Latour v. H.M.T.Q., 2013 NWTSC 22

Date: 2013 04 24
Docket: S 1 CR 2012 000059

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HUGUES LATOUR

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

This document is an unofficial English translation of the Reasons for Judgment of the Honourable Justice L.A. Charbonneau dated April 24, 2013. This document is placed on the Court file for information only.

REASONS FOR JUDGMENT

A) INTRODUCTION

[1] On May 1, 2012, Hugues Latour was convicted, following a trial before the Territorial Court of the Northwest Territories, of charges brought under sections 72(1), 266 and 145(3) of the *Criminal Code*. He appealed his conviction and his sentence.

[2] Mr. Latour filed his notice of appeal in English, but during a subsequent appearance for the purpose of setting a hearing date for his appeal, he asked that the appeal proceed in French. This request was granted. Mr. Latour's appeal was heard on January 24, 2013.

[3] During the hearing, Mr. Latour raised several grounds for appeal, including the fact that he had not been notified of his right to a trial in French. At the time of the appeal hearing, the trial transcript had already been filed in the court record, as had the transcripts of certain other appearances, but several others were missing.

[4] The Crown argued that the court had enough information available to conclude that Mr. Latour had necessarily been informed of his right to a trial in French. The Crown also submitted that, as the Appellant, Mr. Latour was responsible for ensuring that all the information relevant to his appeal was filed in the court record.

[5] I said during the appeal hearing that I did not consider it appropriate to decide a contested question of fact (whether Mr. Latour had been informed of his right to a trial in French) on the basis of inferences and circumstantial evidence, given that the missing transcripts could easily be produced and filed in the court record and were likely to resolve the issue.

[6] I therefore ordered that the missing transcripts of Mr. Latour's appearances be produced and filed in the court record. Once filed, these transcripts were sent with a Memorandum to the Parties dated March 1, 2013. The parties were given until March 21, 2013, to file additional written submissions in light of the new transcripts.

[7] Both parties filed additional written submissions. The Crown now concedes that the requirements of section 530 of the *Criminal Code* were not respected and submits that the appropriate remedy would be to order a new trial.

[8] In light of the transcripts, it is clear to me that the Crown's concession is justified and that the appeal must be allowed. However, because of the importance of the issues raised and the implications for the administration of criminal justice in the Northwest Territories, I consider it necessary to review the applicable principles.

B) ANALYSIS

1. Purpose of section 530 of the *Criminal Code*

[9] The starting point for the analysis is section 530 of the *Criminal Code*:

> **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, or
>
> (ii) the accused is to be tried on an indictment preferred under section 577,

(*b*) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or

(*c*) the time when the accused is ordered to stand trial, if the accused

(i) is charged with an offence listed in section 469,

(ii) has elected to be tried by a court composed of a judge or a judge and jury, or

(iii) is deemed to have elected to be tried by a court composed of a judge and jury,

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.

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(*a*) to (*c*) is applicable, a justice of the peace or provincial court judge may 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 in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall ensure that they are advised of their right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and

> jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.
>
> (…)

[10] This provision was considered in depth in *R.* v. *Beaulac* [1999] 1 S.C.R. 768. That case dealt in particular with the interpretation of subsections (1) and (4) of section 530, but also gave the Supreme Court of Canada the opportunity to examine the purpose of section 530, the importance of the rights it protects, and the principles governing its interpretation. The Supreme Court said the following about the purpose of section 530:

> The solution to the problem, in my view, is to look at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity; *Ford*, supra, at p. 749. The language of the accused is very personal in nature; it is an important part of his or her cultural identity. The accused must therefore be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The principles upon which the language right is founded, the fact that the basic right is absolute, the requirement of equality with regard to the provision of services in both official languages of Canada and the substantive nature of the right all point to the freedom of Canadians to freely assert which official language is their own language (…)

R. v. *Beaulac* [1999] 1 S.C.R. 768, at paragraph 34

[11] The Supreme Court specified that the ability of the accused to speak the other language is not relevant to the determination of whether his or her language rights have been respected:

> In the present instance, much discussion was centered on the ability of the accused to express himself in English. This ability is irrelevant because the choice of language is not meant to support the legal right to a fair trial, but to assist the accused in gaining equal access to a public service that is responsive to his linguistic and cultural identity. It would indeed be surprising if Parliament intended that the right of bilingual Canadians should be restricted when in fact official language minorities, who have the highest incidence of bilingualism (84 percent for francophones living outside Quebec compared to 7 percent for anglophones according to Statistics Canada 1996 Census), are the first persons that the section was designed to assist.

