Language rights violation earns accused new trial

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For the third time since 2005, the Quebec Court of Appeal has allowed an appeal and ordered a new trial because of the failure to respect the language rights of an accused. The ruling admonishes trial judges and Crown counsel for failing to protect those rights.

In setting aside the guilty verdict of second degree murder delivered on June 2006 by a Quebec Superior Court jury, the appeal court found that the rights of Bertam Dow under governing appellate case law interpreting s. 530.1 of the Criminal Code, and s.14 of the Canadian Charter of Rights and Freedoms, were not respected. Hence, the curative provisions of subs. 686(1)(b) of the Code could not be applied.

"Trial judges and Crown counsel therefore have every interest in being alert to the existence of these rights by acting to protect them to avoid orders for new trials, even if, as in the case of Mr. Dow, defence counsel do not fully assert them," said Judge Alan Hilton in a unanimous 26-page ruling.

Even more striking, according to McGill constitutional law professor Robert Leckey, the ruling underlines the fact that it has never been necessary in Quebec to make an application under s. 530(1) of the Code for the trial of an anglophone to take place before an English-speaking jury with a trial judge and Crown prosecutor able to fully participate in English.

Indeed, Judge Hilton goes so far as to flatly state that the addition of s. 530 "had no practical effect" in Quebec. He points out that the provisions of Quebec legislation dealing with the composition of juries dates back prior to Confederation, and contemplates the existence of exclusively English-speaking juries for both civil and criminal cases.

Under s.530(1), an accused has an "absolute right" to equal access to a trial in the language he considers to be his, providing an application is made on a timely basis - and that such rights are not merely procedural but substantive.

"The appeal court is drawing out, possibly for the first time, that the historical practice in Quebec means that the application referred to in s.530 in the Criminal Code isn't determinative," explained Leckey, who served as editor in chief of the McGill Law Journal and clerked for Justice Michel Bastarache of the Supreme Court of Canada. "The court suggests that anglophones may not need to make a formal application because the Criminal Code provisions were understood as applying across the country a state of affairs that was already operative in Quebec."

Even though Dow did not make a formal application pursuant to s.530(1) of the Code, the record is clear from comments the trial judge made during the jury selection process that Dow had elected to be tried before a jury composed exclusively of English-speaking persons, as contemplated by s.14 of the Jurors Act.

Outside the presence of the jury, it was a different story. Several exchanges between the trial judge and counsel took place only in French, with simultaneous instead of consecutive translation being conducted, if at all. That meant that the accused heard what the interpreter said through an earpiece, and no one else in the courtroom knew or could have known what exactly Dow was hearing. "...[T]he fulfillment of the language guarantee available to an accused is better served by consecutive rather than simultaneous interpretation, which is the only way to make it possible to have a transcript in both languages," noted Justice Hilton.

Judge Hilton dismissed the Crown's contention that the accused waived his rights under s.530 of the Criminal Code when Dow replied that he didn't mind when asked by the trial judge if discussions could be held in French outside the presence of the jury - and defence counsel acquiesced. Based on R. v. Tran, [1994] 2 S.C.R. 951, Judge Hilton notes that the law is clear that for a renunciation of language rights at a criminal trial to be valid, "assuming it is possible to do so," an accused must know and understand what rights he is waiving, and understand the consequences of the waiver. Judge Hilton added that a trial judge exercises influence over an accused simply by the disparate nature of their relationship.

Based on the Supreme Court of Canada ruling in R. v. Beaulac, [1999] 1 S.C.R. 768, Judge Hilton concluded that the failure to respect the rights flowing from the applicability of s. 530 of the Code constitutes a substantial wrong and not a procedural irregularity.

Stéphane Beaulac, a constitutional law professor at the Université de Montréal, was not surprised by the ruling given the jurisprudence forged over the years by the nation's highest court. "The signal was clearly sent by the SCC that for an accused language rights are to be considered as fundamental legal rights," said Beaulac, who was formerly a law clerk with Madam Justice Claire L'Heureux-Dubé at the SCC. "For an accused to make full answer and defence, he must be able to defend himself in the language of his choice." (Quote translated by author.)

Leckey concurs. He asserts that the Quebec Court of Appeal ruling is clearly sending a "strong signal" across the country that the language rights of the accused must be respected. Failure to do will lead to a new trial even though "we know it is expensive, that it takes a long time and is not optimal for the administration of justice," said Leckey.

But Leckey also believes that the ruling underscores the importance of the rights of official language minorities in Canada compared to the rights guaranteed under s.14 of the Charter, which guarantees a party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted the right to the assistance of an interpreter.

By devoting most of his attention to the importance of s.530(1) of the Code and paying scant attention to s.14 of the Charter, Judge Hilton highlights the historical importance of French and English minorities in Canada, said Leckey. "The judgment bears out even further the difference between the rights of the official language minorities and the rights for anyone to have an interpreter," said Leckey.

Reasons: Dow c. R., [2009] Q.J. No. 2004 (Que.C.A.)