern may be distilled to the following: the accused speaks French, has limitations in understanding and speaking English. His choice of counsel, I infer, is based on the language in which the evidence would be adduced. Finally, the accused wishes to testify in French while being represented by English-speaking counsel.

[14] The rights under section 7 of the *Charter* and as interpreted in *Tran* play a role here. The right to an interpreter relates to the notion of fairness of trial and refers to the right of the accused to have an interpreter. In this matter, if I decide that, for this English trial, the accused has a right to an interpreter when he testifies, in these particular circumstances, I find he will not be afforded any more rights than others, because of it being, considering the very specific context of this case, a retrial based on the Court Martial Appeal Court's concern about the accused's ability to testify.

[15] Choosing to have the trial in English, having the evidence adduced in English, being represented by a counsel who speaks and understands English, in this context, makes sense to me. He has the right, if he so chooses, to express himself in French, but his testimony would be delivered through an interpreter, meaning that the court would obtain and consider the evidence, as provided by him, through an interpreter. The court

can, at any point, question the quality of the interpretation; therefore, if I have any concern, I may, at some point, raise the issue.

[16] Having said that, I believe that getting duly qualified, experienced interpreters will erase any doubt on that point. To clarify, the evidence provided by the accused would be in French translated into English. The judge of the facts will then have to consider the evidence of the accused as translated into English. My understanding is that the accused would be comfortable with that process, after having explored many possibilities with his counsel. I believe Mr Brown has been fully instructed by his client on this aspect, language of trial, and his client's willingness to proceed in this fashion, that is, the judge of facts will receive and consider his translated testimony.

[17] The trial would be conducted in English, the language chosen by the accused. It would give effect to the right of the accused to full and fair defence, including being represented by counsel of his choice. Also, it would address one concern I raised, the fact that in order to provide adequate testimony, if he chooses to testify, he would get a good understanding of what had been said by other witnesses.

[18] What I would like is to have an interpreter, not only for translating his own testimony, but also, as a matter of fairness, to have an interpreter sit beside him in order to, when necessary, provide him with interpretation of witnesses' testimony. I understand not many witnesses are involved in this matter, two witnesses, if I'm right, so it is not a lengthy trial in that respect. I think that, as a matter of fairness, having an interpreter sitting beside Captain Thibeault for the full duration of the trial would address my concerns with respect to his understanding of what occurs during the proceedings and, in addition, an interpreter would be provided for his testimony, if he chooses to testify.

[19] Choosing to address the language issue in this way, settles for me the matters of fairness of the trial, being represented by his counsel of choice, and his choice of language for the trial. In making this decision, I do not find he gets any more rights than others. This doesn't mean that in other circumstances I would arrive at the same conclusion.

[20] So, my decision concerning this application is not to grant the application for a bilingual trial. The proceedings of this trial will be conducted, as requested by Captain Thibeault, in English. An interpreter will be provided to the accused for the duration of these proceedings starting on the first day of the proceedings. An interpreter will sit beside Captain Thibeault throughout the proceedings, providing translation on request by Captain Thibeault. It won't be simultaneous interpretation because, as raised by defence counsel, the cost outweighs the need. Captain Thibeault is ensured of having a full understanding of what occurs during the proceedings, and, on his request, will obtain translation from the interpreter at any point in the proceedings. The flow of the proceedings may be a little different than is customary; he may ask me to stop in order to ask a question to an interpreter on what was said. It will be up to me to manage this

properly, but he may ask me to stop, at any point, in order for him to gain full understanding of what has been said.

[21] As the interpreter is an officer of the court, I intend to proceed as usual and have the interpreter take an oath or solemnly affirm before commencing the proceedings. The qualification and experience of the interpreters will be authenticated, allowing for official interpretation, should Captain Thibeault decide to testify in this trial. I think this is the best way to achieve a fair trial in this matter and address concerns raised by Captain Thibeault with respect to language of trial. So, that is my decision. The Court Administration will address these operational requirements. We will start the trial on Monday with the first thing the court having to address being the application concerning the type of court martial. Once I provide my decision on that application, then unless there is any other application, the court will be adjourned to 15 February, regardless of the type of court martial decided.

FOR THESE REASONS, THE COURT:

[22] **DISMISSES** the application about an order for a bilingual trial.

[23] **ORDERS** that an interpreter be provided to Captain Thibeault for the duration of the proceedings.

Counsel:

The Director of Military Prosecutions as represented by Major J.E. Carrier.

Mr T. Brown, Greenspon, Brown and Associates, Counsel for the Captain J.R.N.J. Thibeault.