R. v. *Beaulac*, *supra*, at paragraph 45

[12] In *Beaulac*, the Supreme Court did not need to consider subsection 530(3). The case revolved around the interpretation of subsection (4), which gives the court discretion to dismiss an application made under section 530 if the application

is not brought within the time limits set out in subsections (1) and (2). The case also dealt with the scope of section 530 in the context of new trials ordered following an appeal.

[13] But in examining the factors to be weighed by the court in exercising the discretion conferred by subsection (4), the Supreme Court emphasized the fundamental importance of the knowledge of the right by the accused. The Supreme Court's majority judgment was somewhat critical of the wording of subsection (3):

> (…) Since the rule is the automatic access to a trial in one's official language when an application is made in a timely manner, and a discretionary access when such an application is not timely, the trial judge should therefore consider, foremost, the reasons for the delay. The first inquiry that comes to mind is directed at the knowledge of the right by the accused. When was he or she made aware of his or her right? Did he or she waive the right and later change his or her mind? Why did he or she change his or her mind? Was it because of difficulties encountered during the proceedings? It is worth mentioning at this point that the right of the accused to be informed of his or her right under s. 530(3) is of questionable value because it applies only when the accused is unrepresented. The assumption that counsel is aware of the right and will in fact advise his or her client of that right in all circumstances, absent a duty to do so, is unrealistic, as confirmed by the report of the Commissioner of Official Languages of Canada, *The Equitable Use of English and French Before the Courts in Canada* (1995), at p. 105.

R. v. *Beaulac*, *supra*, at paragraph 37

[14] This excerpt highlights how important it is for the court to ensure that the accused is truly aware of his or her rights under section 530. This means that the information provided to the accused must be clear and unambiguous, given the purpose of the provision and the fundamental importance of the right it protects.

[15] The interpretation of the absolute nature of the right and the importance of informing an unrepresented accused of this right at the time of his or her first appearance were highlighted by the Nova Scotia Court of Appeal in *R.* v. *MacKenzie* 2004 NSCA 10. In that case, the Court of Appeal recognized that because the court's obligations are engaged when an accused brings an application under section 530, it is crucial that the accused be informed of the rights conferred by the provision. In summarizing this aspect of the principles set out in *Beaulac*,

the Court of Appeal wrote the following:

> (…)
>
> 4. Ms. MacKenzie's assertion of language is the prerequisite to the application under s. 530(1) for a trial in French.
>
> 5. Effective notice is prerequisite to the assertion of language by an unrepresented accused. Because Ms. MacKenzie was unrepresented, the court was required to notify Ms. MacKenzie under s. 530(3) of her right to apply for a trial in either official language and the time within which that application must be made. Ms. MacKenzie's right to notice is as absolute as are Ms. MacKenzie's rights which flow from that notice (…)

R. v. *MacKenzie*, *supra*, at paragraph 15

[16] The Court of Appeal also rejected the argument that there was no violation of section 530 because there was no indication that the accused was Francophone at the time of her appearance:

> Accused need not take the initiative: While the Crown acknowledged the breach of s. 530(3), at the hearing of this appeal it was suggested that, as there was no material before the Provincial Court judge to indicate that Ms. MacKenzie was French-speaking, it was understandable that the Provincial Court judge did not give the s. 530(3) notice. I disagree. The only condition which triggers the requirement for a notice is that the accused appear unrepresented. The accused is not required to present herself as French-speaking. She need not take the initiative before the notice. The reason for the notice under s. 530(3) is that the unrepresented person likely is unaware of her right to a trial in either language. Once the sole condition - unrepresented appearance - exists, the onus of initiative is with the judge.

R. v. *MacKenzie*, *supra*, at paragraph 12

I fully agree with these remarks.

[17] It is in light of all of these principles that what occurred in this case must be examined.

2. Violation of section 530

[18] Mr. Latour appeared several times before the start of his trial. His first appearance was before a justice of the peace on September 29, 2011. He then appeared in the Territorial Court on October 3, 4, 5, 12, 14 and 20, 2011; December 6 and 13, 2011; January 25 and 31, 2012; and March 6, 2012.

[19] During his first appearance on September 29, 2011, Mr. Latour was not represented by counsel. He was not informed of his right to a trial in French. This in itself constitutes a violation of section 530.

[20] The question of the language of the trial did not come up during the appearances in October, except for the one on October 20, 2012. During that appearance, the Crown raised the issue:

> Mr. Boyd: . . . I believe Mr. Latour is present before the Court. Mr. Shabala is here representing him.
>
> There is one issue I would like to raise with the Court. It's come to my attention I believe Mr. Latour is Francophone and I don't believe inquiries were made as to whether or not he is content proceeding in the English language or would like to exercise his right to have these proceedings in French. I was wondering if the Court could make that inquiry.
>
> The Court: All right. What is your preference, Mr. Latour
>
> The Accused: I would be okay in English.
>
> The Court: You would be okay in English? Thank you.

Transcript of Show Cause proceedings October 20, 2012, page 7, lines 3 to 18.

[21] Even assuming that a violation of subsection 530(3) could be rectified by informing an accused of his or her rights during a subsequent hearing—an issue that I do not need to decide here—in my view, the exchange that took place on October 20 did not meet the requirements of section 530, given the absolute nature of the right and the purpose of the provision, as interpreted in *Beaulac*.

[22] The substance of the exchange between Mr. Latour and the court on October 20 essentially consisted of asking him whether he had a "preference" with respect to his choice of language for the trial. In my view, there is a significant difference between asking a person whether he has a preference between two options and informing him of his *right* to exercise one option or the other.

[23] During the appearances on January 25 and 31, the language of trial issue was raised again. It seems that before his appearance on January 25, Mr. Latour told his counsel that he wanted a trial in French. Counsel for Mr. Latour informed the court of this and the following exchange took place regarding the best way to proceed:

> Mr. Shabala: And I can indicate that Mr. Latour enters a plea of not guilty to those three counts, Your Honour. As noted on the Information, these are Inuvik matters. I have been advised by Mr. Latour that

he wishes to have a trial in French. I don't know, not know [sic] the availability of a trial Judge in Inuvik on that particular date but the defence would be, be in a position to proceed at the earliest.

The Court: Could the Crown proceed with that trial the week of march the 5th?

Ms. Vaillancourt: Currently these files are assigned to Mr. Glen Boyd and I was just made aware that Mr. Latour was requesting a French trial. Mr. Boyd obviously doesn't speak French at a working level so I would need more time to confirm because the Crown that's actually scheduled over and above Mr. Boyd that week does not speak French either. So I'm not sure if we can stand this down.

The Court: Do you want to stand it down or put it to next week to set the date?

Mr. Shabala: I think in the circumstances, I think it might be more prudent to put these matters over to January 31st at 1:30. I can advise that I will also have to check with Legal Services Board to determine what duty counsel who speaks French is available at the suggested trial date.

The Court: That's what I figured, is that there may be a lot of things to check here. I am going to set that matter to January the 31st. Does Mr. Latour want to appear by video on that date? January 31st, at 1:30 by video, territorial Court in Yellowknife. There will be a Form 19 to that effect. To set a date.

Counsel, ask you to consider the week of, I don't know what the Inuvik Registry, you will have to check with them as well to see if there is trial time, but consider the week of March the 5gh and also the week of April the 2nd to 5th. And if we will have to look at other Inuvik weeks, you may want to contact the Chief Judge to see about getting a French Judge.

Transcript of the Appearance January 25, 2012, page 1, line 27 to page 3, line 19

[24] On January 31, counsel for Mr. Latour told the court that Mr. Latour was now prepared to have his trial in English, with the help of an interpreter. However, it seems that this change in his position came after Mr. Latour was informed of the challenges of finding a date on which both the Francophone legal aid lawyer and the Francophone Crown counsel were available:

Mr. Shabala: As indicated on my last appearance, Your Honour, it was my instructions at that time that Mr. Latour wanted a trial in French with respect to the three-count Information.

The Court: Yes.

Mr. Shabala: I can advise, Your Honour, the Legal Services Board is not in a position to provide a French lawyer on a March date as suggested by my friend; and the alternate date in April, a French-speaking Crown would not be available. So I've spoken to Mr. Latour, Your Honour; he is prepared to proceed on the three-count Information only with a French interpreter on that day so the trial in fact can proceed in English with respect to the three-count Information.

The Court: Very well.

Mr. Shabala: I believe my friend is proposing a date of March 6th, 2012.

Mr. Boyd: I believe March 5th is a good date, Your Honour.

The Court: What would be the time estimate?

Mr. Boyd: I'd say a half to three-quarters of a day.

And I can indicate just for the record, the Crown will have a Francophone lawyer in attendance just out of an abundance of caution. I understand Mr. Latour is willing to proceed with an interpreter, but we have made arrangements in respect to what is obviously his constitutional rights to have a trial in the language of his choice.

The Court: Yes.

Transcript of the Appearance January 31, 2012, page 1, line 18 at page 2, line 25

[25] The Territorial Court judge presiding on January 31 addressed Mr. Latour in French to ensure that Mr. Latour had fully understood what had just taken place:

The Court: Very well. So Mr. Latour, est-ce que vous avez compris [did you understand]?

(The Court and The Accused speak in French)

The Court: Just for the record, I just explained in French of confirmed in French to Mr. Latour that he understood that we were setting a trial for March 6th in Inuvik, that it would be in English, and that a French interpreter would be provided. I will also translate back into the record that Mr. Latour said that maybe he would not need an interpreter for that trial. I explained that it was his right to have that and that it was not a question of cost and therefore that the interpreter would be there, whether he needs it or not. Or whether he wants it or not. But it's, as I said, it's a legal requirement

Transcript of the Appearance January 31, 2012, page 4, lines 8 to 23

[26] On March 6, the Crown brought a motion to adjourn the trial to a later date, and this was granted. The trial was adjourned until May 1. Nothing was said on the March 6 appearance about the language of trial.

[27] On the day of the trial, Mr. Latour's Anglophone counsel confirmed at the outset of the proceedings that Mr. Latour was in agreement to have his trial proceed in English:

> Mr. Shabala: Defence is prepared to proceed with Mr. Latour, Your Honour. I can advise the Court that Mr. Latour indicated to me that he is prepared to have his trial in English only. I note that there is an interpreter beside him, and I gather if Mr. Latour has problems he can ask the French interpreter for assistance.

Transcript of Trial Proceedings of May 1, 2012, page 1, lines 1 to 10

[28] It is clear that Mr. Latour was not initially informed of his right to a trial in French. It is also clear that he later told his counsel that he wished to have his trial in French. He changed his mind a week later. But given what he said during his appearance on January 31, 2012, it is not unreasonable to conclude that he believed he had to choose between proceeding in English on the scheduled date with the assistance of counsel and proceeding in French on the scheduled date, but without counsel. Obviously, there was a third option: proceeding in French, with counsel, on a different date.

[29] If Mr. Latour's rights had been clearly explained to him at the time of his first appearance in September 2011, as required by section 530, he could have made his request then and the necessary logistical arrangements could have been made. He would not have found himself in January 2012, four months later, in the position of having to choose between having his trial on the scheduled date, in French, but without representation by counsel; having his trial on the scheduled date, in English, with counsel; or having his trial, in French, on an unknown and possibly distant date because of difficulties with counsel's schedules.

[30] In the circumstances, Mr. Latour's agreement to proceed in English cannot reasonably be considered a true waiver of his right to choose the language of his trial.

[31] The violation of the right set out in section 530 of the *Criminal Code* is an error of law. Subparagraphs 686(1)(*b*)(iii) and 686(1)(*b*)(iv) of the *Criminal Code*, which allow the court to dismiss an appeal even when an error of law has been committed, apply to summary conviction appeals. *Criminal Code*, section 839.

[32] However, an appeal court cannot rely on these provisions to uphold the conviction of an accused whose section 530 rights have been violated. The Supreme Court of Canada decided this issue in *Beaulac*:

> Given the nature of language rights, the requirement of substantive equality, the purpose of s. 530, as described here, and the objective of s. 686, I believe that the violation of s. 530 constitutes a substantial wrong and not a procedural irregularity. Accordingly, s. 686(1)(*b*) has no application in this case and a new trial must be ordered. Clearly, there must be an effective remedy available for breach of s. 530 rights. The application of the s. 686 proviso would make it illusory.

R. v. *Beaulac*, *supra*, at paragraph 54

[33] Accordingly, as the Crown concedes, Mr. Latour's appeal must be allowed. The sole issue remaining to be decided pertains to the appropriate remedy.

3. Remedy

[34] Two remedies could be granted by this Court: a new trial or a stay of proceedings.

[35] A stay of proceedings is a remedy available under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in cases where the state has violated a right guaranteed by the *Charter*. Here we are not dealing with a *Charter* violation. However, it has long been recognized that even when the Charter is not engaged, the court's inherent and residual powers include the power to order a stay of proceedings to prevent an abuse of process. *R.* v. *Power* [1994] 1 S.C.R. 601, at pp. 615-616; *R.* v. *O'Connor* [1995] 4 S.C.R. 411; *R.* v. *Carosella* [1997] 1 S.C.R. 80; *R.* v. *Reagan* [2002] 1 S.C.R. 297.

[36] It has also been clearly established, however, that this measure should be reserved for the clearest and most blatant cases of abuse of process, where irreparable prejudice has been caused. One of the purposes of a stay of proceedings in such cases is to prevent the abuse from continuing. *R.* v. *MacKenzie*, *supra*, at paragraph 88.

[37] I conclude that a stay of proceedings is not justified in this case. Although there was a violation of section 530, there was no indication of bad faith on the part of the authorities. It is most unfortunate that Mr. Latour was not clearly informed of his rights from the start. The fact is that, probably because his rights were not explained to him clearly, the positions he took regarding the language of trial were somewhat ambivalent, and at times contradictory, over the course of the proceedings.

[38] It goes without saying that an accused should never have to choose between legal representation and exercising his or her language rights. However, when considered in context, what happened in this case is not an abuse of process that would justify resorting to the exceptional measure of ordering a stay of proceedings.

[39] Moreover, there is another remedy available (holding a new trial) that will ensure that Mr. Latour's rights are respected. This is not a situation in which a stay of proceedings is the only way to prevent the violation of rights from continuing.

[40] A new trial must be held, and, clearly, it must be held in French. There is no ambiguity in this respect: Mr. Latour stated during the hearing of his appeal that he would have asked to have his trial in French had he been informed of his right. He said that what he was seeking in this appeal was a new trial to be held in French.

[41] In the circumstances, I find that the most appropriate remedy is a new trial, in French.

[42] In light of my findings regarding this ground of appeal, I do not need to consider the other grounds raised by Mr. Latour. Nor do I need to consider his application to file new evidence in the context of this appeal. It will be up to the judge presiding over the new trial to determine the relevance and admissibility of this evidence.

[43] For all these reasons, the appeal is allowed, and I order that a new trial be held in French with respect to the three counts.

"L.A. Charbonneau"
L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NWT,
this 24th day of April 2013

Hugues Latour:	Self-represented
Marc Lecorre:	Counsel for the Respondent
Serge Petitpas:	(courtesy copy)

S 1 CR 2012 000059

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REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU