THE EQUITABLE USE OF ENGLISH AND FRENCH BEFORE THE COURTS IN CANADA

A study by
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The Commissioner wishes to underline the important contribution of Mtre Richard Goreham to the preparation of this report.

TABLE OF CONTENTS

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EXECUTIVE SUMMARY

In addition to a general introduction, the present study on the use of English and French before the courts is divided into three main substantive sections: (i) a review of the constitutional framework which protects the use of both official languages in the judicial system; (ii) the use of both official languages before courts of criminal jurisdiction; and (iii) the use of both official languages before courts of civil jurisdiction. The study also includes a set of recommendations regarding ways to improve access to the courts in both English and French.

CONSTITUTIONAL BACKGROUND

The use of English and French in the judicial system is conditioned by a number of constitutional provisions which apply to certain courts in Canada. First, the use of both languages before all federal courts is guaranteed by the *Constitution Act, 1867*, and the *Canadian Charter of Rights and Freedoms*. However, at the level of provincial courts (where most of litigation takes place), only the courts in New Brunswick, Quebec and Manitoba are subject to constitutional provisions. A striking asymmetry therefore exists regarding constitutional guarantees of language freedom before the courts; and, even among the three provinces subject to these guarantees, the actual ability and opportunities to use either official language vary considerably.

In addition to constitutional language guarantees, the respective constitutional powers of the federal and provincial governments allow for legislative and policy initiatives which supplement entrenched rights. The fact that such powers are spread between two levels of government accounts for further disparities in the use of both official languages before the courts from one region of the country to the next.

The Supreme Court of Canada (established under Section 101 of the *Constitution Act, 1867* by Parliament) has, particularly since 1970, provided the country with a body of case law in English and French. As the final court of appeal for both federal and provincial courts, the Supreme Court has, in effect, facilitated the practice of law in both official languages through the dissemination of bilingual jurisprudence. In addition, the development of effective institutional bilingualism has encouraged the equitable use of either language in hearings conducted before it.

COURTS OF CRIMINAL JURISDICTION

This part of the study reviews the amendments made to the *Criminal Code* which recognize the right of accused persons to be tried in either English and French, i.e., by a Crown

prosecutor and before a judge who speak the official language that is the language of the accused. These amendments complement constitutional rights and are applicable to all provincial courts before which criminal trials are conducted. The implementation of these amendments has raised a number of issues. These range from whether the language of particulars relevant to criminal charges must be in the language in which the trial will be conducted, the manner in which the language of the proceedings is determined when multiple accused of different official languages are involved, the language in which legal proceedings collateral to the trial are conducted, the circumstances justifying two-language trials, the use and quality of interpretation, to the linguistic capabilities of State-supplied duty counsel and those operating under legal aid.

The study reviews the guidelines and policies developed by the federal Department of Justice relating to the manner in which the language rights of accused persons are to be recognized and respected by legal counsel representing the Crown. The federal government has also provided funding to the Office of the Commissioner for Federal Judicial Affairs for the establishment of language training courses for judges. The role of this program in increasing the numbers of judges capable of conducting a trial in both official languages is reviewed.

Since all criminal cases are heard before provincially constituted courts, and prosecuted for the most part by provincial Crown attorneys, supportive administrative structures are beyond direct federal control. The study therefore reviews the situation in each province with respect to the manner in which the language rights set out in the *Criminal Code* of Canada have been implemented.

As to the three provinces where constitutional guarantees apply, the study reveals considerable differences regarding express regulatory measures which have been adopted to respond to the practical repercussions of using either official language before the courts. Where informal practice and tradition has been relied on in Quebec to ensure that accused are tried in their own official language, more conscious policy has had to be developed in New Brunswick and Manitoba to facilitate the use at trial of the minority official language. Even so, the level of institutional two-language capability varies considerably between these jurisdictions.

Great differences also exist among the remaining seven provinces. Ontario has by far the most extensive legislative and policy framework designed to enhance the use of the minority official language. Still, the study takes note of the discrepancy between the number of minority language criminal trials and the size of the French-speaking population of Ontario. The situations in the other provinces, where little or no regulatory measures are in place, show an even greater under-use of the minority official language in criminal proceedings. Province by province, the study examines the underlying reasons why existing language rights in the *Criminal Code* are invoked relatively infrequently, as well as the problems most often encountered in each jurisdiction. These include the general lack of two-language capability of the court systems, the reluctance to institute a policy of actively offering service in the minority official language, the failure to inform accused persons about existing rights,

the absence of policing and related services in the minority official language, the increased legal costs associated with the use of the minority language, the procedural delays caused by the use of the minority official language, and concerns about the narrow choice of legal counsel and judge when proceeding in the minority official language.

COURTS OF CIVIL JURISDICTION

Both Parliament and the provinces have legislative and executive powers related to the operation of courts exercising civil jurisdiction. Nevertheless, most civil litigation is conducted before courts established by the provinces.

Federally constituted courts do exist, however, and Parliament has gradually increased their jurisdiction in regards to the application of federal statutory law. Provisions of the *Official Languages Act* of Canada apply to these courts, as well as language guarantees found in the Constitution. The study reviews various institutional obligations imposed on federal courts by Part III of the *Official Languages Act*, ranging from the language abilities of presiding judges, to the language used by Crown counsel during the course of civil litigation (both oral and written), to the provision of interpretation, to the language in which the final decision is issued and published.

Significant areas of federal statutory law (for example, the *Divorce Act* and the *Bankruptcy Act*) are administered by provincial courts to which the *Official Languages Act* of Canada does not apply. Provinces also enjoy a very wide jurisdiction over substantive civil law, as well as exclusive powers over the rules of civil procedure which apply to their courts.

While constitutional language guarantees apply to three provinces, the practical consequences of using both English and French before their courts have by no means received a uniform response. Reform of statutory law is no doubt one response to the issues which arise when the right to use the minority official language is widely exercised. On the other hand, the ability to use the minority official language in civil proceedings may depend upon practice and tradition rather than statutory provisions, as is the case in Quebec. In some cases it may prove necessary to combine legislative changes with policy initiatives.

Although New Brunswick, Quebec and Manitoba have had to face, as a matter of constitutional necessity, the consequences of using two official languages in the civil process, the remaining provinces are not required to respect any entrenched rights in this regard. Nevertheless, Ontario has enacted a detailed legislative framework and developed a set of policies which attempt both to allow the formal use of the minority official language in the civil process and to respond to the inevitable consequences of such use. This requires the presence of sufficient bilingual judges and court house staff, not to mention legal counsel capable of pleading in the minority official language; it also entails the provision of interpretation for witnesses and unilingual parties to litigation, as well as the development of legal forms and precedents in both official languages, bilingual rules of practice, streamlined

administrative procedures for identifying the language of trial, and the creation of a general atmosphere where service in the minority official language is actively offered.

A province-by-province review of the current situation reveals that in many jurisdictions little has been done to allow the use of the minority official language in the civil process, let alone to encourage it. The solutions Ontario has proposed may not meet the needs of all provinces, but they do provide inspiration to jurisdictions considering ways of reforming unilingual practices. One could also look to the various statutory and policy provisions which have been developed in the three provinces where constitutional language guarantees apply to the courts. The combined experience of these jurisdictions provides a useful reference basis for provincial governments which have not yet determined how to respond to the desire of official minority language speakers to use their language in court proceedings.

1.0 INTRODUCTION

The purpose of the present study is to review and summarize the constitutional, legislative and policy provisions which govern the use of English and French before Canadian courts. In so doing, it delves into both the legal underpinning of the right to use either language before the courts and the practical realities which may encumber the right's full implementation.

Opportunities to use either official language before the courts are by no means uniform across the country. Asymmetries occur at both the constitutional and legislative levels. Moreover, institutional and other barriers to the exercise of existing language rights before the courts introduce variables which further increase disparities. As this study will show, the ability of a legal system to function in two official languages is dependant upon numerous factors beyond the constitutional and statutory status those languages may enjoy.

Lack of uniformity regarding language rights before the courts can be traced, in part, to the fact that legislative authority over language in the judicial process is shared by Parliament and the provinces. For example, while courts of criminal jurisdiction are established and administered by the provinces, substantive criminal law and procedure are determined by the federal government. Such a division of roles thus gives Parliament significant powers to determine the language of criminal proceedings, although full implementation requires the collaboration of provincially constituted courts. The latter depend for proper functioning on an administrative infrastructure under the control of provincial governments. Court clerks, court reporters and stenographers, prosecutorial staff, registrars, directors of court services, general court house personnel - these vital elements are all subject to provincial authority. As a result, even where Parliament enacts rules of language usage applicable to criminal trials, full implementation requires the co-operation of persons beyond federal administrative control.

The different roles of both levels of government are also evident with respect to courts of civil jurisdiction, in the sense that the federal government has created courts empowered to administer many aspects of federal statutory law, while provinces have established courts which exercise civil jurisdiction generally. As a result, federal and provincial court systems exist side by side for the purposes of civil litigation and in some instances statutory law may be administered by the courts of either system. It is only before federally constituted courts, however, that provisions of the *Official Languages Act* of Canada relevant to the administration of justice apply. The federal government has no legislative authority over matters of civil procedure before provincially constituted courts. The Governor in Council does, however, have exclusive authority to appoint judges to most courts established by provincial legislatures, including those of civil jurisdiction.

The fact that legislative authority over language in the judicial process is shared by Parliament and the provinces greatly multiplies the sources which must be consulted in order to present a complete picture of the current situation. Moreover, rules of language usage

applicable to criminal trials differ from those applicable to civil matters. In the interest of clarity, therefore, we have reviewed the situation in each jurisdiction separately (including the Northwest Territories and Yukon) and maintained the overall distinction between criminal and civil courts.

The review this study offers of the use of Canada's official languages before the courts is by no means definitive. The factual situation in each province and territory is not only complex, but varies between regions in the same jurisdiction. As to the information upon which the present study is based, it has been collected during actual visits to all regions of the country to speak to judges, minority language groups, legal counsel and government officials or submitted to us in response to requests made by the Commissioner of Official Languages of Canada. While we can not claim to have examined all problems and difficulties associated with the use of Canada's official languages before the courts, nor all regional disparities, the present document will, we hope, serve as a point of departure for more detailed examinations in the future.

The scope of statutory and related provisions reviewed in this study testifies to the practical consequences of recognizing the right to use either English or French before a court of law. While acknowledging the status of both languages as a matter of principle is an important step, particularly at the level of constitutional law, adequate implementation requires that practical measures be adopted to ensure that a court system is actually capable of operating in either language. In short, the right to use either English or French before the courts inevitably raises the issue of what correlative obligations should lie on the State to provide an institutional framework which respects the language choice of individuals. In some cases, respect for language choice would entail the provision of court clerks, court reporters, judges, lawyers (representing the interest of the State) and other court personnel who are capable of understanding directly and responding to individuals in the official language they speak. In other circumstances it might only require, at least with respect to trials, the provision of some sort of interpretation, whether simultaneous or consecutive.

While this study places considerable emphasis on the practical measures that facilitate the use of either official language before the courts, it also underscores the importance of a constitutional framework which both divides legislative authority over language between two levels of government and renders inviolable a limited number of rights. These matters are discussed briefly in the next section, and provide a point of departure for the subsequent review of the situation as it currently exists before federal courts and before those created and administered by the provinces.

2.0 CONSTITUTIONAL BACKGROUND

2.1 Entrenched Language Rights

Reference to the status of English and French before the courts can be found in Section 133 of the *Constitution Act, 1867* (originally the *British North America Act, 1867*). It provides that either language "may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this *Act*, and in or from all or any of the courts of Quebec". An identical guarantee of language freedom before the courts of Manitoba was included in Section 23 of the *Manitoba Act, 1870*. Constitutional amendments in 1982 reconfirmed (in Section 19 of the *Canadian Charter of Rights and Freedoms*) the right to use either language before federally constituted courts, in addition to extending the application of the right to the courts of New Brunswick. The remaining seven provinces are exempt from any constitutional requirements regarding the use of English and French before provincial courts. Courts situated in Yukon and the Northwest Territories are analogous to those established by the provinces, even though Parliament retains ultimate legislative jurisdiction to intervene. Given the paramount authority of Parliament, it remains an open question as to whether Section 133 of the *Constitution Act, 1867* applies to courts situated in Yukon and the Northwest Territories.[1] As will be explained more fully below, legislative action by territorial governments and Parliament has explicitly endorsed the right to use either official language before these courts in terms similar to those found in Section 133 of the *Constitution Act, 1867*.

The constitutional right to use either language before designated courts is also accompanied by very important guarantees related to the use of English and French in the legislative process. In this regard, the Constitution authorizes the use of both languages in the debates of Parliament and the legislatures of Quebec, New Brunswick and Manitoba; requires the use of both languages in the records and journals of these legislative bodies; and stipulates that all legislation (and other acts) of these bodies are to be printed and published in both languages.[2] The ability to use either English or French before the courts is obviously greatly enhanced by access to statutes and related documents in both languages. Without bilingual legislation a heavy burden is placed on anyone who wishes to conduct legal proceedings in the minority official language. It is therefore not surprising that the freedom to use English or French before the courts, constitutionally recognized in three provinces and at the federal level, is also supported by guarantees that both languages will be used in the

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[1] While an unreported decision of the Yukon Supreme Court raised some doubt about this proposition, subsequent appeal proceedings were interrupted because of legislative action taken by the Parliament of Canada. See *St. Jean v. R. and The Commissioner of the Yukon*, (1986) Supreme Court of Yukon (DVA-S.C. 545.83).

[2] These provisions were found originally in Section 133 of the *British North America Act, 1867* (now called the *Constitution Act, 1867*) and Section 23 of the *Manitoba Act, 1870*. Sections 17 and 18 of the *Canadian Charter of Rights and Freedoms* recapitulate these original provisions, in so far as they apply to the Parliament of Canada, and extend them to cover the legislature of New Brunswick.

passing, enactment and publication of statutes and related instruments of a legislative nature.[3]

As is well known, the inviolability, meaning and scope of these provisions were subject to controversy over a long period of time.[4] As applied to the judicial process, there was nothing in their wording that clarified the consequences of using one language or the other before the specified courts, such as the ability of court officials to understand and respond in the language chosen. Phrased in permissive terms only, the right to use either language did not necessarily impose any language requirements on those to whom one was obliged to speak. Taken literally, it meant simply that any individual appearing before the designated courts could use one language or the other, whether this were in written documents, in testimony or in oral arguments or in any other submission to the court. The question of how one's interlocutor was to understand what one said, in the event there was no common language of communication, remained unanswered on the face of the provisions.

2.2 Scope of Language Rights

Although litigation eventually confirmed that no government could purport to abolish unilaterally the right to use either language before federal courts or those established by the provinces of Quebec or Manitoba (and, by extension, those of New Brunswick), the right was nevertheless given a restricted and narrow interpretation. In effect, the freedom to use either language was found to impose virtually no correlative constitutional obligations on governments to ensure that courts were capable of operating in the language chosen by an

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[3] The Supreme Court of Canada has interpreted the term "*Act*" as applied to these legislatures in a broad fashion. In *A.G. Quebec v. Blaikie* [1979] 2 S.C.R. 1016 at 1027, the Court ruled that, "[d]ealing now with the question whether 'regulations' issued under the authority of *Acts* of the Legislature of Quebec are '*Acts*' within the purview of Section 133, it is apparent that it would truncate the requirement of Section 133 if account were not taken of the growth of delegated legislation." Two years later the Supreme Court provided further clarification of what was included in delegated legislation (*A.G. Quebec v. Blaikie* [1981] 1 S.C.R. 312 at 333): "Section 133 of the *British North America Act* applies to regulations enacted by the Government of Quebec, a minister or a group of ministers and to regulations of the civil administration and of semi-public agencies...which to come into force, are subject to the approval of that Government, a minister or a group of ministers. Such regulations are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management." A subsequent decision further clarified that government orders in council of a legislative character, as well as documents incorporated by reference, in legislative instruments are, in principle, also covered by the rule of mandatory bilingualism: *Re Manitoba Language Rights (A Special Hearing)*: [1992] 1 S.C.R. 212. See also *Quebec (A.G.) v. Brunet* [1990] 1 S.C.R. 260 and *Sinclair v. Quebec* (A.G.) [1992] 1 S.C.R. 579.

[4] This history can be traced in a series of judgments of the Supreme Court of Canada. See: *Attorney General of Manitoba v. Forest* [1979] 2 S.C.R. 1032; *Attorney General of Quebec v. Blaikie et al.* [1979] 2 S.C.R. 1019; *A.G. Quebec v. Blaikie et al.* (No. 2) [1981] 1 S.C.R. 312; *MacDonald v. City of Montreal* [1986] 1 S.C.R. 460; *Re Manitoba Language Rights* [1985] 1 S.C.R. 721; *Bilodeau v. Attorney General of Manitoba* [1986] 1 S.C.R. 449; *Société des Acadiens du Nouveau-Brunswick v. Association of Parents* [1986] 1 S.C.R. 549 [hereinafter *Société des Acadiens*]; *Re Manitoba Language Rights (A Special Hearing)*, [1992] 1 S.C.R. 212.

accused person or by a party to civil litigation.[5] From a strict constitutional point of view court documents in criminal and quasi-criminal proceedings do not have to be issued in two-language format (in order to respect the rights of persons to use either language), nor does the State have to ensure that judges and other court officers are capable of understanding directly the official language used by an accused or a civil litigant.[6] On the other hand, civil litigants and criminal accused (and their counsel) cannot be precluded from using their official language or forced to provide a translator in order to ensure that other participants in the court process understand what is being said. Nor could those who operate the court systems in these three provinces and at the federal level refuse to accept documents written in the official language of a litigant.[7]

Judicial interpretation has, however, extended the scope of the term "court" to include administrative tribunals which exercise quasi-judicial powers. The Supreme Court believed it important to recognize that many adjudicative functions potentially exercised by traditional courts are now dispersed across a broad spectrum of statutory agencies which make decisions by applying legal principles to the assertion of claims. This argued in favour of giving a broad interpretation to the type of court contemplated by the terms of Section 133 of the *Constitution Act, 1867* so as to include tribunals of an administrative law nature.[8] While

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[5] The Supreme Court of Canada has characterized constitutionally entrenched language rights in the judicial system as based upon a historic compromise designed to guarantee only minimal protection. Such rights can be complemented by federal or provincial legislation or changed by way of constitutional amendment, "...but it is not open to the courts, under the guise of interpretation, to improve upon, supplement or amend this historical constitutional compromise: *MacDonald v. City of Montreal.*" [1986] 1 S.C.R. 460 at 496. Put succinctly, the language rights protected "...are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of writers or issuers of written pleadings and processes, not those of the recipients or readers thereof."

[6] *Obiter dicta* found in the majority decision of the Supreme Court of Canada in *R. v. Mercure* [1988] 1 S.C.R. 234 suggest that the constitutional right to use either English or French before given courts may require the court to record what is said in the language chosen. While Mr. Justice La Forest agreed that past decisions had determined that the right to use either language gave no right to be understood in it, and that the "judges and all court officials may use English and French as they wish" (p. 273), he felt that the question remained open as to "whether when proceedings are required by law to be recorded, a person using one or the other official language has the right to have his remarks recorded in that language." (p. 275) He answered this question in the affirmative (p.276) but suggested that valid legislation could nonetheless require the recording of statements in one language only, at least in Saskatchewan, where the language right enjoys no constitutional protection.

[7] See *Société des Acadiens, supra*, note 4 and *R. v. Mercure* [1988] 1 S.C.R. 234.

[8] The Supreme Court in *A.G. Quebec v. Blaikie et al.* [1979] 2 S.C.R. 1016 at 1028 had no difficulty concluding that Section 133 applied to all courts established by the province of Quebec, whether administered by federally or provincially appointed judges. With this as a point of departure, the Court went on to decide: "It is not a long distance from this latter class of tribunal to those which exercise judicial power, although they are not courts in the traditional sense. If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies, however some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies. In the rudimentary state of administrative law in 1867, it is

this study does not include any significant discussion of the situation before administrative tribunals exercising judicial or quasi-judicial powers, it should be remembered that the constitutional principles applicable to the courts in three provinces and at the federal level must be respected by these tribunals as well.

In addition, the Supreme Court of Canada has extended the rule of mandatory publication in both official languages (applicable to legislative acts) to include rules of practice before the designated courts, whether such rules are found in statutory enactments or issued by the courts themselves. It did so because litigants who have a right to use English or French before the courts "...would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only."[9] Moreover, the mandatory publication of rules of practice in both languages extends not just to traditional courts, but to all administrative tribunals exercising quasi-judicial powers.

Despite these two examples of relatively broad judicial interpretation, the exercise of the constitutional right to use either language before a court (applicable in three provinces and at the federal level) clearly raises a set of practical problems not answered on the face of the provisions nor adequately resolved by the case law. From an administrative point of view steps must be taken to allow parties to civil litigation (and their counsel) who speak different official languages to understand one another, as well as to enable parties to communicate to judges and other court officers in their own official language. In the case of criminal trials the possibility of procedures being conducted in the official language of an accused requires the establishment of a high level of institutional two-language capability. Ideally this means that judges and prosecutors should be able to understand directly the official language of the accused. While collateral issues of this sort may not be strictly determined by judicial

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not surprising that there was no reference to non-curial adjudicative agencies. Today, they play a significant role in the control of a wide range of individual and corporate activities, subjecting them to various norms of conduct which are at the same time limitations on the jurisdiction of the agencies and on the legal position of those caught by them. The guarantee given for the use of English or French in Court proceedings should not be liable to curtailment by provincial substitution of adjudicative agencies for Courts to such extent as is compatible with Section 96 of the *British North America Act, 1867.*" (pp. 402-403 of judgment) The same reasoning obviously applies to federal administrative tribunals exercising quasi-judicial powers.

[9] The full argument of the Court was as follows: "The point is not so much that rules of practice partake of the legislative nature of the *Code* of which they are the complement. A more compelling reason is the judicial character of their subject-matter for which Section 133 makes special provision. Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may under Section 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes, such for instance as the motion for authorization to institute a class action or a judgment in a class action..., a proceeding in the Superior Court, a process of the Superior Court. All litigants have the fundamental right to choose either English or French and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only." (*A.G. Quebec v. Blaikie et al.* (No. 2) [1981] 1 S.C.R. 312 at 332).

interpretation of existing constitutional language rights, they seem unavoidable once the rights are invoked and applied.

It should also be remembered that the ramifications of allowing English or French as procedural languages extend beyond the constitutional right to the assistance of an interpreter found in Section 14 of the *Canadian Charter of Rights and Freedoms*. This latter right, accorded to a party or witness who does not understand or speak the language of the proceedings, relates to the issue of comprehension. It is founded upon a basic principle of fairness in our legal process, in that it ensures that individuals will be able to understand the nature of proceedings in which they are involved and to give testimony which a court will be in the position to understand. This is particularly important in the context of criminal trials, where an accused must be given the opportunity to give full answer and defence within the framework of a fair and public hearing.[10] Giving full effect to this right does not have, however, any impact on the actual language of procedures, be it English or French. While recourse to interpretation is sufficient to meet the requirements of Section 14 of the *Charter*, it falls short of responding adequately to the necessary implications of addressing a court in the one or the other official language.

2.3 Legislative Jurisdiction over Language

The constitutional right to use English or French before certain courts can be broadened by the legislative initiative of both the federal and provincial governments.[11] While neither

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[10] The Supreme Court of Canada has recently articulated the purposes served by Section 14 of the *Charter*, as applied to an accused in a criminal trial, in the following words: "The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Second, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this county. Third, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through Section 27 of the *Charter*. The magnitude of these interests which are protected by the right to interpreter assistance favours a purposive and liberal interpretation of the right under Section 14 of the *Charter*, and a principled application of the right." See *R. v. Tran* [1994] 2 S.C.R. 951 at 977.

[11] The Supreme Court of Canada has ruled that "...language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must be used in certain situations will be classified not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers." *Devine v. Quebec (A.G.)* [1988] 2 S.C.R. 790 at 807. As regards Section 133, the Court has ruled that it was not intended to introduce a comprehensive scheme or system of official bilingualism in the courts: "Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing....It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation, as was held in the *Jones* case. And it is a scheme which can of course be modified by way of constitutional

level of government has exclusive legislative jurisdiction over language, each can adopt measures affecting language while exercising powers assigned to it under the Constitution.

The provinces are given authority over the administration of justice, including the constitution, maintenance and organization of provincial courts of both civil and criminal jurisdiction, as well as the procedure in civil matters in those courts.[12] Although provincial court systems were originally composed of three levels of court, legislative action since the 1970s has gradually eliminated the middle (district and county) level. Provincially constituted courts are thus currently divided into a set of lower courts (of limited or circumscribed jurisdiction) and superior courts which exercise plenary jurisdiction. From a general or structural point of view the superior courts are composed of a trial division and a court of appeal.[13]

The power to appoint judges to provincial courts is divided between the federal and provincial governments. In the case of the lower provincial courts it is the province which has the authority to appoint. However, responsibility for judicial appointments to provincial superior courts (both trial and appeal) lies with the federal government, even though the provinces are charged with the responsibility to create, maintain and organize them. As a result, both levels of government can affect, via the power of appointment, the linguistic realities inherent in the operation of provincial courts.

In addition to its power to appoint judges the federal government is given jurisdiction over substantive criminal law and the procedure in criminal matters.[14] This gives it further latitude to establish rules of language usage applicable to provincial courts which apply and administer the *Criminal Code* of Canada. Beyond the area of criminal law, Parliament has the authority to provide for the constitution, maintenance and organization of a general court of appeal for Canada (i.e., the Supreme Court of Canada) and any other courts deemed necessary for the better administration of federal laws.[15] In the exercise of this power the federal government can provide for the use of both English and French in proceedings before the courts it designates.

While provincially constituted superior courts have the inherent power to administer federal law, Parliament has established the Federal Court and given it jurisdiction over matters

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amendment." *MacDonald v. City of Montreal* [1986] 1 S.C.R. 460 at 496.

[12] See Paragraph 14 of Section 92 of the *Constitution Act, 1867.*

[13] For a simplified diagram of the structure of the court system in Canada see Appendix.

[14] See Paragraph 27 of Section 91 of the *Constitution Act, 1867.*

[15] See Section 101 of the *Constitution Act, 1867.*

arising under a number of federal statutes.[16] Where the jurisdiction of a Federal Court is declared to be exclusive, provincial courts are denied any adjudicative role. The authority of Parliament to create the Federal Court (and other tribunals) and give it exclusive jurisdiction in selected areas of federal law is clear from the terms of the *Constitution Act, 1867.* Nevertheless, Parliament can also designate provincially constituted courts as possessing jurisdiction for matters arising under federal law. This is the case, for example, with respect to the *Criminal Code*, the *Divorce Act* and the *Young Offenders Act*. While it is unclear whether Parliament itself could create courts of criminal jurisdiction,[17] the fact remains that federal legislation designates both lower and superior provincial courts as proper fora for criminal prosecutions.

The administration of federal law by provincially constituted courts raises the issue of whether constitutionally protected language rights which exist at the federal level should be applicable to such proceedings. This is a crucial issue in the seven provinces where constitutional language provisions do not prevail. If Parliament declines to create or to designate an existing federal tribunal as the proper adjudicative forum under a given statute (other than the *Criminal Code*), the right to use either official language in proceedings related thereto is dependant upon provincial law or practice, which may provide little or no room for the use of the minority official language. Proceedings under the *Bankruptcy Act* and the *Divorce Act* represent two instances where unilingual practices before provincially constituted courts can have the effect of reducing the scope of language rights. In both cases Parliament has the legislative authority to designate its own courts (to which constitutional and legislated language rights apply) as the proper adjudicative forum, but its failure to do so potentially jeopardizes the use of either English or French (at the option of litigants) in such proceedings.

Some have argued that by giving provincially constituted courts the authority to administer federal statutory law, the application of Section 133 of the *Constitution Act, 1867* or Section 19 of the *Canadian Charter of Rights and Freedoms* is avoided. Such arguments have been made in two cases pending before the courts that allowing civil rules of court at the provincial level to determine the language regime applicable to the administration of federal law is an abdication of federal responsibilities.[18] Such a conscious abdication may

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[16] The jurisdiction of the Federal Court has been described by Professor Peter Hogg as covering cases involving the revenue and the Crown in right of Canada, copyright, trade marks, patents, admiralty, tax, citizenship, the review of decisions of federal agencies and officials, and claims for relief in respect of aeronautics, interprovincial undertakings and certain kinds of commercial paper. See P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 174ff..

[17] Such authority could arguably be said to flow from Section 101 of the *Constitution Act, 1867.* Provincial jurisdiction to establish courts of criminal jurisdiction is also clear under Section 92(14) of the *Constitution Act*, 1967. On this question see Hogg, ibid. at 498.

[18] See *Conseil de la vie française en Amérique and Guy v. R.*, T-181-91 (F.C. T.D.) concerning the issue of legal aid and *Beauregard v. R.*, T-1383-91, (F.C. T.D.) on the issue of the *Bankruptcy Act.*

amount to a breach of the declaration of language equality found in Section 16 of the *Canadian Charter of Rights and Freedoms*.[19] This position may also be based on the principle of equality found in Section 15 of the *Charter*, in the sense that the use of the French language is excluded with respect to the administration of federal law in some Canadian provinces, whereas the use of the English language is everywhere guaranteed.[20] Such an anomaly arises from the fact that the constitutional right to use either language before provincially constituted courts applies in only three of the ten provinces.

2.4 Supreme Court of Canada

The Supreme Court of Canada was originally established by Parliament in 1875, although it has evolved considerably since that time.[21] It represents the final court of appeal in criminal and civil matters from all federal and provincial courts. As such, the Supreme Court has come to exercise a unifying influence over a judicial system composed of courts established by different levels of government.

Being subject to Section 133 of the *Constitution Act, 1867*, the Supreme Court of Canada necessarily faces the practical repercussions of the right to use either English or French before it, in much the same way as other federally constituted courts and the provincial court systems in Quebec, New Brunswick and Manitoba. While effective institutional bilingualism is a distinguishing feature of the Court's current operations, this has not always been the case. For example, a major study done for the *Royal Commission on Bilingualism and Biculturalism* in the 1960s identified significant institutional barriers to the use of French as a

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[19] Subsection 16(1) reads as follows: "English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada."

[20] It should be noted, however, that in *Mahé v. Alberta* [1990] 1 S.C.R. 342 at 369, the Supreme Court of Canada rejected this interpretation: "While I agree that it is often useful to consider the relationship between different sections of the *Charter*, in the interpretation of s. 23 I do not think it helpful in the present context to refer to either s. 15 or s. 27. Section 23 provides a comprehensive code for minority language educational rights; it has its own internal qualifications and its own method of internal balancing. A notion of equality between Canada's official language groups is obviously present in s. 23. Beyond this, however, the section is, if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada. As the Attorney General for Ontario observes, it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

[21] Originally created pursuant to the *Supreme and Exchequer Courts Act, 1875*, S.C. 1875; while the current legislative basis can be found in the *Supreme Court Act*, R.S.C. 1985, c.S-26. For a detailed discussion of the its history and development see J.G. Snell, F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985).

procedural language.[22] This resulted not from any overt attempt to disregard Section 133 of the *Constitution Act, 1867*, but rather from the lack of efforts to create an institutional framework which encouraged the use of both official languages. In this regard, the study observed: "...[I]t is one thing to grant individuals a right, and quite a different thing for the public authorities who are legally bound to recognize such rights to create the positive environment in which these rights can be most effectively exercised."[23]

To overcome past institutional barriers to the use of both official languages before it the Supreme Court has put in place a system of simultaneous interpretation of arguments made to it on appeals and motions. Simultaneous interpretation of proceedings is routinely provided for all cases and is thus available to any counsel or judge who may not be able to understand directly oral submissions made in one or the other official language. In addition, Rule 9 of the Supreme Court of Canada stipulates that "the parties will be provided with simultaneous translation services in both official languages at the hearing of any proceeding held before the Court". This ensures that litigants themselves will be able to follow all arguments and submissions by counsel, and questions and comments originating from the Bench. Where a motion is heard before a judge in chambers simultaneous translation is not routinely provided, although it is available upon request to the Registrar of the Court prior to the hearing. Statistics made available by the Registrar of the Supreme Court for the period January 1991 to April 1994 indicate that 21.6% of all cases heard were prepared and argued in French.

To facilitate access to the Court's jurisprudence by all Canadians its decisions are published in both official languages, both versions being available in the vast majority of cases at the moment judgment is rendered. The Court's plenary jurisdiction as a final court of appeal in both criminal and civil appeals has given it the opportunity to provide the country with a body of case law in both official languages of exceptionally broad scope. This is an important contribution to facilitating the practice of law in Canada in both official languages. The issue of bilingual publication of court decisions will be considered more fully below when addressing federal legislative initiatives related to civil proceedings before courts established by Parliament.

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[22] P.H. Russell, *The Supreme Court of Canada as a Bilingual and Bicultural Institution*; Documents of the *Royal Commission on Bilingualism and Biculturalism*; Queen's Printer, 1969; Catalogue No. Z1-1963/1-2/1, at 78-111.

[23] Ibid. at p. 78. Apprehension that the use of French would impose an added burden on the Court and possibly make it more difficult to be sure that one's case was adequately heard is reflected in the fact that 50% of factums filed with the Supreme Court involving cases from Quebec (in the period 1963-1965) were written in English. The same proportional use of English by counsel from Quebec was also evident in oral argument before the Court. See Russell, ibid., at 79-89.

2.5 Legislative Powers and Constitutional Rights

Before proceeding to a detailed consideration of language usage before courts of criminal jurisdiction it should be emphasized that the exercise of legislative authority over the use of language before the courts must not interfere with the constitutional right to use either English or French in federal courts and in the courts of Quebec, New Brunswick and Manitoba. This is the constitutional minimum to which reference has been made, a minimum which thus precludes any attempt by these jurisdictions to promote the one or the other language as the only official language before the courts.[24]

Legislative measures which add to this constitutional minimum (whether enacted by provinces not subject to constitutional requirements, by the federal government or by those provinces where constitutional protection currently prevails) can find inspiration in Section 16 of the *Canadian Charter of Rights and Freedoms*, which recognizes the equality of status of Canada's official languages at the federal level and in the province of New Brunswick. In the third paragraph of that section it is declared that nothing in the *Charter* "limits the authority of Parliament or a legislature to advance the equality of status or use of English and French". The Supreme Court of Canada has viewed this section of the *Charter* as containing a principle of advancement or progress towards achieving language equality.[25] Ideally, then, government policies or legislative initiatives which affect the use of Canada's official languages before the courts should be guided by this underlying principle.

3.0 COURTS OF CRIMINAL JURISDICTION

3.1 Criminal Code Amendments

As already mentioned, matters of criminal procedure fall under federal legislative authority. In the exercise of that authority, Parliament has enacted a set of provisions which allow an accused to be tried in his or her official language (Part XVII of the *Criminal Code* of Canada). Subsection 530(1) of the *Code* provides that where an accused whose language is one of the official languages of Canada makes an application (within the time limits therein set out), an order shall be made 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

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[24] See Supreme Court of Canada decisions in *A.G. Manitoba v. Forest*; *A.G. Quebec v. Blaikie*; and *Société des Acadiens*, *supra*, note 4.

[25] The Supreme Court has emphasized in *Société des Acadiens*, *supra*, note 4 at 579, that this principle is tied to the legislative process, a process best suited to achieving any enhancement of the historical compromise on language rights set out in the Constitution: "I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in ss. 16(3).... The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise."

warrant, who speak both official languages of Canada." A similar order may issue, on the application of an accused under Subsection 530(2), establishing the language of trial as a function of the official language in which an accused can best give testimony.

To ensure that an accused unrepresented by counsel is made aware of these provisions the justice of the peace or provincial court judge before whom the accused first appears is obliged to inform him or her of his or her right to make an application relevant to the language of trial (Subsection 530(3)). Even where the accused has failed to make an application pursuant to these provisions the judge may remand the case to another court in order that it may be tried in the accused's official language or in the official language in which he or she can best give testimony (Subsection 530(4)). However, there is an absence of any criteria to guide judges in exercising their discretion where an accused has failed to meet the time limits set out in Section 530. This may lead to the consideration of factors unrelated to the linguistic circumstances of the accused, such as the shortage of court resources necessary to hold a trial in the minority official language. It would seem inappropriate, for example, to invoke the rarity of bilingual court reporters as a reason to deny an accused person's request to be tried before a judge and by a prosecutor who speak his or her language.[26]

Once an order has been made under Section 530 directing that trial take place before a judge or a judge and jury who speak the official language of the accused, a number of important consequences follow. These are set out in Section 530.1:

> (a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
>
> (b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
>
> (c) any witness may give evidence in either official language during the preliminary inquiry or trial;
>
> (d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;
>
> (e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;

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[26] This occurred in the case of *R. v. Beaulac* (January 24, 1991), (B.C. S.C.) [unreported], although other reasons were also invoked, to deny the request of the accused to be tried before a judge and by a prosecutor who spoke French.

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,
(ii) a transcript of any interpretation into the other official language of what was said, and
(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered;

(h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

While some of these provisions encompass the type of language freedom protected in three provinces by parts of the Constitution, others take the matter considerably further by establishing requirements which ensure that the official language of the accused becomes a main language of trial procedures (without excluding the use of both official languages[27]). As a result, these provisions enhance the language rights of accused persons even in provinces where Section 133 of the *Constitution Act, 1867* and related constitutional protections currently apply. Being in force in all provinces and territories, they also ensure that accused persons are accorded the same language rights before courts of criminal jurisdiction regardless of physical location.[28]

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[27] Two cases have arisen in Quebec where the language of trial provisions in the *Criminal Code* were challenged as being a breach of the language rights of Crown Prosecutors under Section 133 of the *Constitution Act, 1867*, and have resulted in conflicting decisions of the Quebec Superior Court. See: *R. v. Cross* [1991] R.J.Q. 1430; and *R. v. Montour* [1991] R.J.Q. 1470. The matter is now before the Quebec Court of Appeal.

[28] These provisions came into force for all jurisdictions in Canada as of January 1, 1990. Prior to that date, the *Criminal Code* allowed for gradual implementation of Section 530: applicable to New Brunswick, the Yukon Territory and the Northwest Territories as of May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982. The uneven application of these rights was challenged in a series of cases which alleged that this selective procedure was discriminatory and thus contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*. This resulted in conflicting decisions. See: *R. v. Paquette* (1987) 46 D.L.R. (4th) 82; *Ringuette v. A.G. Canada and A.G. Newfoundland* (1987) 33 C.C.C. (3rd) 509; *Re French Language Rights of Accused in Saskatchewan*, Criminal Proceedings (1987) W.W.R. 597. Challenges in the courts undoubtedly hastened the proclamation of these rights in all jurisdictions in 1990.

3.2 Scope of Criminal Code Provisions

Judicial interpretation of Section 530.1 and its implementation suggests that an order for a minority language trial may require the recognition of rights not specifically mentioned in Part XVII of the *Criminal Code*. For example, although no mention is made in Section 530.1 of the language in which the charges against an accused should be written, a lower court in Ontario has determined that they must be made available without delay in the official language of the accused where an order has issued directing that trial take place in that language.[29] However, two years later the Ontario Court of Justice refused to recognize a binding obligation on the Crown to provide the particulars of a charge in the official language of the accused. While it seemed anomalous that a French language trial could proceed with the charges themselves written in English only, legislative silence regarding the matter was a factor supporting the court's conclusion that the particulars of a charge did not have to be presented in the official language of the accused.[30]

The issue of the language in which charges against an accused should be written ultimately converges with the requirement found in Subsection 841(3) of the *Criminal Code*, to the effect that "any pre-printed portions of a form (set out in Part XXVII of the *Code*) varied to suit the case or of a form to the like effect shall be printed in both official languages." The use of bilingual forms in the criminal process clearly facilitates the use of either official language, at the option of the accused. Failure to comply with this two-language requirement has raised the question of the appropriate sanction to be imposed by a court. For example, should the use of a unilingual information result in a declaration that the proceedings are null and void? Although judicial response has not been uniform the weight of authority leans to the conclusion that failure to comply with this requirement is not fatal to

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[29] See *R. v. Boutin* (26 November 1992), (Ont. Prov. Ct) [unreported]. The Court found it reasonable to read such a requirement into Part XVII of the *Criminal Code* in light of the principle of the equality of English and French found in Section 16 of the *Canadian Charter of Rights and Freedoms*. In addition, the court observed: "Section 530.1 provides that testimonial evidence at a trial be translated and that the prosecutor and the judge shall speak the language of the accused. In this context to say that since the information containing the charges does not issue from the accused he is not entitled to an information in the language of the trial would mean that the legislators did not intend that the accused have the right to understand what he is accused of. I find it difficult to believe that to be the case." *[Translation]* For a contrary decision, see *R. v. Breton*, (9 July 1995), (Y.C.T.) [unreported].

[30] See *R. v. Simard*, (30 March 1994), (Ont. Gen. Div.) [unreported]: "Section 530.1 does not provide that an information shall be translated from the language of the informant to the official language chosen by an accused. Subsection 530.1(g) establishes exactly in what the record of proceedings shall consist. The record of proceedings does not include the information. I can only conclude, therefore, that if Parliament had wanted to include the information in the record of proceedings, and if it had wanted the information to be translated in written form in the charging portion of the information for these kinds of cases, then it would have so provided." This decision is now on appeal before the Ontario Court of Appeal. See also *R. v. Belleus*, (13 May 1991), (Ont. Gen. Div.) [unreported] for contrary decision.

a prosecution and that the defect can be amended at the request of the Crown, so long as the accused would not as a result be prejudicially affected.[31]

Questions have also been raised as to whether pre-trial disclosure of evidence by the Crown must be made in the official language of an accused. Where an order has issued for a trial in that language, it has been argued that Sections 530 and 530.1 of the *Criminal Code* should be interpreted so as to include the right of disclosure in the accused's official language. The Supreme Court of the Yukon[32] recently rejected such arguments, pointing out that provisions in the *Code*[33] relating to the record of proceedings allow for any documentary evidence to be tendered in either official language. This being the case, it was unable to conclude that the pre-trial disclosure of documentary evidence must be translated into the official language of the accused. However, the court suggested that circumstances different from those of the case before it might require, in order to allow an accused to be given full answer and defence in the context of a fair trial, the pre-trial translation of documentary evidence. But where the accused and counsel both understand and speak English, as in the case before it, the court could find no potential prejudice which would justify imposing a translation requirement.

Translation of documentary evidence submitted at trial can be distinguished from the more general issue of pre-trial disclosure. In this regard, it seems only fair that evidence actually submitted be available in the official language of the proceedings. Moreover, it should not be forgotten that Subsection 530.1(f) of the *Criminal Code* requires the court to make interpreters available "to the accused, his counsel or any witness". The Court of Appeal of New Brunswick has taken the view that, where an accused has requested trial in his or her official language, "...it would be contrary to the principle of a fair trial to receive, without

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[31] See, for example: *R. v. Goodine*, 71 C.C.C. (3rd) 146; *R. v. Alcan Aluminium* (10 February 1994), (Court of Quebec, Criminal Division. The question is also currently before the Quebec Court of Appeal in the case of *Noiseux v. Belval* R.P.J.Q. 92-303 (C.S.). On the issue of prejudice allegedly suffered by a Francophone served with a unilingual French information or summons, the Quebec Superior Court in the latter case remarked: "It is incomprehensible to me, however, that a French-speaking person could reasonably complain when he receives a summons in French based solely on an information also written in that language. I do not see how this person could suffer prejudice, and I consider the argument to be completely baseless." *[Translation]*

[32] *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455 (Y.T.S.C.), appeal quashed (30 December 1994), (Y.T.C.A.) [unreported]. The appeal was rejected for reasons unrelated to the issue of pre-trial disclosure in the official language of the accused. Leave to appeal to the Supreme Court of Canada was rejected on September 7, 1995.

[33] See Subsection 530.1(g) of the *Criminal Code*:
"[T]he record of proceedings during the preliminary inquiry or trial shall include
(i) a transcript of everything that was said during those proceedings in the official language in which it was said,
(ii) a transcript of any interpretation into the other official language of what was said, and
(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered."

the consent of the accused, evidence in a language other than that chosen for the trial without translating it into the language of the trial."[34]

Uncertainty about the scope of Part XVII of the *Criminal Code* is also created by the absence of any specific rights collateral to an order directing that a trial take place before a judge or a judge and jury who speak both official languages. For example, the Nova Scotia Supreme Court held that there is no requirement that a prosecutor assigned to such a trial be bilingual nor is there any duty on the prosecution to provide written translations of documentary evidence and has suggested that these issues should be decided in a pragmatic manner and with the view to giving an accused a fair trial and an opportunity to make full answer and defence.[35]

Part XVII does not apply to a number of other matters integral to the criminal justice system. For example, the process of retaining counsel is an important step taken by an accused person. Access to information relevant to the language abilities of prospective lawyers would help in the selection of defence counsel able to speak the official language of the accused. In addition, where the accused is eligible for legal aid it would seem appropriate that a certain number of bilingual defence counsel be available to assist. The same applies to duty counsel paid for by the State who are present in various docket courts. Where no bilingual lawyer is available to assist an accused consideration would have to be given to the provision of an interpreter who could assist unilingual counsel in communicating with his or her client. While none of these matters are addressed by Part XVII they can certainly be approached by way of policy. The same is true of communications between defence counsel and the Crown once the language of the preliminary inquiry and the trial has been established. Encouraging the use of the minority official language would certainly entail its use in correspondance and other communications between the Crown and defence counsel, not to mention its use in all court proceedings related to the charges but falling outside the preliminary inquiry or trial as such.

3.3 Bilingual or Separate Trials

Criminal proceedings before a judge who speaks both official languages, often referred to as a "bilingual trial", may not satisfy the requirements of a fair trial where charges are laid against multiple accused. Indeed, the Quebec Superior Court has recently questioned the

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[34] *Boudreau v. New Brunswick* (1990) C.C.C. (3d) 436.

[35] See *R. v. Mills* (19 July 1993), (N.S. S.C.) [unreported]. The trial judge made the following observation: "Nevertheless, it seems clear that the purpose of sections 530 and 530.1 is to ensure that accused of all languages have a fair trial and an opportunity to make full answer and defence. Therefore, in the third situation where the trial proceeds in both official languages, as in all trials, the purposes just mentioned must be achieved. The court should then apply s. 530.1, with such modifications as may be required, in a trial before a judge and jury who speak both official languages of Canada, to ensure that these objectives are met."

meaning of the phrase "bilingual trial". In *Forsey v. R.*,[36] it pointed out that such a phrase is not even used in the *Criminal Code*; rather, the *Code* speaks of a trial before a bilingual judge when the circumstances so warrant. In this context, nothing in the *Criminal Code* determines explicitly what the over-all language of proceedings will be. For example, while the language of testimony may vary from witness to witness, what factors should determine the language in which lawyers address the court during the course of the trial or on interlocutory motions? The ability of accused to follow arguments submitted by counsel, or to understand other exchanges with the court, would clearly be hindered if the language used was not directly understood.

In the matter before it, the Quebec Superior Court noted that, while persons jointly charged with conspiracy to import a narcotic should normally be tried together, fairness to all accused may require separate trials as a function of their respective official languages. If such were not the case and accused persons of different official languages were tried together, those who spoke one official language would inevitably be placed at a disadvantage by being unable to understand directly those parts of the proceedings conducted in the other official language. In the circumstances under review (involving both English- and French-speaking accused), the Quebec Superior Court found that recourse to interpretation would be problematic, especially if applied to legal arguments, rulings on admissibility of evidence and the judge's charge to the jury. Problems of this sort are avoided to the extent that the procedural language corresponds as far as possible to the official language of the accused. In the Court's view this is the intent of the language rights set out in the *Criminal Code*, an intent which should not be jeopardized by rigid adherence to the principle that persons engaged in a common enterprise should be tried together (i.e., before a judge who speaks both official languages). As a result, the Quebec Superior Court ordered that Anglophone and Francophone accused (at that point facing joint trial) be tried separately in their respective official languages.

While recourse to interpretation may create a burden on some co-accused which can be resolved by ordering separate trials, the use of interpreters in the criminal process cannot always be avoided. This is clearly the case when witnesses testify at trial in a language different from that of the proceedings in general. The type of interpretation best suited to a criminal trial has recently been considered by the Supreme Court of Canada in the context of the constitutional right to the services of an interpreter under Section 14 of the *Canadian Charter of Rights and Freedoms*. This right extends to any accused regardless of the language they speak and is thus not directly related to establishing the overall, official language of the proceedings. Nevertheless, observations made by the Supreme Court regarding the distinction between consecutive and simultaneous interpretation are relevant to criminal cases involving the use of both official languages:

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[36] (1995), 95 C.C.C. (3d) 354 (Sup. Ct. Que., Crim. Div.). See also *R. v. Lapointe and Sicotte* (1981), 64 C.C.C. (2d) 562 (Ont. Gen. Sess. of Peace), *R. v. Garcia* (1990), 58 C.C.C. (3d) 43 (Que. S.C.), *R. v. Gauvin et al.* (17 October 1995), (Crt.Q.B.N.B.), [unreported] and *R. v. Mills*, *supra*, note 35.

> A further factor which needs to be taken into account when defining the proper standard for interpretation is that of timing. To meet the constitutionally guaranteed standard of protection under Section 14 of the *Charter*, interpretation must take place contemporaneously with the proceeding in question. Here, it may be useful to keep in mind the distinction between "consecutive" (after the words are spoken) and "simultaneous" (at the same time as words are spoken). While it is generally preferable that interpretation be consecutive rather than simultaneous, the overriding consideration is that the interpretation be contemporaneous. Although I need not decide the matter, I would tend to agree...that, although consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation. Simultaneous interpretation is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained. Moreover, it requires expensive sound equipment with which our trial courtrooms are rarely equipped. In addition, simultaneous interpretation works best when there is a minimum of distraction both for the interpreter and the listener(s), a feature which will not always be present in our busy courtrooms. Consecutive interpretation, on the other hand, has the advantage of allowing the accused to react at the appropriate time, such as when making objections. It also makes it easier to assess on the spot the accuracy of the interpretation, something rendered more difficult when one has to listen to the original language and its translation at the same time, as would be the case with simultaneous interpretation.[37]

Trial before a judge or a judge and jury who speak both official languages will often require the services of interpreters. One need only think of cases where the accused speaks only one official language fluently, thus making it difficult to understand testimony given by a witness (or arguments presented by counsel) in the other official language. For the reasons given by the Supreme Court, interpretation of testimony from one official language to the other is best made in consecutive fashion. Beyond the question of testimony, however, the language in which the proceedings are conducted should, wherever possible, be understood directly by the accused. The Quebec Superior Court in the recent *Forsey* decision has underscored the importance of this to the accused. Even from a practical point of view, it is hard to imagine how consecutive interpretation could be applied efficiently to legal arguments and other submissions made by counsel during the course of the trial. Simultaneous interpretation would appear better suited, but the disadvantages and the costs identified by the Supreme Court of Canada militate against such a solution. The most effective solution, one which ensures that accused persons are not disadvantaged by virtue of the official language they speak, is to limit the need for interpretation for the accused to the examination and cross-examination of witnesses who do not speak the accused's official language. Beyond that, the language of the proceedings should correspond to that of the accused, be it English or

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[37] *Tran v. R.* [1994] 2 S.C.R. 951 at 989-990.

French. Where an accused speaks neither official language interpretation would have to be extended to the other elements of the process.

3.4 Federal Measures to Ensure Implementation

Although provincial Attorneys General are designated by the *Criminal Code* as responsible for the conduct of prosecutions under the *Code*, the Attorney General of Canada retains responsibility for prosecutions under other federal statutes, such as the *Narcotics Control Act*. In such cases administrative measures to ensure compliance with Section 530 are his or her responsibility. An indication of such measures can be found in the Terms and Conditions of Appointment of Agents at Clause 7.6, where federal agents are required to advise their supervisor that a case should be referred to another agent in order to respect the rights of accused to have a prosecutor who speaks their official language. In the case of federal Crown Attorneys (i.e., permanently employed), administrative practices and policies within the federal Department of Justice should be designed to accomplish the same objective.

Guidelines are currently being developed which will establish administrative procedures for ensuring that the official language used by federal Crown Attorneys corresponds to that of the accused. The process of developing guidelines provides the opportunity to address various issues which have arisen regarding the implementation of Part XVII of the *Criminal Code*.

As already mentioned, legislative silence concerning the consequences of an order to be tried before a judge who speaks both official languages leaves open the issue of whether the prosecutor in such cases should be bilingual as well. This is clearly desirable in cases of multiple accused of different official languages, for it would ensure that accused persons would be examined in their own official language (should they opt to testify).

The language in which witnesses would be examined is another issue which receives a varying response. It is difficult to establish a rigid rule regarding the language in which questions should be posed to a witness. Should this be done in the language of the procedures (i.e., the language of the accused) or in the language of the witness? In developing guidelines for the implementation of Part XVII some thought should be given to this question.

Any measures which the Department of Justice may take to ensure that Crown counsel speak the official language of an accused are clearly effective only if a sufficient number of judges are available to preside at trials in either official language.[38] In order to help increase the

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[38] The level of individual bilingualism among members of the judiciary is a delicate issue, especially given the interpretation of Section 133 of the *Constitution Act, 1867* and parallel provisions in other parts of the Constitution. In this regard see: *Société des Acadiens, supra*, note 4, and *Robin v. Collège de St. Boniface* (1985) 1 W.W.R. 249. It is apparent that greater reflection on the importance and role of bilingualism in the judicial system is needed. A recent report commissioned by the Canadian Judicial Council which examines the twin issues of judicial

availability of bilingual judges a language training program is offered by the Office of the Commissioner for Federal Judicial Affairs. The program is open to all federal and provincial judicial appointments, although special funding arrangements must be made in the case of provincial appointees.

The ultimate goal of language training is to enable judges to preside at trials in their second official language, that is to say, to understand testimony, to communicate with witnesses and legal counsel and to deliver judgment in the minority official language of their jurisdiction. Although not all judges registered in the program will achieve the highest level of language proficiency, all contribute through the enhancement of their knowledge of the other official language to enabling the judicial system to function in both languages.

The courses are divided into four levels of linguistic ability: basic, intermediate, advanced and proficiency. Each level has its own specific objectives, the first two emphasizing acquisition of basic vocabulary and passive listening and comprehension, while the two higher levels seek to expand and perfect active speaking and writing skills which will enable a judge to preside without difficulty at a minority language trial, pronounce judgment in the official language of the accused and even draft a written decision with minimal assistance.

Admission into the program is not subject to any formal requirements, although each judge interested in participating is given an aptitude test for language learning abilities, as well as a test to determine the level of actual knowledge of English and French as second language. Once registered, passage from one level to the next is subject to an evaluation of progress made.

The program is divided into intensive sessions (up to sixty hours at the rate of thirty hours per week) and private courses offered in the home jurisdiction of each judge. Since the intensive sessions amount to only two weeks per year it is recommended that judges follow a minimum of four hours of private courses each week upon return to their home jurisdiction.

For the fiscal year 1993-94 there were 227 judges registered in the language training program, of whom 189 were federal appointees and 38 provincial appointees. The total can also be broken down into the following categories: 21 Francophone judges from Quebec studying English, 34 Francophone judges from common law provinces in French language-style and legal terminology courses; 172 Anglophone judges studying French. Among the Anglophone judges, we were informed that 42 are far enough advanced in their knowledge of French to be able to preside over simple cases and preliminary inquiries; and 28 of these are able to preside over complicated trials with or without a jury as well as write a judgment in French with minimal assistance.

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independence and accountability does not, unfortunately, mention the issue of the language abilities of judges. See: *A Place Apart: Judicial Independence and Accountability in Canada*, Martin L. Friedland, May, 1995.

It was not possible for us to determine how long any of these judges have been enrolled in language training offered by the Office of the Commissioner for Federal Judicial Affairs. During visits to various regions of the country comments were often received about slow progress in providing effectively bilingual judges through language training. While passive bilingualism was often seen to improve with language training the degree of language proficiency necessary to communicate with witnesses and to engage in exchanges with legal counsel was a more difficult accomplishment. Given that the current language training program has been operating since 1978, it would seem opportune to undertake an evaluation of the results so far achieved. Clearly the Office of the Commissioner for Federal Judicial Affairs does a conscientious job but answers to the following questions would seem important:

- In any given year, how many judges are registered at each level, and what proportion of the whole does each level represent?

- On average, how long does it take a judge to complete each level in the language training program? If this varies considerably from judge to judge, is it possible to calibrate the various time periods involved and the percentage of judges who fall within each time period?

- What percentage of judges achieve the highest level of language proficiency? How much training is necessary to achieve this level? What percentage of all judges who have received language training have presided over a trial conducted in the minority official language?

- Does the program have any means to determine if judges who attend the intensive training sessions continue their language training once they have returned to their home province? Should a certification test be developed?

While language training for judges is one means of attempting to enhance the two-language capability of the judicial system, the federal government can also affect linguistic realities before superior courts of criminal jurisdiction through its power of appointment.[39] Where a lack of bilingual judges before superior courts is evident, it becomes important to consider the actual bilingual capabilities of potential candidates for judicial appointment. In this regard, a long list of general criteria used to assess candidates includes, as a final item, the matter of two-language capability (with the proviso that it becomes relevant where "applicable"). However, since decisions on federal judicial appointments are made by Cabinet, whose deliberations are always secret, it is difficult to know what weight is given to the language capabilities of potential candidates. Nevertheless, one should rightly expect that the federal government will place considerable emphasis on individual bilingualism when

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[39] It should be remembered that provincial courts of lower jurisdiction, whose members are appointed by the provinces, administer a significant portion of the *Criminal Code*, and hence are beyond influence of the federal power of appointment.

making appointments to superior courts which may lack a sufficient number of judges to conduct criminal proceedings in the minority official language.

3.5 Provincial Initiatives

The provincial role in implementing Part XVII of the *Criminal Code* is underscored by Section 533, which declares that the Lieutenant Governor in Council of a province "may make regulations generally for carrying into effect the purposes and provisions of this Part in the province". A specific example of this is foreseen in Section 531, which obliges a court to order, "subject to any regulations made pursuant to Section 533", that the trial of an accused be transferred to another territorial district of a province in order to comply more conveniently with language of trial requirements. This type of provision is quite understandable when one remembers that the *Criminal Code* of Canada confers exclusive jurisdiction over the trial of criminal charges on provincial courts (Sections 468, 798). Moreover, as already mentioned, the *Criminal Code* also determines that provincial Crown attorneys are responsible for the conduct of prosecutions thereunder. (See definition of Attorney General under Section 2 of the *Criminal Code*.) All of these factors make it important to turn to the provincial level in order to determine the manner in which the language-of-trial provisions of the *Code* have been implemented.

New Brunswick

The official status of both English and French before the courts of New Brunswick is formally guaranteed by Section 19 of the *Canadian Charter of Rights and Freedoms*. Section 13 of the *Official Languages of New Brunswick Act* also recognizes the use of both languages before the courts, although this basic right is subject to any regulations regarding reasonable demand, or regarding measures deemed necessary for the orderly implementation of the *Act*. Subsequent additions to Section 13 now explicitly provide that a person accused of a provincial or municipal offence has the right to be tried in the official language of his or her choice.[40] Further amendments to the *Act* in 1990, as regards civil proceedings, ensure that parties have the right to be heard by a court which understands directly the official language in which they intend to proceed. The basic principles set out in these sections provide, in essence, the general framework within which Part XVII of the *Criminal Code* of Canada is applied.

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[40] See Subsections 13(1.1) and 13(1.2) of the *Official Languages of New Brunswick Act*, S.N.B. 1985, ch. 0-1:
13(1.1) Subject to subsection (1), a person accused of an offence under an Act or a regulation of the Province, or a municipal by-law, has the right to have the proceedings conducted in the official language of his choice, and he shall be advised of the right by the presiding judge before his plea is taken.
13(1.2) Subject to subsection (1), a person who is a party to proceedings before a court has the right to be heard by a court that understands, without the need for translation, the official language in which the person intends to proceed.

No specific regulations have been adopted by New Brunswick under Section 533 of the *Criminal Code*. However, as a matter of policy judges and other court personnel who speak the official language of the accused are routinely available for all preliminary inquiries and trials. We are informed that the province is divided into administrative regions, to which are attached linguistic profiles which assist in the recruitment and the identification of the training needs of court personnel. Language requirements thus vary from region to region depending upon demographic facts.

At the level of law enforcement, police officers are expected to identify the language choice of accused persons and make any necessary summons returnable before an appropriate court capable of operating in the language chosen. Thus, where a crime or infraction occurs in a region in which one or more bilingual judges routinely sit, a summons will be made returnable before the court on a day when the presiding judge speaks the language of the accused. In regions where the minority language population is small the summons is made returnable on the one or two days per month set aside to deal with cases in the minority language. The underlying aim of this policy is to ensure that accused persons make their first appearance before a judge who speaks their official language. Where a criminal matter is heard in the Court of Queen's Bench the identification of the language of trial is made when the case is set down for trial. A judge who speaks the language of the accused is then assigned to conduct the trial.

Data made available by the Court of Queen's Bench of the province indicate that in the period 1993-94, approximately 20% of procedures related to the appearance of accused persons before that court were conducted in the French language while 75% were in the English language. The remainder were divided amongst those conducted in English with interpretation (1%), French with interpretation (2%) and in both languages (2%).

With respect to preliminary inquiries before the Provincial Court for the same period the data indicate that approximately 78% were conducted in English, 19% in French and 1% in both languages. However, this data does not include the judicial district of Edmunston, where virtually all preliminary inquiries are held in French. As a result, the proportion of preliminary inquiries conducted in French is underestimated. With respect to trials during the same period the data indicate that 77% were conducted in English and 23% in French, although the same proviso regarding the judicial district of Edmunston applies here as well.

It would not appear that there are any difficulties in New Brunswick with empanelling juries whose members speak the minority language. Potential jurors are simply selected by consulting the electoral list prepared for provincial elections, which identifies an elector's preferred official language. The relatively large size of the French-speaking community (approximately 33% of the total provincial population) is an additional factor which facilitates the selection process.

The language of proceedings in the New Brunswick Court of Appeal is generally determined by the language of the original trial, although in some cases that language is changed with

the consent of all legal counsel involved. This may occur where a lawyer arguing on appeal did not participate in the trial and is more comfortable speaking the other official language. No written policies or formal regulations appear to exist with respect to this matter, thus making it difficult to determine how any serious disagreement about the procedural language would be resolved. Four of the six judges sitting on the Court of Appeal are bilingual and, should there be any problem in making a bilingual judge available for proceedings in the minority language, the Chief Justice requests the services of a judge of the Court of Queen's Bench competent in the French language.

The limited number of Crown counsel (both at the federal and provincial levels) able to speak the minority official language would appear to impose cost burdens on accused persons who wish to proceed in French at pre-trial appearances. This occurs because it is often necessary to order an adjournment of proceedings in order to give the prosecution the opportunity to replace unilingual Crown counsel by someone able to speak French. Facing the prospect of delay and the resultant increase of costs, a French-speaking accused is often persuaded to agree to proceed in English. As a result, many pre-trial proceedings take place in English even where accused and counsel would prefer to proceed in French. Such proceedings include those where the accused intends to plead guilty and thus would probably like the matter to be settled as quickly as possible.

Members of the Association des juristes d'expression française du Nouveau-Brunswick (AJEFNB) have indicated that, beyond regions of the province where the French language enjoys a strong majority position, a number of problems persist in the implementation of Section 530 of the *Criminal Code*. For example, in the city of Moncton it is estimated that up to 80% of Francophone accused proceed in the provincial court (with respect to pre-trial matters) in English. As explained above, this is done to avoid increased legal costs associated with adjournments made for linguistic reasons. In general, it would appear that in many areas of the province English is presumed to be the normal language of criminal law procedures, unless a specific request is made to proceed in French. The request to use French is therefore seen as an exception and almost always results in procedural delays. We were informed of cases where accused persons were not even informed of their right to procedures in French, and of one case where a judge requested the services of an interpreter for his own convenience. It was therefore felt that greater emphasis should be placed on the two-language capabilities of candidates for appointment to the judiciary in New Brunswick.

The issue of the language abilities of judges sitting on the Court of Appeal of New Brunswick was also raised by members of the AJEFNB. Given that only four of the six members of the Court of Appeal are bilingual and capable of hearing an appeal in French, it is felt that Francophones have unequal access to the Court of Appeal. Whereas Anglophones have the choice of six judges who are able to preside over an appeal conducted in English, that choice is reduced to four in the case of Francophones.

Members of the AJEFNB take the view that deficiencies in the two-language capability of the New Brunswick judicial system could be improved by a greater active offer of service in the

minority language. Increased bilingualism of court room personnel, judges and Crown prosecutors would decrease delays caused by using the minority language, thereby diminishing any impression that the normal pattern of court proceedings has been disrupted. It is this impression which often convinces accused persons to forego the use of their official language, in addition to wanting to avoid increased costs which would be occasioned by further delay. Short of enhanced individual bilingualism, the presence of qualified translators at first appearance court would promote an atmosphere which welcomes, rather than deters, the use of the official language of an accused. In short, where positive steps are taken to encourage the use of the minority official language there is usually a marked increase of the number of proceedings which are actually conducted in that language.

Quebec

Section 133 of the *Constitution Act, 1867* guarantees the right to use either English or French before the courts of Quebec, in the same way as those guarantees which apply to New Brunswick and Manitoba. However, as explained earlier, this constitutional right does not impose any obligation on the State to ensure that criminal trial procedures will be conducted in the official language of the accused. Despite the limitations of Section 133, Quebec has a long tradition of ensuring that accused persons are tried in their own official language. It could even be said that the current language rights provisions in the *Criminal Code* of Canada (Subsection 530.1) constitute a kind of codification, for the country as a whole, of practices prevalent in Quebec since at least the last century.

While not specifically recognized in provincial law or regulations, the *de facto* language rights of accused persons are sufficiently well entrenched in practice that they can be relied upon even if no formal order under Section 530 of the *Criminal Code* is issued (dealing with the language of trial). The historic ability to deliver criminal justice in both English and French by informal administrative response to the linguistic requirements of each case was made possible largely because of widespread bilingualism amongst members of the judiciary and the practising bar. This is particularly true in Montreal where most English-speaking Quebecers live. A recent report on access to the justice system in English, prepared by an *ad hoc* Committee of the Montreal Bar, points out that:

> [t]he past success of bilingual judicial services in the District of Montreal has historically depended upon a large pool of highly trained lawyers and judges who were fluent in both English and French, supported by court staff who were also capable of working in both languages. These individuals, able to shift back and forth from one language to the other, formed the backbone of bilingual court services in the District, and did so at relatively little expense to the community at large.[41]

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[41] See: Comité *ad hoc* sur l'accès à la justice en anglais dans le district de Montréal, Report, March 31, 1995 at page 5 [hereinafter *ad hoc* Committee report]. The mandate of the Committee contained four elements:

Nevertheless, concern about the possible erosion of long-standing institutional bilingualism within the administration of justice in general led to the creation of the *ad hoc* Committee. Its mandate extended well beyond the operation of criminal courts, so that the deficiencies identified in its final report relate for the most part to aspects of civil courts (including quasi-judicial tribunals) and the administrative structure which supports them. Greater reference will therefore be made to this report in Part 4 of the present study.

Regarding courts of criminal jurisdiction (in the District of Montreal), there appears to be little or no concern about the ability of the system to conduct trials in the official language of the accused. As a general comment, the report recognizes the impressive level of passive bilingualism among judges of the Superior Court: "...[I]t would appear that all the Montreal Superior Court judges, with very rare exceptions, are sufficiently bilingual to preside a trial in either official language and to do so without great difficulty."[42] Functional bilingualism (i.e., the ability to communicate adequately with counsel, the accused, parties in a civil action or witnesses in either English or French) is also very considerable. While these comments apply with particular emphasis to courts of civil jurisdiction, there can be little doubt that Superior Court judges sitting on criminal matters (either alone or with a jury) demonstrate a very high level of functional bilingualism. This is clearly important in the District of Montreal, where 20% of the population (or approximately 600,000 people) are English-speaking.

Even though Sections 530 and 530.1 of the *Criminal Code* guarantee the right to a trial before a jury which speaks the same official language as the accused, the issue of the right to a trial before a bilingual jury was raised in a number of cases involving co-accused who requested their trial in different official languages[43].

Trials without jury and involving less serious offenses are heard in the Court of Quebec (which is divided into Civil, Criminal and Youth Divisions). With respect to the language abilities of judges at this level presiding at criminal or young offender proceedings, the report simply states:

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1) to inquire generally into problems of access to justice that are related to inadequate English-language services or the lack of English-language services and report on them;
2) to describe specific problems related to inadequate or absent English-language services;
3) to evaluate how serious the impact of these problems is on the justice system and the administration of justice in the District of Montreal; and
4) to suggest remedies or reforms if possible.

[42] Page 18 of the *ad hoc* Committee report.

[43] *R. v. Ferreira*, (11 September 1995), (Que. Sup. Ct., Crim. Ch.) C.S.M.: 500-01-000133-956; *R. v. Forsey supra*, note 36, *R. v. Bouchard*, (13 September 1995), (Que. Sup. Ct., Crim. Ch.) C.S.M.: 500-01-0001861-951. One can recall the case of Reference *Re Regina v. Coffin* (1955) S.C.R. 191 where, in a different context, the Supreme Court of Canada recognized the judge's discretion to refuse the hearing of a trial before a jury speaking the language of the accused and ordered a bilingual jury.

> The initial observation to be made with respect to the Court of Quebec is that the overall level of functional bilingualism among the judges of the Criminal Division appears to be quite high and to respond well to the needs of the District.
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> The same comment may be made with respect to the Youth Division. In cases where young people who come before the Court are English-speaking, save rare exceptions, they will be dealt with in English.[44]

Individual bilingualism among judges of the Quebec Court of Appeal appears so self-evident that the report of the *ad hoc* Committee simply takes note of it and states that: "...the issue of bilingualism does not really arise in the Court of Appeal where the level of linguistic proficiency is very high."[45]

Practice before the Court of Appeal of Quebec indicates that the language of procedures is subject to a certain number of informal and flexible rules. First, written arguments prepared for the appeal can be in either English or French, at the option of the lawyer preparing them. This obviously is in line with the guarantees found in Section 133. Oral arguments are also presented in the official language chosen by the speaker, but this does not necessarily correspond to the language in which the original trial took place. Thus, an appeal from a trial which took place in English may be conducted in the French language if counsel so chooses. The reverse is also true, so that appeal proceedings related to a French-language trial might take place in English. Nevertheless, the language of appeal proceedings generally corresponds to that of the trial, with exceptions to this rule more often reflecting a shift from English to French at the level of the Court of Appeal.

The availability of bilingual judges to preside at minority language trials is clearly important to the manner in which witnesses of different official languages are examined and cross-examined. It would appear to be a widespread practice in the District of Montreal to question witnesses in their preferred official language. As the report of the *ad hoc* Committee points out, this obviously requires "...that at all times a significant proportion of the players in the system be sufficiently competent in both languages to carry on translating and shifting from one language to another without jeopardizing the rights of the parties or the integrity of the administration of justice."[46]

Oral arguments on points of law, as well as written arguments, are often prepared and presented in the preferred language of the speaker, i.e., counsel involved, although there is no definite practice in this regard. The issue of whether the *Criminal Code* does and can

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[44] See page 35 of the *ad hoc* Committee report.

[45] See page 14 of the *ad hoc* Committee report.

[46] See page 28 of the *ad hoc* Committee report.

require a Crown prosecutor to use at all times the language of the accused is currently before the Quebec Court of Appeal.[47] As will be remembered, the language choice of legal counsel in Quebec is protected by Section 133 of the *Constitution Act, 1867*. While Francophone Crown counsel in the cases before the Quebec Court of Appeal were willing to conduct examination of witnesses and related matters in the language of the accused persons (English), they felt more comfortable in preparing and presenting technical legal arguments in their mother tongue (French). Consequently, however, the accused would have been required to use the services of an interpreter in order to follow the arguments presented to the judge. Where interpreters are used in criminal and quasi-criminal trials, written policies of the Quebec Department of Justice specifically provide that the cost will be assumed by the State.[48]

The language in which documents are issued under court authority (such as subpoenas, notices of appearance, summonses, etc.) is not determined by statute or regulation in Quebec. Moreover, with respect to the forms which are required to be printed in both English and French by virtue of Subsection 841(3) of the *Criminal Code*, it does not appear that they are issued in bilingual format, although they are available in both official languages.[49] In essence, the issuer of a court document is free to prepare it in the official language of his or her choice. This conforms to the strict requirements of Section 133 of the *Constitution Act, 1867*.[50] Policies of the Quebec Department of Justice do provide, however, that written procedures in criminal matters (as well as procedures involving provincial offences) will be translated into the official language of the accused or a witness upon specific request.[51]

As already mentioned, judges in Quebec enjoy the constitutional freedom to issue their decisions in the official language of their choice. Where judgment is rendered orally in criminal matters, the impressive level of functional bilingualism among the judiciary ensures that accused persons will hear the decision concerning them in their own official language.

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[47] *Supra*, note 27.

[48] See: Recueil des politiques et directives, Schedule B: Directive A-6, Services d'interprètes et paiement des frais: "In federal or provincial criminal matters before all courts, the services of interpreters are provided to the party or witness who does not understand the language used at the hearing or who is deaf. These costs may not be claimed from the parties and are chargeable to the Minister of Justice." *[Translation]*

[49] On this issue, see also *Belval v. Noiseux*, *supra*, note 31, *Lavoie v. R.* (1990) 58 C.C.C. (3d) 246, *R. v. Alcan Aluminum*, *supra*, note 31.

[50] See *R. v. Cotton*, (1991) J.E. 91-735 (C.S.).

[51] See: Directive en matière de communications judiciaires, November 1, 1989, revised on March 3, 1994. The Directive provides that written procedures in criminal cases and those under federal or provincial penal statutes will be translated upon demand: "Whether they are written in English or in French, these procedures are translated at the request of the accused or of the witness". *[Translation]*

This would also seem to flow naturally from the requirement of the *Criminal Code* that the judge be able to speak the official language of the accused. Functional bilingualism for the purposes of oral judgments does not, however, necessarily equip a judge to prepare a written decision in his or her second language. This is recognized by the report of the *ad hoc* Committee of the Montreal Bar, which points out that one of a judge's most important objectives is "...to produce a decision that is at once clear and concise and in which the nuances and complexities of the applicable law are properly and fully elaborated. This is a task which for the vast majority of even the most fluently bilingual among us is most easily and confidently accomplished in one's first language."[52]

Other factors, beyond the ease of writing in one's mother tongue, also influence the language in which a judge will render a written decision, such as time pressures in busy courtrooms and the volume of work which any individual judge must produce in a given year. None of this precludes, of course, a judge from preparing written reasons in his or her second language in order to remain consistent with the language in which the trial was conducted. In the case of criminal matters it would appear to be the exception that a written decision at the trial level would not be issued directly to the accused in his or her official language. Nevertheless, the above-cited factors do help explain why a judge may feel it more appropriate and effective to prepare a written decision in his or her mother tongue, subject to a translation being made available to an accused. The availability of a translated decision would appear to conform to the *Criminal Code* requirements, which stipulate that written judgment will be made available by the court to the accused in his or her official language.

While the issue of written judgements may not arise every day at the trial level, it becomes very important at the level of the Quebec Court of Appeal. It will be remembered that Subsection 530.1 of the *Criminal Code* does not apply to proceedings before a provincial court of appeal. As a general rule, judgments of the Quebec Court of Appeal are written in the mother tongue of a judge, although it may very well happen that an Anglophone or Francophone judge writes his or her opinion in the other official language. Once again, this corresponds with the guarantees found in Section 133 which protect a judge's language freedom. The Court of Appeal has recently reiterated that Section 133 entrenches the right of judges to chose either English or French when delivering or writing their decisions.[53] As a result, parties before the court (even in criminal matters) may find that judgment is delivered in an official language which does not correspond to their own.

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[52] See page 20 of the *ad hoc* Committee report.

[53] "In short, regardless of the point of view from which section 133 of the *Constitution Act, 1867* is analyzed, the jurisprudence seems to me to be very clear to the effect that this provision gives the judge the constitutional right to use English or French, as he wishes, in writing his judgment, whereas the same provision imposes no obligation on the State to provide an authenticated translation." See *Pilote v. Corporation de l'Hôpital Bellechasse de Montréal*, [1994] R.J.Q. 2431, 500-09-000056-887 at page 14, (21 September 1994), (C.A. Que.) [unreported].

To address the problems which may arise from unilingual English or French decisions issued by the courts, the Quebec Department of Justice maintains a translation service. Upon request, a decision will be translated into the other official language,[54] although it appears that time delays of several months are common. In addition, the translation has no official status and does not become part of the court record. It is provided only as a matter of convenience at the request of a party. Recent amendments to the *Charter of the French Language* (contained in Bill 86, assented to June 18, 1993) now provide a legislative basis for the duty of the State to provide for the translation of court decisions. Section 9 of that *Charter* declares: "Every judgment rendered by a court of justice and every decision rendered by a body discharging quasi-judicial functions shall, at the request of one of the parties, be translated into English or French, as the case may be, by the civil administration bound to bear the cost of operating such court or body." While this legislative initiative does not guarantee that a translated judgment will be of equal authority to the original, it does create a statutory duty in favour of a litigant which the government of Quebec is bound to respect.

Outside the district of Montreal, and particularly in regions of Quebec such as the Eastern Townships and the Gaspé Peninsula (Gaspé and New Carlisle) where we find Anglophone communities, the right to use English varied from one region to the other. In general, the judiciary and the Crown prosecutors were, for the most part, bilingual and therefore there were not many problems in this regard. There appear to be some difficulties, however, because of the lack of two-language capability of the court personnel at the courthouses and the lack of availability of other legal services in English. In addition, it is sometimes necessary to have recourse to an interpreter to deal with a unilingual witness or judge.

Generally speaking, there are no difficulties in obtaining a trial in English if advance notice is given. With respect to appearances and other applications where it is not possible to make advance arrangements for an English-speaking judge, however, greater availability of interpreters could facilitate access to justice in English. The Gaspé region, New Carlisle and the Magdalen Islands come to mind as there is only one interpreter for a large territory.

Manitoba

Like New Brunswick and Quebec, Manitoba is constitutionally bound to respect the right to use either English or French before the courts. This right is set out in Section 23 of the *Manitoba Act, 1870*, which also imposes mandatory bilingual requirements regarding all *Acts* of the provincial legislature. As the Supreme Court of Canada has pointed out, the purpose

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[54] Official policy of the Quebec Department of Justice requires that judgments and related procedures be translated at the request of a party to litigation. See: Directive en matière de communications judiciaires, November 1, 1989, revised March 3, 1994: "Whether they are written in English or in French, these procedures are translated into the other language upon written request from a party to the litigation addressed to the Director of the criminal section". [*Translation*]

of Section 23 is "to ensure full and equal access to the legislature, the laws and the courts for francophones and anglophones alike."[55]

Respect for the principle of equal access to the courts in Manitoba, regardless of one's official language, requires significant administrative adjustments aimed at reducing impediments to the use of the minority official language. For example, the right to be tried before a judge who speaks the official language of the accused is of little consequence if sufficient numbers of bilingual judges are not available. The consequences which flow from a lack of judges who speak the minority official language are aptly illustrated by a 1991 decision of the Manitoba Court of Queen's Bench.[56] The case involved a Francophone accused whose trial on criminal charges had been postponed on numerous occasions due to the fact that the only Provincial Court judge who spoke French was, because of a conflict of interest, unable to preside. The conflict of interest arose from the marital relationship of the judge with a lawyer associated with the law firm representing the accused, a conflict which often arose because of that firm's frequent involvement in French language trials.[57]

Delays in appointing a second bilingual judge to the Provincial Court had reached two years by the time the Court of Queen's Bench considered an application by the accused for a stay of proceedings. In reviewing the matter, the court pointed out: "All the delay in this matter is systemic and is clearly due to the failure by the Province of Manitoba to ensure that there were in place the human resources for the Crown to provide expedient justice to an accused."[58] The court also emphasized that the declaration of a right is of little significance if concrete measures are not taken to implement it: "It is not sufficient for governments to acknowledge that rights exist; governments must act in ways that will ensure that citizens can avail themselves of those rights."[59] In the circumstances of the case, a delay of 15 months was considered unreasonable and the application of the accused for a stay of proceedings was accepted.

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[55] See *Re Manitoba Language Rights* [1985] S.C.R. 721 at 739.

[56] *R. v. Allain* (1991) 70 Man. R. (2d) 161.

[57] The recent history to that point in time regarding the paucity of French-speaking Provincial Court judges was summarized by Mr. Justice Monnin of the Court of Queen's Bench as follows: "Prior to January, 1988, the Provincial Court of Manitoba had on its bench one judge who could speak and understand French. He ceased sitting at that time and eventually retired. Duval, P.C.J., a person capable of speaking and understanding French, was appointed to the provincial bench in March, 1988. At first blush, Duval, P.C.J.'s appointment should have resolved at least superficially the problems of French trials at the Provincial Court level. However, Duval, P.C.J. is married to an active member of the bar of this province who is associated with a law firm which without question is called upon to handle a great number of cases in which French trials are requested. Clearly and correctly, Duval, P.C.J. refused to sit on any cases where the accused was represented by a member of her husband's firm as was the case with Allain." See *R. v. Allain*, Ibid., at 168.

[58] Ibid., at 175.

[59] Ibid., at 176.

While there has been some progress made since the *Allain* case in addressing the issue of the availability of bilingual Provincial Court judges, a recent report prepared by the Association des juristes d'expression française du Manitoba (AJEFM) concludes that the current situation does not adequately respond to the needs of Francophone Manitobans. At the present time, one full-time and one part-time Provincial Court judge capable of presiding in French are available. This is not considered sufficient to avoid possible conflicts of interest and attendant delays in scheduling trials to take place in French. It is recommended that a minimum of two full-time bilingual judges be available at all times in the Provincial Court.

The report of the AJEFM also identifies other elements of the criminal trial process which generate excessive delays. With respect to charges laid against an accused who elects to be tried before a French-speaking judge, the report points out that there is no policy of automatically providing a French-language version of the charges. It is necessary to submit a specific request for a translation of the charges from English to French, a request that results in a delay of four to six weeks. A similar delay is very frequently caused by any request that the particulars of a criminal charge be provided in French, even though established policies envisage a time period of two weeks. The report recommends that procedures be put in place in order to ensure that translations of the charges and particulars be available at the time of the first appearance of an accused.

The infrequency with which Francophone Manitobans request to be tried in French is often cited as a reason for not increasing the two-language capability of the courts. No definitive statistics are available regarding the number of French-speaking Manitobans who appear before the courts of Manitoba each year, nor the total number of French-language criminal trials. It is estimated that about 30 trials out of a yearly total of 25,000 heard by the Provincial Court, or roughly three trials per month, are conducted in French or bilingually. This is barely .1% of all trials. Given that Francophones represent 4.4% of the provincial population, one is inclined to conclude that institutional barriers to the use of French must deter Francophone accused from requesting trial in their official language.

The most frequently cited deficiency, especially regarding proceedings before the Provincial Court where the majority of criminal matters are heard, is the lack of an active offer of service in French. This is reflected in the fact that one must always make a specific request to use French or to have documents provided in that language, requests which inevitably result in delays detrimental to the accused. It is also reflected in the fact that no full-time provincial Crown prosecutor conducts trials in French, such matters being contracted out to part-time agents of the Crown. It would appear that agents often do not have the same expertise as full-time prosecutors, nor do they enjoy the same level of discretion to deal with the nature of the charges against an accused. These factors diminish the likelihood that defence counsel will consider it in the interest of Francophone accused to request trial in French. When this is combined with the delays and difficulties associated with charges and particulars not being routinely available in the official language of the accused, it should come as no surprise that many Francophones decline to exercise their right to be tried in their official language.

Other, more subjective, factors have also been raised to help explain the small number of trials in the French language. For example, the closure of a permanent Provincial Court in St. Boniface and the centralization of court services in Winnipeg has created the opportunity for many Francophone accused to avoid trial in their home community. If trial in French means that proceedings will take place at one of the periodic sittings of Provincial Court in St. Boniface, Francophone accused will very often prefer the anonymity of trial in Winnipeg. Trials in Winnipeg rarely take place in French. In other words, the policy of transferring all French-language trials to St. Boniface, where Provincial Court sits on specific days of the month only, may have the unintended, paradoxical result of diminishing the frequency of French-language trials. When given the option, so it is said, many will choose not to face trial under the scrutiny of their own community.

Another subjective factor concerns the perception of some Francophone accused that they may suffer prejudice if they insist on disrupting normal court procedures by requesting to be tried in their official language. Appearance in court can be an intimidating experience in and of itself, one which may not predispose an accused person to make a request which might be seen as an attempt to receive exceptional treatment. This is a theme encountered in a number of jurisdictions across the country and one which can be successfully addressed only through an active, positive offer of service in the minority language.

A fairly recent example of failure to provide active offer of service in the minority language concerns the appointment of four Hearing Officers who have the authority to release persons detained at the Winnipeg Remand Centre. Available on a 24-hour basis, such officers are considered a necessary complement to provincial magistrates who are not always available on short notice to review the incarceration of accused persons. However, none of the four Hearing Officers is bilingual (a fifth hearing officer is bilingual, but, since he is not a lawyer, the Francophone lawyers do not often request his services), thus making it inevitable for Francophone detainees to have their status reviewed in English. The necessity to use English to apply for interim release is also apparent with respect to hearings before magistrates as well, for an imprisoned Francophone must often face an additional delay of at least 24 hours in order to appear before a French-speaking magistrate or judge.[60] Where the price to pay for requesting a hearing in French is an additional 24 hours in prison, many persons would certainly be inclined to agree to proceed in English.

Other elements of the pre-trial process give further evidence of a lack of active offer of service in French. Arrest, procedures for identifying a detained person and the formalities of the detention itself take place almost exclusively in English. The report of the AJEFM recommends that, as a minimum, written notices be posted in police vehicles and at police stations which inform detained persons of their right to be tried in their own official

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[60] The consequences of not being able to appear before a bilingual judge for the purposes of applying for bail, within the normal 24-hour period provided for in the *Criminal Code*, are aptly illustrated in the case of *R. v. Maltais* (6 January 1992), Suit No. AR91-30-00517, (Man. C.A.). In that case the accused was incarcerated for 48 hours before gaining access to a judge who was able to speak his official language.

language. Early notice of this right, as well as a more positive environment regarding the use of both official languages in the judicial system, can help allay fears and render fairer and more efficient the process of determining the prospective language of trial.

As already mentioned, the existing administrative process in Winnipeg for responding to a request that trial take place in French causes delays not experienced if trial proceeds in English. Such a request must be made when an accused first appears in Provincial Court (often referred to as "Docket Court"), at which time the matter is postponed to a later date in order to give an administrative officer (the co-ordinator of French-language trials) enough time to identify available interpreters and determine the availability of a French-speaking judge. Trial is subsequently scheduled to take place at one of the periodic sittings of the Provincial Court in St. Boniface. This process inevitably increases the time defence counsel must spend on pre-trial matters and hence increases the legal costs of a trial in French.

The same type of delay is evident when a Francophone accused appears in court and wishes to plead guilty to the charges. Proceedings in French at this stage are possible only if by chance the presiding judge is one of the few who are capable of hearing a matter in French. Otherwise, the hearing must be postponed to a later date in order to arrange for a bilingual judge to preside. Not only does this increase expenses, but an accused who wishes to plead guilty is most likely to want the matter disposed of as quickly as possible. These factors will no doubt induce many accused to proceed in English.

The report of the AJEFM suggests that administrative changes, which could be embodied in written policies applicable to the Provincial Court, would help decrease the delays that the current system generates. These include an increase in the two-language capability of court personnel, better co-ordination of existing bilingual staff attached to the Court of Queen's Bench and the Provincial Court, earlier identification of the prospective language of trial, the timely translation of charges and other documents and a more widely spread implementation of active offer of service in French within the court system.

While the majority of criminal matters are dealt with in the Provincial Court, the most serious offenses, including jury trials, are heard in the Court of Queen's Bench. It would appear that very few trials take place in French at this level, although we are informed that the number of bilingual judges is sufficient to respond to current and anticipated needs. As already indicated, the most urgent needs are felt to exist at the level of the Provincial Court.

Jury trials in French are an extremely rare occurrence. The first one in the Winnipeg area was recently in the process of being organized, when proceedings were stayed upon application of the accused (due apparently to the disappearance of material evidence and part of the transcript of the preliminary inquiry). We are informed that the only other jury trial in French which actually took place in Manitoba occurred in December of 1986[61]. As a

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[61] *R. v. Lavoie*, *supra*, note 49.

result, little can be said about the problems which may arise regarding the empanelling of a jury whose members speak French or the problems which might be encountered during a trial itself. It is worth mentioning, however, that the process of identifying prospective jurors who speak French is facilitated by access to the electoral list compiled for the purpose of elections to the Francophone School Division of Manitoba ("Division scolaire franco-manitobaine").

The Court of Queen's Bench does have a set of written policies and procedures which relate to the translation of documents and to the provision of interpreters. Although the policies and procedures primarily concern civil matters, those regarding interpreters clearly bear some relationship to criminal trials. All requests for interpreters must be forwarded to the administrative director of the Queen's Bench, the policy explaining that the limited number of available resources makes it necessary to co-ordinate such matters through one office. The policy also establishes that the examination of witnesses under oath at a court hearing will be interpreted only in a consecutive manner. (It appears, however, that recourse to whispered interpretation for the accused in such cases is not infrequent.) With respect to legal arguments, only simultaneous interpretation is offered. The use of simultaneous interpretation in the context of a criminal trial would appear problematic. It is far preferable that the language of the proceedings correspond to the official language of the accused. This obviously requires the presence of bilingual judges, as well as Crown prosecutors able to present arguments to the court in the language of the accused, as required by Part XVII of the *Criminal Code*.

It would appear that whispered interpretation is offered at times to Francophone accused where legal arguments take place in English. Where this occurs, it is difficult to see how Subsection 530.1(g) of the *Criminal Code* can be respected. It will be remembered that this provision states that the record of proceedings shall include "a transcript of any interpretation into the other official language of what was said...." Moreover, such a manner of proceeding is unfair to the accused, as well as seemingly contrary to the intent of Section 530.1 to ensure that trial take place before a judge, and be conducted by a prosecutor, who speak the official language of the accused. As already mentioned, the right of an accused to interpretation (reflected in Section 14 of the *Canadian Charter of Rights and Freedoms*) is distinguishable from rights pertaining to the actual language of proceedings in criminal matters. It is only the two official languages of Canada which enjoy the status of procedural languages, creating institutional obligations which extend beyond the availability of interpretation.

While Part XVII of the *Criminal Code* does not cover appeal proceedings, the constitutional right to use either English or French before the courts of Manitoba clearly allows for the use of both languages before the Manitoba Court of Appeal. Part III of the *Rules of Court of the Manitoba Court of Appeal* (called the *Language Rules*) sets out the parameters governing the exercise of that right. These Rules stipulate that an initiating document must be in either English or French (Rule 112). As a general principle, the language of procedures during the appeal corresponds to that of the initiating document, unless a party makes application for an

order regarding the use of more than one official language.[62] In such cases, an order of language directions is issued by the registrar or a judge, an order which "shall regulate the mode of exercise of the right to use English and French in the proceeding." (Rule 120) Although the full extent of such an order is left undefined by the Rules,[63] it is stipulated that translation of documents may be required, in which case the Court Services Branch assumes responsibility, and that the Department of the Attorney General may be required to supply simultaneous interpretation for oral hearings (Rules 121 and 122).

With respect to orders and certificates of decision issued by the Manitoba Court of Appeal, the Rules provide that they shall be in both English and French in all cases where an order of language directions has been made; otherwise they shall be in the language of the initiating document (Rule 125). Reasons for judgment and judgments of the court may also be issued in both languages where an order of language directions has been made (Rule 124).

The Rules remain silent on the issue of the language abilities of a judge sitting on an appeal initiated in French, thus implying that the use of simultaneous interpretation by an Appeal Court judge may be adequate in such a context. Appeal procedures in which French is used are very infrequent and they normally take place in a courtroom equipped with simultaneous interpretation. As of August 1995 it would appear that only one member of the Manitoba Court of Appeal is fluent in French. Where legal counsel are faced with an appeal court which must use the services of interpreters to understand pleadings in the minority official language, it is not surprising that the use of French is rare.

Ontario

Ontario has a significant legislative framework which allows for the use of French before its courts. Though largely inspired by the desire to recognize the official status and use of French in the context of civil proceedings, which will be discussed below in Part 4 of this study, the language provisions of the *Courts of Justice Act* contain elements relevant to the

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[62] Rule 113 provides for such an application:
"Where
(a) a party wishes to exercise his or her right to use a language other than that of the initiating document;
(b) a party wishes to use a language other than the language used by that party in the forum from which appeal is being taken; or
(c) testimony of witnesses or written exhibits were tendered on behalf of a party in both the English language and the French language in the forum from which appeal is being taken;
that party shall file with the registrar a notice to determine the language directions on appeal, within 14 days of service of an initiating document."

[63] At the time this rule was adopted members of the French-speaking lawyers association (AJEFM) voiced concerns that it might be in conflict with Section 23 of the *Manitoba Act, 1870*. Regulating the modalities of the use of English and French could result in a restriction of the constitutional guarantee of language freedom and hence a breach of Section 23.

criminal process as well. This is particularly true with respect to language usage in appeal proceedings, a matter not covered by the language guarantees of the *Criminal Code*.

Under the *Courts of Justice Act*, the exercise of the right to use French gives rise to what is referred to as a bilingual proceeding. Such a proceeding is conducted in accordance with a set of rules set out in the *Act*. For example, the presiding judge must be one who speaks both English and French, evidence and submissions must be recorded in the official language in which they are given, written pleadings may be in French (subject to certain territorial restrictions), judgment may be written in English or French, and the court is obliged to provide interpretation of oral evidence and submissions to a unilingual party or counsel who so requests, as well as a translation of any decision. Where an appeal is taken from a bilingual proceeding, the *Act* provides that "...a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French." We have been informed that five of the 22 appellate judges (which includes supernumerary judges) are bilingual and thus able to hear appeals in French. Other provisions applicable to bilingual proceedings apply to appeals with any necessary modifications.

With respect to trials before judge alone, an individual has an unqualified right to a bilingual proceeding upon request. In the case of jury trials this right is subject to territorial qualifications under the *Courts of Justice Act*.[64] Territorial restrictions (in the absence of all-party consent) also apply regarding the right to file French-language documents without an English translation.

While these provisions were designed for civil trials and appeals, they nevertheless provide a framework which facilitates the conduct of criminal appeals in the official language of the accused. Moreover, Subsection 126(5) of the *Courts of Justice Act* specifically declares that "[a] process issued in or giving rise to a criminal proceeding...may be written in French." No right to obtain a translation of any document or process referred to in Subsection 126(5) exists in criminal proceedings by virtue of Subsection 95(2) of the *Courts of Justice Act*. The Ontario Court of Appeal has also confirmed that, as a matter of policy, appeal proceedings from a trial held in French may also be conducted in that language as well. The use of French in criminal appeals before the Ontario Court of Appeal, both orally and in written documents, is thus a matter of choice of the accused and defence counsel.

At the trial level it is Part XVII of the *Criminal Code* which continues to provide the set of rules which prevail when an accused requests to be tried before a judge who speaks his or her official language. The fact that Ontario law recognizes the right to use French before Ontario courts generally, the exercise of which gives rise to a number of specific institutional duties as described above, cannot help but favourably influence the use of French in the criminal trial process.

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[64] A complete list of territorial restrictions can be found in Part 4.2 of the present study, at footnotes 140 and 142.

In the related area of provincial offenses, which can lead to bilingual proceedings at the request of accused persons, recent amendments to the *Courts of Justice Act* provide that "[w]hen a prosecution under the *Provincial Offences Act* by the Crown in right of Ontario is being conducted as a bilingual proceeding, the prosecutor assigned to the case must be a person who speaks English and French".[65] This provision is analogous to that found in the *Criminal Code*, which also recognizes the right of an accused to have a prosecutor who speaks his or her official language. In effect, it imposes an institutional duty upon the Crown in right of the province to take the necessary steps to ensure that sufficient bilingual prosecutorial staff is available.

Where French-language trials take place, the services of interpreters may still be needed when witnesses testify in English. When such witnesses are examined and cross-examined directly in their own language, it would appear that whispered interpretation is sometimes provided to the accused. While such procedures are not infrequent (with the accused often giving his or her consent), whispered interpretation does not allow for the translation to be officially recorded as required by the *Criminal Code*. In other cases, however, witnesses are examined in the official language of the accused, with consecutive interpretation being used to translate both the questions and a witness' response. As is the case in other jurisdictions, there is no consistent practice in this regard. It would even appear that there is a one in four chance that the accused will be given no choice in the matter and witnesses will be examined directly in their own official language.

In prosecutions under provincial law before the Ontario Court (Provincial Division), regulations[66] stipulate that whispered interpretation is provided to the defendant, unless he or she expressly requests that the whole proceedings be interpreted, in which case the interpretation is consecutive. Where a witness speaks neither official language, the language of examination, cross-examination and interpreted answers (be it English or French) is determined by the judge (based on the official language understood by all counsel) and the defendant is provided with whispered interpretation if required due to lack of comprehension.[67] Otherwise, witnesses are allowed to chose the official language in which questions will be posed.

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[65] This amendment to Section 126 of the *Courts of Justice Act* can be located at Statutes of Ontario, 1994, c. 12, Section 431.

[66] See *Regulation Re Use of French Language*, R.R.O. 1990, Reg. 185; Amended O. Reg. 681/92, in force November 16, 1992.

[67] See Section 8 of *Regulation 185*.

Notwithstanding the positive legislative framework, a recent report[68] prepared by Professor Marc Cousineau has concluded that only a small minority of French-speaking accused choose to be tried in their official language, pursuant to the provisions of Part XVII of the *Criminal Code*. Though statistics compiled by the Ministry of the Attorney General of Ontario (and made available to Professor Cousineau) may underestimate the number of French-language criminal trials, they do show that a vast difference exists between the relative size of the Francophone population of certain regions and the frequency of criminal trials conducted in French. For example, in the Ottawa region, where 18.4% of the population is French-speaking, only 3% of trials in 1992 and 5% in 1993 were conducted in French. In Cornwall, where 34% of the population is French-speaking, the proportion of trials conducted in that language in 1992 was 2% and in 1993 only 0.7%. These figures suggest very strongly that French-speaking accused are, in great numbers, discouraged from requesting trial in their official language.

In addition to the statistics provided by the provincial government, Professor Cousineau collected information from random sampling of Francophone accused and litigants at court houses situated in four regions of the province (Ottawa, Sudbury, Cornwall and Windsor). Though he did not isolate data relevant to criminal trials, the global figures he obtained show a consistent pattern of substantial underuse of French as a language of court proceedings. The number of Francophones interviewed whose trials were in English was on average 80% of the total.

Professor Cousineau's study provides evidence that the vast majority of Francophone accused do not invoke their right to be tried in French. It also explores in some depth the various factors which may explain the marked reluctance to take advantage of existing legal rights regarding the language of trial, which are considerable. The study identifies, for example, a number of institutional barriers which inhibit the use of French in the judicial system. These begin at the initial contact that an accused may have with court house staff and at his or her first appearance before a judge. It would appear that very large numbers of Francophone accused are often confronted with English-only services. In the words of Professor Cousineau's report: "The number of litigants and accused who received English-only service is disturbing because it suggests that everything happens in English in the court house and

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[68] *The Use of French Within the Ontario Judicial System: An Unrealized Right*, prepared by Professor Marc Cousineau for the Attorney General of Ontario, September 1994. The random sampling upon which the observations of this report are based do not purport to be definitive, although the pattern of underuse of the French language in the judicial system is sufficiently consistent as to raise serious concern. In the words of the report: "The aim of the project was to determine the use of French within the Ontario judicial system. We wished to obtain as complete a survey of the subject as our budget and deadlines permitted. Four regions where francophones make up a significant minority were selected for the study. We prepared and sent questionnaires to the legal clinics as well as to French-speaking lawyers, judges and Crown Attorneys in the four regions. In each city, a good number of accused and litigants were consulted.... The report does not claim to be a scientific survey. Some of the groups analyzed are too small to be able to draw conclusions of a scientific nature.... Even though the study results are not in the nature of a scientific survey, they do offer insight into the state of French within the judicial system." See page 123 of the report.

that francophones must assert themselves to receive French language services. Someone who is dealing with the anxiety caused by a criminal charge cannot be expected to insist on French language services."[69]

It should be remembered, however, that Section 5 of the *French Language Services Act*) recognizes the right to French language services from the Ministry of the Attorney General and courthouses in 23 designated areas. While the law is clear in this regard, the manner in which it is being implemented may give rise to the difficulties experienced by those Francophone accused interviewed by Professor Cousineau. The need to make a special request to use French, as well as perceived resistance on the part of some court house staff, may deter Francophone accused from using their official language.

First Appearance Court (and Plea Court) were also identified as too often operating exclusively in English because of a lack of bilingual personnel. Requests to proceed in French inevitably result in significant delays (the time to summon an interpreter), leaving the impression of a disruption of normal procedures. This can raise in the minds of accused persons emotions ranging from embarrassment to fear of being discriminated against for having asked for French-language proceedings. Moreover, duty counsel assigned by legal aid (who are present to give advice to unrepresented accused) are very often unilingual in English and thus unable to provide any service in French. This works to create an atmosphere were English is presumed to be the normal language of procedures, i.e., the normal language of the law.

This impression is also conveyed in estimates provided by the Ontario Ministry of the Attorney General to the effect that 50% of hearings involving guilty pleas and subsequent sentencing of accused persons who request that procedures take place in French are conducted with the assistance of interpreters.

Procedural delays caused by a request to use French (in particular if the matter is to proceed to trial) may also increase legal costs by adding to time-related professional fees. Where this is anticipated an accused may well attempt to decrease costs by foregoing any right to have proceedings conducted in French. In addition, an accused person's decision to proceed in English may be motivated by the limited numbers of French-speaking defence counsel available and the desire to be represented by the best lawyer possible regardless of language. As Professor Cousineau's report observes: "Wanting to be represented by a competent lawyer is hardly matter for criticism. The number of francophone lawyers in the four regions is small compared to anglophone lawyers, and they have usually been in practice for fewer years, in large part because the University of Ottawa has only recently been offering a French common law program. We can only hope that over time, francophone lawyers will come to enjoy the same reputation as their anglophone colleagues."[70]

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[69] See Cousineau, *supra*, note 68 at 27..

[70] See Cousineau, *supra*, note 68 at 76.

While the above factors work together to deter the use of French in criminal proceedings, one might hope that encouragement from practising lawyers and the judiciary would counterbalance such effects. Regrettably, the report not only gives evidence of a reluctance to promote the exercise of existing rights, but also identifies a failure even to inform many accused Francophones of their right to proceedings in French. Global figures cited in the report indicate that approximately 80% of litigants and accused (randomly consulted) had not been encouraged by their lawyer to request proceedings in French. Even when one considers only litigants and accused represented by Francophone lawyers, the data collected by the report indicate that fully 70% were not encouraged to request proceedings in French.

Professor Cousineau's report, though limited in its statistical basis, does provide food for thought regarding the infrequent exercise of existing language rights in the criminal process. Phrased at the most general level, the report underscores the importance of actively offering legal services in the French language. Its many recommendations seek, in large part, to fill the gap caused by the absence of an active offer of service in the minority language. These range from recommendations to increase the numbers of French-speaking judges, justices of the peace and masters of the Ontario Court of Justice, and recommendations to ensure that First Appearance Court and Plea Court (and court house services in general) are at all times able to operate bilingually, to recommendations about the need to ensure the presence of bilingual legal aid duty counsel and Crown counsel appearing in the latter courts.

The apparent infrequency with which Francophones request to be tried in French helps to explain the very small number of appeals before the Ontario Court of Appeal which are actually conducted in French. Information supplied by the Executive Legal Officer indicates that in 1993 only nine French-language appeals were filed. The corresponding figure for 1994 (up to the month of November) is two, although the total could rise, for the court is sometimes only informed of the intention to proceed in French when counsel seeks a date for the hearing of the appeal.

We are also informed that appeal proceedings conducted in both official languages are rare; and only very infrequently has the Court of Appeal arranged for simultaneous translation of argument for the benefit of counsel who may be unilingual. Where French is the language in which an appeal is conducted the judgment of the court is issued in that language as well.

Saskatchewan

The Supreme Court of Canada ruled in 1988 that the right to use either English or French before the courts of Saskatchewan still existed by virtue of Section 110 of the *North-West Territories Act*, which was in force when that province entered Confederation in 1905.[71] These provisions were analogous to those found in Section 133 of the *Constitution Act, 1867*

[71] *R. v. Mercure* [1988] 1 S.C.R. 234.

and Section 23 of the *Manitoba Act, 1870*. As such, they gave official status to both languages before all provincial courts.

While the scope of language rights recognized by these provisions does not impose any strict obligation on the State to provide judges and other court personnel who speak the official language of an accused person, they do have practical consequences once they are invoked and applied. Moreover, such language rights have been found to apply to all administrative tribunals exercising quasi-judicial powers. No doubt with this in mind, the government of Saskatchewan exercised its legislative authority regarding these matters (which was recognized by the Supreme Court) and enacted The *Language Act*.[72] This *Act* abolishes for civil matters and provincial penal proceedings the provisions of the previous *North-West Territories Act* (continued in force after 1905) and provides a legislative basis for a narrower set of language rights applicable to the judicial system. In effect, Subsection 11(1) of the *Language Act* permits the use of either English or French before designated courts (which include all courts exercising criminal jurisdiction).[73] The repercussions of such language freedom, however, are not resolved by provisions in the *Act*. The legislation simply recognizes that the courts themselves may make rules for the purpose of carrying into effect the right to use either language before the designated courts or for the purpose of providing for any matters not fully or sufficiently provided for in Subsection ll(1) of the *Act* or in any existing rules of court.

Although the rules of procedure before the courts of Saskatchewan have been printed and published in both English and French (the *Act* having required this to be done before January 1, 1994), it would appear that no substantive provisions have been adopted regarding the inevitable administrative adjustments required by a bilingual court system. For example, nothing clarifies how the language of procedures should be established, nothing is said about the linguistic abilities of judges or other court personnel, nor is there any reference to the provision of translation or interpretation. In the face of such silence it is well to remember the observations made regarding application of Section 133 by the Supreme Court of Canada: "...[I]t is one thing to grant individuals a right, and quite a different thing for the public authorities who are legally bound to recognize such rights to create the positive environment in which these rights can be most effectively exercised."

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[72] See: *An Act Respecting the Use of the English and French Languages in Saskatchewan*, Statutes of Sask. c. L-6.1

[73] Subsection 11(1) reads:
"Any person may use English or French in proceedings before the courts entitled as:
(a) the Court of Appeal;
(b) the Provincial Court of Saskatchewan;
(c) Her Majesty's Court of Queen's Bench for Saskatchewan;
(d) the Surrogate Court for Saskatchewan;
(e) the Traffic Safety Court of Saskatchewan; or
(f) the Unified Family Court of Saskatchewan."

At the same time as recognizing by statute the right to use either English or French before its courts, Saskatchewan also abolished mandatory bilingualism in the legislative process (provided for as well under Section 110 of the *North-West Territories Act* in force in 1905) and declared all its past statutes and regulations, adopted in English only, to be valid. The obligation to enact, print or publish past and future statutes in both languages was replaced by a purely discretionary power to do so, vested in the executive arm of government. While more will later be said regarding the availability of provincial statutes in both official languages (see Part 4 of this study, Courts of Civil Jurisdiction), it is worth repeating here that denial of access to legislation in the minority official language constitutes a major barrier to the use of that language before the courts. In other words, one could very well be deterred from using French in any given case if French-language versions of relevant legislation were unavailable.

The prosecution of provincial offences in Saskatchewan (under English-only statutes) illustrates the incoherence of granting a right to use either official language before the courts, on the one hand, and the refusal to provide for bilingual publication of legislation on the other. Indeed, the Saskatchewan Provincial Court has recently underscored the unfairness of such a situation in the case of *R. v. Rottiers*.[74] At issue was the unavailability of the *Highway Traffic Act*, which was related to the prosecution of Rottiers for violation of a municipal bylaw. Rottiers invoked his right to use French before the court, as provided for under the Saskatchewan *Languages Act*, but his request to be provided with a copy of the *Highway Traffic Act* in French could not be complied with by the Crown.

The Provincial Court judge found "...that a person who elects to speak French at trial in Saskatchewan must have access to relevant legislation in French. Without this guarantee the right to use French at trial is hollow and illusory. Certainly, the person who litigates in French will not be in so strong a position before the courts in Saskatchewan as the person who litigates in English." He also ruled that the failure of the government of Saskatchewan to take reasonable steps to ensure that French-language versions of relevant legislation were available gave rise to significant unfairness to the accused. As he said: "The accused has a clear procedural disadvantage here in comparison to the Crown which has elected to conduct its case in English." While this decision was overturned on appeal, it serves to remind us that positive measures must be taken in order to facilitate the exercise of a right to use a minority official language before the courts.

The legislative framework in Saskatchewan clearly envisages the formulation of rules and practices which facilitate the exercise of the right to use either official language before the courts, including courts exercising criminal jurisdiction.[75] This is also anticipated in Section 533 of the *Criminal Code*, as explained above. Nevertheless, in the parallel area of

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[74] *R. v. Rottiers*, (20 July 1994), (Sask. Prov. Ct.) [unreported]; overturned on appeal (19 January 1995), (Sask. Q.B.) On June 6, 1995, the Saskatchewan Court of Appeal dismissed Mr. Rottiers' appeal.

[75] See Subsection 11(2) of the *Languages Act* of Saskatchewan.

provincial offences, there is an impression among Francophone lawyers that the provincial Department of the Attorney General advises its prosecutors to use English at all times, even where an accused proceeds in French. Should this be the case, one can only wonder how effectively the provisions of Part XVII of the *Criminal Code* are implemented in Saskatchewan. In any event, the absence of any visible initiatives to encourage the use of French before the courts of Saskatchewan can only have the effect of inhibiting the use of the minority official language.

Alberta

The judgment of the Supreme Court of Canada in 1988 in *R. v. Mercure*, regarding the continued existence of language rights rooted in Section 110 of the *North-West Territories Act* in force in 1905, had direct application to the province of Alberta. The provincial government therefore moved quickly to abolish[76] those language rights in civil matters and provincial penal proceedings which were applicable to its courts and legislative process and which had been carried over into the law of Alberta when it entered Confederation. As already mentioned, these rights had been modelled on provisions found in Section 23 of the *Manitoba Act, 1870.*

At the same time as abolishing these historic provisions, the *Languages Act* of Alberta recognized a greatly diminished right to use French before a certain number of courts, including those of criminal jurisdiction. In effect, Subsection 4(1) of the *Languages Act* provides that "any person may use English or French in oral communications in proceedings before the following courts: (a) the Court of Appeal of Alberta; (b) the Court of Queen's Bench of Alberta; (c) the Surrogate Court of Alberta; (d) the Provincial Court of Alberta."

The filing of written documents in French is, however, omitted from the legislation, thus making it subject to the administrative practices of the courts themselves. As a result, the statutory right to use French before the courts is considerably more restricted than under equivalent legislation in Saskatchewan. Moreover, the *Languages Act* makes no provision for the adoption or publication of provincial statutes or regulations in the French language.[77] Without a statutory right to submit documents to Alberta courts in French, and deprived of access to provincial legislation in that language, a Francophone litigant may very well find that the statutory right to speak French before Alberta courts is of little consequence.

There may, of course, be practical repercussions which flow even from the oral use of either official language before Alberta courts. This is implied by the very terms of Subsection 4(2) of the *Languages Act*, which gives to the Lieutenant Governor in Council the power to

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[76] *Languages Act*, Statutes of Alberta, c. L-7.5. The abolition of rights found in Section 110 of the *North-West Territories Act* (as it stood in 1905) can be found in Section 7 of the *Act.*

[77] Section 3 of the *Languages Act* provides that "all Acts and regulations may be enacted, printed and published in English". This simply confirms the existing practice of unilingual legislation.

"make regulations for the purpose of carrying into effect the provisions of this section, or for any matters not fully or sufficiently provided for in this section or in the rules of those courts already in force." No regulations under this power have ever been adopted, nor have any changes been made to the Alberta *Rules of Court*. Had this been done, thought could have been given to measures necessary to ensure full implementation of Part XVII of the *Criminal Code*. While the *Languages Act* of Alberta cannot purport to interfere with the provisions of the *Criminal Code* of Canada, it does create a general context which can have an impact on the full implementation of Part XVII of the *Code*. This is particularly true when one considers that active offer of service in the minority language is often an important step towards overcoming institutional barriers to the use of the minority official language before courts of criminal jurisdiction.

The prosecution of provincial offences, though not strictly a matter of criminal procedure, can often provide an opportunity to create an environment receptive to the use of the minority official language. Unfortunately, regulations adopted by Alberta in 1989 specifically exclude the application of the provisions of Part XVII of the *Criminal Code* to any prosecution under a provincial statute.[78] The language rights of an accused person will therefore vary considerably depending on whether the proceedings are criminal or quasi-criminal in nature.

It would appear that criminal prosecutions before the Provincial Court rarely take place in French. One of the reasons advanced for the rarity of French language trials is the noticeable lack of bilingual Provincial Court judges. The Association des juristes d'expression française de l'Alberta has expressed its concern in this regard, pointing out that only two Provincial Court judges are capable of hearing a trial conducted in French, one in Calgary and one in Edmonton. The possibility of a trial in French in either southern or northern Alberta is thus dependent on the availability of a single judge, a factor which not only can produce undesirable delays, but also leaves little room for choice. Those who proceed in English clearly do not face these constraints.

The Attorney General of Alberta would appear to believe that the existing judicial complement is sufficient to handle what is considered to be the relatively infrequent occurrence of a French-language hearing. Unfortunately, the infrequent occurrence of French-language hearings may very well be the result of institutional barriers to the use of

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[78] See Alberta Regulation 233/89. Although the *Provincial Offences Procedure Act* adopts most of the *Criminal Code* provisions applicable to summary procedures, Section 12(1) of this *Regulation* excludes the application of Part XVII. The constitutionality of this regulation, among other things, was contested unsuccessfully in the case of *R. v. Klassen* (heard in Provincial Court on September 14, 1995), a case involving a unilingual parking ticket issued by the RCMP and where the accused had requested to be tried in the French language. The argument was made that the exclusion of Part XVII of the *Criminal Code* to provincial prosecutions is contrary to freedom of expression under Section 2 of the *Canadian Charter of Rights and Freedoms*. The same issue was argued unsuccessfully in the case of *R. v. Fréchette*, heard in provincial court on August 15, 1995. Both cases also argue that the exclusion of Part XVII of the *Criminal Code* is a violation of Section 4 of the *Language Act* of Alberta as well, which recognizes the right to communicate orally in either English or French before Alberta courts.

that language within the judicial system. Perhaps only the most tenacious and committed can overcome those barriers, thus leaving the impression that the demand for French-language trials is small.

Where trial does proceed in French the anomaly of charges being presented in English, which has already been documented in other provinces, occurs in Alberta as well. The form routinely used is in bilingual format, but the specific charges are written in English only. It would appear that it is the practice of the courts to translate the charges for the accused upon first appearance. Crown prosecutors have the discretion to produce an information in French, which has been done in the past, but no general policy in this regard exists.

The question of added expense has also been raised by French-speaking lawyers in Alberta. For example, there is a complete absence of personnel capable of transcribing the sound recording of a French-language preliminary inquiry or trial. As a result, the sound recording must be sent to Ottawa or to the province of Quebec, a procedure which can double the costs of producing a transcript. Moreover, considerable delays are experienced (up to several months) before a proper transcript is produced. Such delays and added expenses are good examples of institutional barriers to the use of French before the courts of criminal jurisdiction in Alberta. The commitment to hiring at least one fully bilingual stenographer would constitute a positive measure facilitating the use of French in the judicial system.

Appeals before the Court of Appeal of Alberta are inevitably encumbered by the delays and increased costs just mentioned, even though it would appear that five of its members are able to preside at a hearing in French. In addition, the absence of any provisions in Part XVII of the *Criminal Code* applicable to appeals, and the narrow status of French, as only an oral language, before Alberta courts (pursuant to the *Languages Act*), creates a vacuum when it comes to the use of French for appeal purposes. Fortunately, the Alberta Court of Appeal has, as a matter of informal practice, accommodated the use of French in proceedings before it. While such proceedings are rare, the Court of Appeal has recently allowed the production of the French-language transcript of evidence given at trial and assembled a bench of three bilingual judges to hear the appeal.[79] Nevertheless, the factums prepared and arguments before the court were in English due to the fact that Crown counsel was unilingual in English.

The Court of Queen's Bench sitting on appeal has also accommodated the use of French, despite the lack of a statutory basis for the right to use French in written documents. It also has the capacity to hear a criminal trial conducted in French, though such trials are extremely rare.

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[79] See *R. v. Tremblay* (8 April 1994), appeal number 9203-0902 (Alb. C.A.).

British Columbia

There are no constitutional or provincial statutory provisions which recognize the right to use either official language before the courts of British Columbia. A general provision in the Rules of Court of British Columbia establishes that all written documents must be in the English language,[80] though this would not be applicable to courts of criminal jurisdiction if it conflicted with provisions in the *Criminal Code* of Canada. In this regard, it will be remembered that Section 530.1 of the *Criminal Code* recognizes the right of accused and counsel to use either official language for all purposes during the preliminary inquiry and trial. Where this involves written submissions or documentary evidence either official language could clearly be used regardless of the provision found in the British Columbia *Rules of Court*.

Beyond the preliminary inquiry and trial, i.e., before the British Columbia Court of Appeal, the *Criminal Code* provisions do not apply, leaving the way open for the application of the *Rules of Court* which require all written documents to be submitted in English. While the rule in question would not appear to exclude outright the use of French, it could certainly be invoked to require an authentic English translation, presumably paid for by a party who filed a document in the French language.

The Provincial Court of British Columbia has informed us that three judges sitting at that level are capable of conducting trials in French. Language training of judges has been available through the Office of the Commissioner for Federal Judicial Affairs. In addition, the Department of the Attorney General for British Columbia has trained and appointed bilingual court staff, including sheriffs, clerks and recorders. The system in place is said to permit the holding of criminal trials in French in any Provincial Court in the province. Where this occurs, judges and bilingual staff must travel to the locality where trial is to take place. Such trials have in fact been held in Dawson Creek, Quesnel, Victoria and Kelowna. French-speaking court room staff are centred in New Westminster and criminal trials arising out of crimes committed in the Lower Mainland are routinely transferred there. Such transfers also expedite the hearing of trials in French, due to the much greater number of unbooked courtrooms which are available in New Westminster. We have therefore been informed that a request for trial in French does not result in any appreciable delays.

The Fédération des Francophones de la Colombie-Britannique has brought to our attention a number of persistent problems related to French-language proceedings.[81] For example, while the length of time between the setting down for trial and the trial itself may not raise

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[80] Rule 4(2) reads, in part: "Unless the nature of the document renders it impractical, every document prepared for use in the court shall be in the English language...."

[81] The Fédération des francophones de la Colombie-Britannique, in a report to be published entitled "L'Accès à la justice en français," makes some 18 recommendations designed to rectify shortcomings in the criminal justice system and improve the pertinent sectors of the administration of justice.

serious difficulties, delays at other stages of the process appear to exist. In this regard, first appearance courts in British Columbia operate virtually exclusively in English. Where an accused requests trial in French at first appearance, the matter must be adjourned for approximately three weeks in order to allow for the preparation of a timetable relevant to trials conducted in New Westminster. Accused and counsel must therefore reappear three weeks later simply to establish a date for the trial. In addition to lost time, this type of delay results in increased legal costs related to the supplementary hours which defence counsel must allot to the case. Additional legal costs are also incurred at trial if defence counsel must travel to a jurisdiction outside the area where he or she normally practices.

Access to information about the linguistic abilities of defence counsel also impede the ability of Francophone accused to use French within the criminal justice process. Accused persons are seldom informed early in the process of their right to be tried in their official language. For example, forms used to request legal aid make no reference, so we are informed, to the right to choose either English or French as the language of trial, nor is there any concerted effort to maintain an up-to-date list of defence counsel who are able to plead in French. Should an accused request to be represented by French-speaking counsel, it would appear that steps are taken to satisfy the request on an *ad hoc* basis. While the lack of defence counsel able to plead in French is a very real problem (and in itself raises the issue of access to language training for members of the legal profession in general), the resources currently available should be better identified and relevant information made routinely available to accused persons.

As in other jurisdictions, it is difficult to determine if accused persons are always informed of their right to trial in either official language. Concern has been expressed that defence counsel do not frequently provide such information to prospective clients, nor does it appear that police forces in the province make the effort to apprise accused persons of their rights in this regard. It would appear that even judges raise the matter only when it becomes apparent that the accused has significant difficulties with the English language. The only routine step of any significance which appears to be taken concerns a notice in both official languages which is posted on the door of each remand court. It reads:

> You may apply, pursuant to Section 530 of the *Criminal Code*, to have your trial in whichever of the two official languages of Canada (English or French) is your language.
>
> You must apply to the court before -
>
> (1) Your trial date is set, if you do not have an election; or
> (2) Your election, if you elect trial in this court; or (3) Your committal for trial, if you elect, or are deemed to elect, trial in the Supreme Court.

In addition, some judges will provide an oral explanation of the language rights set out in the written notice referred to above where it appears that an accused person's official language may be French or that an accused person may best give testimony in French.

While there are no statistics on the number of French-speaking accused who appear before the Provincial Court of British Columbia each year, we are informed that only nine trials were conducted in French in 1993, out of a total of 43,872. Since the coming into force of Section 530 of the *Criminal Code* in 1990 there have been 51 criminal trials or preliminary enquiries in Provincial Court conducted principally in French, five trials in the Supreme Court of the province, and no appeals.

The organization of jury trials in British Columbia has underscored problems in identifying potential jurors capable of following the procedures in French. In the absence of any official mechanism for determining the language abilities of potential jurors, recourse has been made in the past to the list of subscribers to the French-language newspaper *Le Soleil de la Colombie-Britannique*. Other names which appeared to be French in origin were also taken from the Electoral List and added to the list of potential Francophone jurors. While this has made it possible to respond to the needs of the very small number of jury trials, it would appear that any increase in the number of requests for trial by jury in French would reveal serious deficiencies in the present situation. In order to develop a larger and more diversified bank of potential Francophone jurors, some thought could be given to making the necessary changes under the *Elections Act* of the province to provide for the identification of the official language or languages spoken by an elector.

In the context of a trial before a judge who speaks the official language of the accused, interpretation is provided when necessary to witnesses (who testify in the official language in which they are most comfortable). There have been some instances when interpretation was provided to the English-speaking counsel of a French-speaking accused. It would appear that where the procedural language is French, English-speaking witnesses are examined in the French language with the assistance of an interpreter. Where both languages are used in the procedures, witnesses may be examined in English and their answers translated into French for the benefit of other participants in the trial (primarily the accused).

Where French is the procedural language, court files are maintained in that language. Where circumstances require, some court documents are maintained in both official languages. Transcripts of preliminary inquiries are issued in the language used by the participants in court. The same rule applies to trial transcripts, which are prepared upon request by one of the parties.

Northwest Territories

Although it comprises fully one-third of Canada's land mass, the Northwest Territories are sparsely settled. The 1991 census showed a total population of 57,649. People of Aboriginal descent constitute the majority of the population (61% of the total) and are

territorially concentrated in various regions. For example, the Inuit form a substantial majority in the Eastern Arctic, representing approximately 85% of that region's population. They are also by far the largest group of Aboriginal people across the Northwest Territories (approximately 63% of the native population). The territorial dominance of the Inuit is reflected in the recent agreement in principle with the federal government to divide the Northwest Territories into two regions, the Eastern Arctic to become (April 1, 1999) the new territory of Nunavut.[82]

The Dene people are concentrated in the Mackenzie Valley, representing 46% of the population in the Fort Smith region, Yellowknife excluded. The non-Aboriginal population is to a great extent concentrated in Yellowknife, where it constitutes 83% of the city's population. The city of Yellowknife thus contains 56% of all non-Aboriginal people in the Northwest Territories.

While English is the dominant non-Aboriginal language, there is great linguistic diversity in the Aboriginal population itself. Among the Dene people there are five spoken languages: Chipewyan, Dogrib, Gwich'in, North Slavey and South Slavey. Three Inuit languages are also spoken in the Northwest Territories: Inuktitut, Inuvialuktun and Inuinnnaqtun, as well as dialects of them. The Cree language is also present in the Aboriginal population of the Fort Smith region.

The French-speaking population represents 7% of the total non-Aboriginal population (2.4% of the total population of the Northwest Territories). In addition to being present in Yellowknife, Hay River and Fort Smith, Francophone communities are also found in the Eastern Arctic and at Inuvik.

Despite the linguistic diversity of the Northwest Territories, government institutions and the courts operated for many years exclusively in English. Serious questions were raised in the early 1980s about the legality of such practices, in particular regarding the status of Canada's two official languages. Various arguments were raised to support the proposition that mandatory bilingualism (English/French) applied to the legislative process and that both English and French enjoyed official status before Territorial courts. For example, it was argued that Territorial ordinances were delegated legislation of the Parliament of Canada and hence subject to Section 133 of the *Constitution Act, 1867*. It was also argued that public institutions in the Northwest Territories were an extension of the federal government and thus subject to the same language guarantees applicable at the federal level by virtue of provisions in the *Canadian Charter of Rights and Freedoms*.

The controversy which arose at that time was resolved by the adoption in 1984 of a Territorial ordinance entitled the *Official Languages Act* (later modified), which announces in

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[82] See the *Nunavut Act*, S.C. 1993, c. 28. The date for the creation of Nunavut can be set earlier by order of the Governor in Council.

its preamble that the Northwest Territories are, in addition to "desiring to establish English and French as the official languages of the Territories", also "committed to the preservation, development and enhancement of the Aboriginal languages". Given the demographics of the Northwest Territories, it is not surprising that reflections about the status of English and French should have also raised the question of the legal status of Aboriginal languages. It is of course true that the issues facing Aboriginal languages, such as the efforts required to preserve them from further erosion and the need to introduce programs for their development, are distinct in many ways from those relevant to English and French. Nevertheless, legislative action which establishes the framework for official languages policy must inevitably address the concerns and expectations of the Aboriginal people of the Northwest Territories.

The dual purpose of the original *Act*, as set out in the preamble, was also reflected in its basic structure and substantive provisions. For example, Part II of the original *Act* is devoted to the status accorded English and French, as well as rights and obligations regarding their use. Among other things, it declares that "English and French are the official languages of the Territories and have equality of status and equal rights and privileges as to their use in all institutions of the Legislative Assembly and Government of the Northwest Territories."[83] The *Act* also recognizes, in terms identical to those found in Section 19 of the *Canadian Charter of Rights and Freedoms*, that English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the legislature of the Northwest Territories.

The use of either official language before the courts is also supported by the mandatory use of both languages in the printing and publishing of all statutes and other acts of the Legislative Assembly.[84] A rule of mandatory bilingualism for judicial decisions (where a question of law of general public interest or importance is determined, or where both languages were used at trial) is included in the *Act* as well.[85]

Part I of the original *Act* declared that Chipewyan, Cree, Dogrib, Loucheux, North Slavey, South Slavey and Inuktitut were recognized as the official Aboriginal languages of the Territories. However, in contrast to provisions relevant to the use of English and French, the manner in which those languages were to be used for all official purposes of the

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[83] See the *Official Languages Act*, Revised Statutes of the Northwest Territories, 1988, c. O-1. The declaration of the official status of English and French is found in Subsection 8(1) of the *Act*. The freedom to use either language before the courts is found in Section 12.

[84] This requirement is found is Section 10 of the *Act* and is modelled on various constitutional provisions to the same effect, such as Section 133 of the *Constitution Act, 1867*.

[85] See Section 13 of the *Act*. This provision is modelled on those found in the *Official Languages Act* of Canada.

Territories was left to be determined by regulation.[86] With respect to the use of those languages in the judicial system, the *Act* foresaw the adoption of regulations determining which of the existing rights applicable to English and French would also be recognized for official Aboriginal languages.[87]

At the time of the original ordinance establishing the *Official Languages Act* of the Territories, the Parliament of Canada amended the *Northwest Territories Act* so as to require its consent for any changes to the ordinance which might adversely affect the protected rights.[88] While the amendments to the *Northwest Territories Act* allow the Territorial government to add to the rights set out in the ordinance, they do not allow such rights to be diminished.

Substantial amendments were made to the *Official Languages Act* in 1988. The distinction between official languages (being English and French) on the one hand, and official Aboriginal languages on the other, was abolished. Section 4 of the *Act* now declares that "Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut and Slavey are the Official Languages of the Territories." Slavey is defined as including North Slavey and South Slavey and Inuktitut as including Inuvialuktun and Inuinnaqtun. The official languages are said to "have equality of status and equal rights and privileges as to their use in all institutions of the Legislative Assembly and Government of the Territories", although this is subject to any regulations adopted under the *Act*.[89]

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[86] This is found in Section 5 of the *Official Languages Act* found in the 1988 Revised Statutes of the Northwest Territories:

> The Commissioner, on the recommendation of the Executive Council, may by regulation prescribe the use of an aboriginal language in the Territories including the use of an aboriginal language for all or any of the official purposes of the Territories.

[87] See Subsection 6(a) of the *Official Languages Act*, ibid.

[88] This amendment to the *Northwest Territories Act* can be found in: Revised Statutes of Canada, 1985, 4th Supplement, Chapter 31, Section 98. The full text reads as follows:

> 43.1 Subject to section 43.2, the ordinance entitled the *Official Languages Act*, made on June 28, 1984 by the Commissioner in Council, as amended on June 26, 1986, may be amended or repealed by the Commissioner in Council only if the amendment or repeal is concurred in by Parliament through an amendment to this *Act*.
>
> 43.2 Nothing is this Part shall be construed as preventing the Commissioner, the Commissioner in Council or the Government of the Territories from granting rights in respect of, or providing services in, English and French or any languages of the aboriginal peoples of Canada, in addition to the rights and services provided for in the ordinance referred to in section 43.1, whether by amending the ordinance, without the concurrence of Parliament, or by any other means.

[89] This is found in Subsection 8(1) of the amended *Act* [R.S.N.W.T. 1988, c. 56 (Supp.), s.6]:

> To the extent and in the manner provided in this *Act* and any regulations under this *Act*, the Official Languages of the Territories have equality of status and equal rights and privileges as to their use in all institutions of the Legislative Assembly and Government of the Territories.

Mandatory bilingualism (English/French) in the publication and printing of statutes and regulations is unaffected by the amendments, although the *Act* now provides that "[t]he Commissioner in Executive Council may prescribe that a translation of any *Act* shall be made after enactment and be printed and published in one or more of the Official Languages in addition to English and French." This provision foresees the development of multilingual statutes, but no regulations regarding the matter have yet been adopted.

The amended *Act* also provides that any of the Aboriginal languages may be used in Territorial courts, without at the same time allowing explicitly for their use in any pleading or process.[90] It also requires that a sound recording of all final decisions, orders and judgments shall be made in one or more of the official languages other than English or French. Copies of such sound recordings are to be made available to any person on reasonable request where a question of law of general public interest or importance is involved and where access is considered practicable in the circumstances.[91]

Part III of the amended *Act* establishes the office of the Languages Commissioner of the Northwest Territories. The general duty of the Commissioner is to ensure that the rights, status and privileges of each of the official languages are recognized by government institutions and that the spirit and intent of the *Official Languages Act* are respected.[92]

Both the original and the amended *Act* foresaw the possibility of measures being needed to facilitate the exercise of language rights. Preserving the language of the original ordinance, the amended *Act* declares that the Government of the Northwest Territories may enter into agreements with the Government of Canada (or any other body or person) respecting the implementation of the *Act* or any regulations made thereunder.[93] It also provides that the Commissioner, on the recommendation of the Executive Council, may make regulations respecting any matter that the Commissioner considers necessary to implement the right to

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As applied to English and French, the government of the Northwest Territories would not appear to have the authority to diminish their equality of status and equal rights and privileges (as set out in the original ordinance establishing the *Official Languages Act* of the Territories) without the consent of Parliament. The principle of equality as applied to English and French could therefore not be subject to the qualification expressed in the phrase "to the extent and in the manner provided in...any regulation" under the *Act*.

[90] The actual wording of Subsection 12(2) of the *Act* is: "Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey may be used by any person in any court established by the Commissioner acting by and with the advice and consent of the Legislative Assembly." This differs considerably from the right to use English or French "in any pleading in or process issuing from any court established by the Legislature".

[91] See Subsection 13(4) of the amended *Act*.

[92] See Subsection 20(1) of the amended *Act*.

[93] See Subsection 27 of the amended *Act*.

use any of the official languages before the Territorial courts, as guaranteed under Section 12 of the *Act*.[94]

Since 1984, federal assistance has taken the form of the *Canada Northwest Territories Co-operation Agreement for the French and Aboriginal Languages in the Northwest Territories*. The most recent one is dated February 28, 1995 (being a multi-year agreement). Through this vehicle the federal government has provided substantial financial assistance to meet the dual purpose of the *Official Languages Act* of the Northwest Territories; that is to say, "to enable and encourage the use of Aboriginal languages in the home, in the school, and in the community, thereby contributing to the revitalization of Aboriginal languages as official languages in the Northwest Territories", and "to develop and provide French language services as required by the *Official Languages Act* of the Northwest Territories and to generally support activities that contribute to the development of the Francophone community in the Northwest Territories and thereby supporting the French language" (see Clause 3 of the *Agreement*).

Aboriginal languages clearly need a set of supportive and developmental programs which are linked to the special needs of such languages. Both the *Official Languages Act* of the Northwest Territories and the *Co-operation Agreement* recognize these realities. With regard to French, however, emphasis can legitimately be placed on measures necessary to ensure respect for its official status, whether this is before the courts or in legislative acts. There is no need to revitalize French as a language *per se*, but there is a need to take concrete steps which allow for its use in a variety of institutional settings.

Regarding the implementation of rights set out in the *Act* and applicable to the courts in the Territories, we are informed that judicial and support staff resources are adequate to provide for proceedings in either English or French in the Territorial courts. However, the demand for criminal proceedings in French is very small. No precise statistics are kept regarding the number of Francophones appearing before the courts each year, nor of the number of trials held in French. One estimate we received suggested that no more than 50 out of 20,000 matters would be handled in French in the Territorial and Justice of the Peace Courts. (The vast majority of these estimated 50 matters would be heard in the Eastern Arctic, where a proportionally large number of Francophones live.) Another estimate suggested that around 20 criminal matters are heard in French on a yearly basis. We have been informed that perhaps one matter on appeal has been pleaded in French in the last few years, the case having been heard in Alberta. The Court of Appeal of Alberta often acts as the Court of Appeal for the Northwest Territories.[95]

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[94] See Subsection 28 of the amended *Act*.

[95] The *Judicature Act* establishes the Northwest Territories Court of Appeal. See R.S.N.W.T. 1988 c. 62 (Supp.) and c. 100 (Supp). Subsection 16(1) provides:

> The Court of Appeal shall be composed of a Chief Justice and the other justices of appeal that are appointed by the Governor in Council from among the judges and supernumerary judges of the

One of the reasons advanced for the lack of information about the numbers of French-speaking accused persons appearing in the Territorial Court is their marked tendency to proceed in English. For the most part Francophone bilingual accused are able to turn to English, especially since most defence counsel in the Northwest Territories are unilingual in English. This is particularly true in Yellowknife.

Although no regulations or written policies have been adopted by the Territorial government relevant to the implementation of Part XVII of the *Criminal Code*, administrative measures have been taken to appoint deputy judges who normally sit on courts in Quebec and New Brunswick. The court reporter present at criminal trials and preliminary inquiries held in French usually comes from the Ottawa region. With respect to Crown prosecutors (the federal Department of Justice has the jurisdiction to conduct criminal prosecutions), measures have been taken to ensure a bilingual capability. For example, a bilingual prosecutor is stationed in Iqaluit, as well as two full-time and one part-time prosecutors in the city of Yellowknife. Where necessary, federal Crown attorneys in Montreal and Ottawa are also available to assist in prosecutions in the Northwest Territories. In Iqaluit (Eastern Arctic), three to four weeks annually are set aside in the schedule of the Territorial Court for proceedings in French. Elsewhere requests for proceedings in French are dealt with on an *ad hoc* basis, although the demand is very small.

The issues relevant to the use of Aboriginal languages in the courts of the Northwest Territories are of a quite different order. No reasonable prospect exists at the moment for providing judges or prosecutors who speak any of the Aboriginal languages fluently.[96] The most pressing concern is the training and availability of interpreters who can assist a court to understand the testimony of witnesses or accused persons who speak an Aboriginal language. Until recently, the Territorial Department of Justice maintained a Legal Interpreting Program (fully funded under the *Canada-Northwest Territories Co-operation Agreement*) whose aim was to train Aboriginal-language speakers as court interpreters. Without reliable interpretation, Aboriginal people appearing before the Territorial courts face serious disadvantage. Moreover, a language barrier deepens the impression that the court system is foreign and not really an integral part of one's community. The need for the assistance of interpreters is apparent in the number of hours of interpretation logged during the fiscal year 1993-94, which ranges from 1,324 hours of Inuktitut, 366 of Dogrib, 265 of North Slavey, to 176 of Chipewyan. Cuts in funding under the Co-operation Agreement for French and Aboriginal Languages have affected this valuable program. In addition to decreased funding,

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Appellate Division of the Supreme Court of Alberta, the judges of the Appellate Division of the Supreme Court of Saskatchewan, and the judges of the Supreme Court and the ex officio judge of the Supreme Court of the Northwest Territories.

[96] It should be noted that the *Jury Act* of the Northwest Territories allows a person who speaks an official Aboriginal language to serve as a juror without being fluent in English or French. See the amendment to the *Jury Act* found at: R.S.N.W.T. 1988, c. 125 (Supp.), s.2. Thus a jury can be composed of persons who speak the Aboriginal language of an accused, though interpretation would still be needed for the judge, Crown prosecutor and other legal counsel.

responsibility for this program has been transferred to the Arctic College in Fort Smith and Iqaluit and is no longer assumed by the Territorial Department of Justice.

Yukon

Like the Northwest Territories, controversy arose in Yukon during the early 1980s as to whether language guarantees found in the old *Northwest Territories Act* and Section 133 of the *Constitution Act, 1867* applied to the legislature and courts of that jurisdiction as well.[97] In order to resolve the questions raised, legislation was adopted both by the Parliament of Canada and the Yukon Legislative Assembly. The latter adopted an ordinance regarding official languages[98] that provides, among other things, that either English or French may be used in the courts and that both languages shall be used in the printing and publishing of statutes and regulations. The text of the provision regarding the courts is identical to that found in Section 19 of the *Canadian Charter of Rights and Freedoms* and Section 133 of the *Constitution Act, 1867.* As to the Parliament of Canada, it amended the *Yukon Act* so as to exclude any amendment or repeal of the ordinance without the consent of Parliament.[99]

Beyond the declaration of principle, the Yukon *Languages Act* (as it later came to be known) recognizes that practical measures are also important in order to provide adequate implementation. Accordingly, Section 12 of the *Act* provides that the Commissioner in Executive Council may make regulations respecting any matter that the Council deems necessary to implement the right to use either official language before the courts. In addition, Section 10 of the *Act* declares that the Government of the Yukon may enter into agreements with the Government of Canada respecting the implementation of any of its provisions or any matter related to the *Act*.

With the exception of a practice directive, there appear to have been no regulations adopted regarding the use of English and French before the courts. The practice directive was issued by the Supreme Court of the Yukon on May 30, 1994, and was intended to amend Rule 4(2) of the *Rules of Court*, which reads:

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[97] See *St. Jean v. R. and The Commissioner of the Yukon*, (1986) Supreme Court of Yukon (DVA - S.C. 545.83).

[98] This ordinance later became known under the title *Languages Act*. See Statutes of the Yukon, 1988, Chapter 13. Section 5 of the *Languages Act* provides that "either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by the Legislative Assembly." Mandatory bilingualism in the legislative process is found in Section 4 of the *Act*. Of course, Section 5 of the *Yukon Languages Act* is given the same narrow interpretation as that given to Section 133 of the *Constitution Act, 1867,* in the sense that it does not oblige the State to provide judges and other court officers able to understand directly the official language of an accused.

[99] The amendments to the *Yukon Act* can be found in the Revised Statutes of Canada, 1985, 4th Supplement, c. 31. The amendments allow the government of the Yukon to grant additional rights regarding services in English or French, or in any of the Aboriginal languages, without the consent of Parliament.

> Unless the nature of the document renders it impractical, every document prepared for use in the court shall be in the English language, legibly printed, typewritten or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper.

This was clearly in conflict with provisions in Section 5 of the *Languages Act* adopted in 1988. The directive therefore declares that Rule 4(2) shall be read subject to the *Languages Act* and that the words "English language" shall mean "English or French language". It would appear that old Rule 4(2) was not rewritten and officially replaced by one compatible with Section 5 of the *Languages Act* because of statutory provisions which adopt the practice rules of British Columbia and apply them to Yukon courts.[100] Nevertheless, it took nine years from the adoption of the original ordinance recognizing the official status of French to make the *Rules of Court* available in the French language.

The Supreme Court of the Yukon has informed us that ten accused made application for trial in French in the period 1993-94, which represented 5% of the total. In the same period, 17 French-language trials were scheduled, representing somewhat less than 5% of the whole. Only one French-language jury trial has been set. The selection of potential jurors was made in consultation with Francophone organizations in the region and by deducing the official language of a person by his or her surname. We are told that no significant problems have been encountered in this regard, although it would appear difficult to generalize from one experience. There may have been some slight delay in court procedures caused by the need to select potential jurors who spoke French. (The federal Crown is said to have at least two French-speaking prosecutors on staff at any time, and thus has no difficulty in conducting court procedures in French.)

As mentioned in Part 3.2 of the present study, the issue of pre-trial disclosure of evidence in the official language of the accused has been recently litigated in Yukon.[101] While the Supreme Court of Yukon found that no clear statutory obligation existed requiring the Crown to disclose documentary evidence in the official language of the accused, it also ruled that circumstances might require the pre-trial translation of such evidence in order to allow an accused to give full answer and defence in the context of a fair trial. However, where both defence counsel and the accused understood English, it could not be said that the accused would suffer any prejudice in the absence of pre-trial disclosure in the French language.

The information we have is somewhat sketchy regarding the availability of bilingual judges in Yukon. We are told that the Territorial Court "has a bilingual Justice of the Peace available at all times and several French-speaking deputy judges available when needed." The Supreme Court "arranges the attendance of French-speaking judges." The use of deputy

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[100] See Section 37 of the *Judicature Act* of Yukon, R.S.Y. 1988, c. 96 and Section 12 of the *Court of Appeal Act*, R.S.Y. 1988, c. 37.

[101] See *R. v. Breton*, *supra*, note 29 and *R. v. Rodrigue*, *supra*, note 32.

judges from various provinces is similar to the practice in the Northwest Territories. The lack of local judges able to conduct a trial in the minority official language is thus remedied by reliance on judges from another jurisdiction who agree to sit on an *ad hoc* basis in Yukon.

There are no French-speaking judges on the Court of Appeal of Yukon (many appeals are heard in Vancouver). Members of the Court of Appeal of British Columbia may sit as the Court of Appeal of Yukon. We have been informed that appeals argued in French are generally dealt with by way of simultaneous translation, and written submissions in French are translated for the Court prior to the hearing. It would therefore appear that French is normally a language of translation, rather than an original language of procedures, before the Yukon Court of Appeal.

Nova Scotia

No regulations have been adopted by Nova Scotia as contemplated by Section 533 of the *Criminal Code*. However, the holding of minority language trials at the level of the Provincial Court has been facilitated by the appointment of two bilingual Provincial Court judges, the first in 1988 and the second in early 1994. These judges are called upon when needed to preside over cases conducted in French, or in both official languages, anywhere in the province.

While both judges are more than willing to preside over criminal trials conducted in French, the demand is very low. This is particularly true regarding the Acadian population of the province, who seldom request to be tried in their mother tongue. It is more common for out-of-province Francophones to so request. It would appear that about six French-language trials per year take place before the Provincial Court of Nova Scotia.

Francophone Nova Scotians are more likely to request to be tried in the Provincial Court before a judge who speaks their language but where the procedural language remains English. In such cases, lawyers and judges communicate with each other for the most part in English, although the judge is able to understand French directly should a witness (including the accused) testify in that language. An interpreter is made available for the accused, such interpretation often being whispered for the benefit of the accused alone and hence not forming part of the official record of the trial. Where French is the actual language of procedures, however, interpretation of the testimony of English-speaking witnesses is consecutive and for the benefit of the court as a whole. Moreover, English-speaking witnesses are generally examined and cross-examined in French with the assistance of an interpreter. In other words, the participants defer to the official language of the proceedings should that be the wish of the accused person. With the consent of the accused person, however, a witness will be examined in the witness' official language.

The tendency to accept English as a language of procedures can be related in part to the paucity of criminal counsel who feel competent to plead in French. An accused person will

no doubt want to be represented by the most experienced counsel regardless of his or her official language, while at the same time requesting to be tried before a bilingual judge. While the number of practising lawyers in the province who have benefited from legal education in French is expanding (for the most part graduates of the University of Moncton Law School), the vast majority have received their higher education in English only. This constitutes a significant impediment to pleading in French, creating extra work and added costs. It is therefore not surprising to find that the use of French as an actual language of procedures is much rarer than the presence, at the request of the accused, of a bilingual judge.

With respect to those half dozen cases per year which proceed entirely in French, both the charge and particulars are produced in that language once the desire of the accused is known. However, the issue of the language in which pre-trial disclosure is made raises a number of difficulties. For example, the actual scope of pre-trial disclosure in criminal matters (irrespective of the language issue) remains an open question. Many documents amassed in the course of criminal investigations are not used in subsequent prosecutions. Moreover, it may be only a small part of a much longer document which will be used as evidence at a given trial. To the extent that disclosure must be made of everything used in an investigation, which may be a very large mass of materials, is it reasonable to require that it all be translated into the official language of an accused person?

It would appear that it is the practice of the regional office of the federal Department of Justice to translate (for the purpose of pre-trial disclosure) only those documents which will be entered as exhibits at the trial of an accused. Other documents used or produced in the course of the investigation are disclosed in their original language. By way of example, it was noted in the course of our research that a dispute has already arisen regarding the obligation to translate into the official language of the accused the notes of a policeman. While such notes may be relied on to refresh one's memory, they do not constitute an exhibit or evidence at trial. Even though it may be feasible to provide a translation of such notes, there will be other instances where the documents disclosed are voluminous. To require translation of the whole into the official language of the accused would impose a very substantial burden on an already strained court system.

With respect to the Supreme Court of the province, information made available indicates that only two trials (both with juries) have taken place in the minority official language since the coming into force of Part XVII of the *Criminal Code*. As with the Provincial Court, there are two members of the Supreme Court of Nova Scotia who are bilingual and able to preside at a criminal trial in French. It will be remembered that all jury trials take place at the level of the Nova Scotia Supreme Court.

Problems of interpretation encountered in the course of jury trials conducted in French have been brought to our attention. For example, the first criminal trial in French held before the Nova Scotia Supreme Court took place several years ago in the area of Digby and involved an accused from Montreal. The differences between the French spoken in Digby and in

Montreal were sufficient to interfere with full comprehension as between the various participants at the trial, thus complicating the giving of evidence and cross examination of witnesses.

With respect to the second trial, which took place in the Halifax region, the selection of jurors was made very difficult by the absence of information identifying persons in the region able to hear a trial in both English and French (the trial involved multiple accused of different official languages). Consequently, those responsible for establishing a list of potential jurors had no choice but to consult the telephone book covering Halifax County, Dartmouth and Halifax. Five thousand names were selected from that source for the purposes of selecting a jury of twelve members. Nevertheless, this large number of persons on the original list was barely sufficient to select twelve jurors who were sufficiently bilingual to hear the trial.

The use of French before the Court of Appeal of Nova Scotia has never arisen. It should be noted that no current member of the Court of Appeal is apparently able to preside at a hearing conducted in French without the use of interpretation.

Prince Edward Island

It would appear that no regulations or written policies related to the implementation of Part XVII of the *Criminal Code* have been adopted by the province. However, one judge at the level of the Supreme Court of Prince Edward Island, and one at the provincial court level, are able to preside at trials conducted in the French language. It is estimated that one trial per year before the Supreme Court of the province takes place in the minority official language, whereas four to five take place each year before the Provincial Court.

Prosecutions conducted in French before the Provincial Court in the western region of the province require the court's bilingual judge to travel to that region for the hearing. Arrangements to this effect are made after a Francophone accused's first appearance, the latter proceedings being conducted in English before the judge who normally sits in that region. Bilingual court personnel and interpreters are hired specially for the hearing of a trial in the language of the accused. Simultaneous interpretation is often used to assist Francophone accused where witnesses testify in English, an arrangement which seeks to avoid the delays caused by consecutive interpretation heard by the court as a whole. It should also be noted that criminal prosecutions conducted in French require that an agent represent the Crown in right of the province due to the absence of any bilingual prosecutors within the Department of the Attorney General. The use of agents is also evident with respect to prosecutions conducted by the Federal Department of Justice.

Two jury trials before the Supreme Court of the province have been heard in the last five to six years. In one case the matter had to be transferred to the western region of the Island (Queen's County) in order to ensure that a jury composed of persons who spoke the language of the accused could be empanelled. Where witnesses speak English, examination and cross-

examination take place in English with simultaneous interpretation being offered to the accused. This is done in order to avoid delays caused by consecutive interpretation being made to the court as a whole.

Where prosecutions take place in the minority official language every effort is made to ensure that the charges, the particulars and any other procedural documents are made available in that language as well. Nevertheless, it would appear that there is a widespread perception that criminal courts operate essentially in English, with procedures conducted in French amounting to an exceptional measure.

It has also been brought to our attention that problems have arisen in the past when the one bilingual judge sitting on the Provincial Court was unavailable when needed to conduct a minority language trial. This can result in charges being dismissed, a result which is, of course, undesirable from the point of view of the administration of justice. In addition, bilingual criminal counsel are rare on Prince Edward Island, a factor which hinders the full implementation of Part XVII of the *Criminal Code*.

Newfoundland

No regulations have been adopted relating to Section 533 of the *Criminal Code*, nor are there any written policies in this regard. It would appear that two or three trials per year before the Provincial Court are conducted in the French language, out of a total of 22,000. The presence of one bilingual judge makes this possible, the judge travelling to the region of the province where a trial in the minority language is to take place. Agents are often used to conduct these prosecutions. It would also appear that the charges, the information and the particulars are communicated to defence counsel in the original language in which they were prepared, i.e., in English.

With respect to the Supreme Court of the province, we are informed that one judge is bilingual, although the province is finalizing an agreement with the federal government to have three to four judges per year attend French-language training. No information was available as to whether a proceeding before the Supreme Court of the Newfoundland had ever been conducted in French.

3.6 Summary

It is apparent from the foregoing that implementation of the language rights provisions of Part XVII of the *Criminal Code* varies considerably from one province or territory to another. Such disparities underline the dictum quoted earlier that "it is one thing to grant individuals a right, and quite a different thing for the public authorities who are legally bound to recognize such rights to create the positive environment in which these rights can be most effectively exercised."

While no single reason can be advanced to explain the very considerable difference between the size of the minority language population in some provinces and the small number of minority language trials, there is nonetheless a correlation between the frequent absence of active offer of service in the minority official language and the rarity of its use as a language of criminal procedures. In light of the information reviewed in this study, it is difficult to avoid the conclusion that many public authorities have been reluctant to replace a passive attitude to the implementation of Part XVII of the *Criminal Code* with an active offer of access to the criminal justice system in either official language.

A frequently cited deficiency in the administration of Part XVII concerns the failure to identify in a timely fashion the official language of an accused. From first contact with the police, to questioning of the accused, to issuance of a summons or possible arrest, to the appearance of the accused in a court of law, there is a noticeable lack in many jurisdictions of procedures designed to inform accused persons of their right to be tried in their own official language. Where this is the case, it is more than likely that the first official language of an accused will go unnoticed by a court before which he or she appears. Even where an accused is represented by counsel, it is far from certain that he or she will be informed of the rights set out in Part XVII of the *Code*; and if, perchance, the accused does request to be heard in the minority official language, the chances are slim that the presiding judge at this stage of the procedures will be bilingual.

This situation contrasts sharply with the practice prevalent in the province of New Brunswick, for example. There, it will be remembered, the official language of an accused is identified in the first instance by the investigating police officer, who then ensures that the accused appears before a judge who speaks that language. This implies that certain court days are identified as being presided over by a bilingual judge, an administrative arrangement which facilitates the use of an accused person's official language. The early identification of the official language of an accused also helps ensure that pre-trial matters (such as bail applications) are conducted in that language as well.

To encourage administrative reform, an appropriate amendment to Part XVII of the *Criminal Code* could be envisaged which would introduce a new mandatory form designed to identify the official language of an accused. Completion of this form should be required no later than the time at which an accused person makes his or her election (pursuant to Section 530 of the *Code*) regarding the language of trial or preliminary inquiry. With this as part of the formal record before the court, a judge would then be clearly informed as to the linguistic circumstances of the accused. The introduction of such a mandatory form, designed only to bring relevant information before the court, would not impose any significant burden on the criminal justice system as a whole.

Whether reforms of the above-mentioned nature were enacted or not, there might still be circumstances where an accused would fail to meet the time requirements for electing the language of trial. Currently no criteria exist to guide judges in determining if their discretion should be exercised in favour of granting an order for trial in the official language of the

accused. It would appear, in some jurisdictions, that failure to meet the time requirements for election has become almost an absolute bar to granting an order in favour of the accused. Appropriate legislative amendments would therefore seem in order to establish explicit criteria for the exercise of a judge's discretion. Such criteria should relate only to the linguistic circumstances of the accused, but should take into account the good faith in which a request for a minority language trial is made.

Once the official language of the trial or preliminary inquiry is determined, both the charges and the particulars should be available without delay in that language. Problems in this regard have already been fully discussed. It is surely anomalous that the charges and particulars would not be available in the proposed language of the trial at a very early stage in the procedures.

The language in which disclosure of documentary evidence is made is also a recurring problem. The types of documents which are subject to disclosure in criminal matters are open to dispute. Nevertheless, it would appear that at least those documents which will be introduced as evidence at trial should be supplied to the accused and the legal counsel in the official language of the trial. Any other documents generated in the course of a criminal investigation should be subject to the same rule only if translation into the language of the trial is reasonable in the circumstances. Otherwise, they should be disclosed in the language in which they were prepared.

Lawyers who practice in the minority official language have also brought to our attention difficulties experienced regarding the language in which court proceedings, other than the trial and preliminary inquiry, are conducted. It would appear that little effort is made in many jurisdictions to allow for the use of the minority official language, for example, on bail applications and various interlocutory motions. While this may meet the letter of the current law, it does little to encourage the use of the minority official language in the criminal process. It would therefore seem appropriate to amend Part XVII of the *Criminal Code* so as to ensure, once an order has been issued under Section 530, that all subsequent proceedings related to the charges are conducted in the official language chosen by the accused.

Interpretation offered to the accused, legal counsel and witnesses, under Subsection 530.1 (f) of the *Code*, has raised a number of problems. For example, we have been informed that the quality of interpretation is sometimes inadequate. While there is no consistent pattern in this regard, concerns about the quality of interpretation could be addressed by amending the Subsection in question to make it clear that a court should ensure that only qualified interpreters be used. Where interpretation is needed, it should be provided at every step of the proceedings following an order for a minority official language trial.

Regarding the type of interpretation provided, we have been informed in the course of this study that whispered interpretation is frequently made available to the accused. As already stated, this type of interpretation does not appear to conform to the current requirements of Subsection 530.1(g) of the *Code*, which provides that the record of proceedings shall include

"a transcript of everything that was said during those proceedings in the official language in which it was said" and "a transcript of any interpretation into the other official language of what was said". While some may feel that whispered interpretation is less disruptive to court procedures, the fact remains that it does not allow any transcript to be made of the translation. Questions of accuracy were no doubt at the origin of the current requirements of Subsection 530.1(g), for only where a transcript of the translation is available can the two versions be compared. This matter should be brought to the attention of all those involved in the administration of justice. Where changes are thought necessary, appropriate legislative reform should be proposed.

The language of appeal proceedings is a matter not mentioned in Part XVII of the *Criminal Code*. As pointed at various junctures, there are great disparities in the language capabilities of provincial and territorial courts of appeal. Where an appeal court is not able to understand directly the official language in which a trial was conducted, the entire transcript would have to be translated into the other official language. Moreover, legal counsel for the accused would be put in the position of having to plead in a language different from that of the trial, or accept that the court have recourse to simultaneous translation in order to follow the proceedings. The inequities and practical difficulties of such a situation are evident, although they have yet to be fully faced because of the small number of minority official language trials in a number of jurisdictions. Since any increase in the number of minority official language trials in these jurisdictions would highlight the current constraints, it would seem advisable to review without delay the possible solutions which provincial and territorial courts of appeal could adopt.

4.0 COURTS OF CIVIL JURISDICTION

Courts exercising civil jurisdiction encompass those created by the provinces as well as those constituted by Parliament for the better administration of federal laws or to serve as a general court of appeal (the Supreme Court of Canada). The regulation of language usage in civil law matters is therefore shared by both levels of government, depending upon the court to which any particular rule may apply. In addition, rules that might be adopted and applied to federal courts, or to provincial courts in Manitoba, New Brunswick and Quebec, must be compatible with the constitutional language rights found in Section 133 of the *Constitution Act, 1867* and other parallel constitutional provisions.

4.1 Federally Constituted Courts

Part III of the *Official Languages Act* contains a number of important provisions relating to the use of English and French in the administration of justice. As a statement of basic principle, it declares that "English and French are the official languages of the federal

courts,[102] and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court" (Section 14). The wording here is reminiscent of constitutional guarantees of language freedom before the courts, reviewed above. As we have seen, however, the right to use either official language before the courts is incomplete in the absence of a precise and detailed obligation upon public authority to provide a judicial system capable of operating directly in both languages.

Rules that establish the language of procedures in civil matters will inevitably vary depending upon the nature of the lawsuit before the court. Where litigation involves private parties only (i.e., where no government institution is involved), two situations must be distinguished. Firstly, the parties to an action may choose to proceed in different official languages. Indeed, freedom to do so before federal courts is guaranteed by Section 133 of the *Constitution Act, 1867* and Section 19 of the *Canadian Charter of Rights and Freedoms*. Where this occurs, paragraph 16(1)(c) of the *Official Languages Act* requires that "every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter". Such a bilingual requirement ensures that a party (or his or her counsel) will not be put at a disadvantage (by judicial recourse to translation or interpretation) solely because of the official language in which he or she proceeds. However, the *Act* does not assume that parties to an action will necessarily be bilingual; it therefore provides that "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"[103].

The latter provision is broad enough to encompass the second type of civil action that may arise before a federal court involving private parties only, that is to say, an action where the parties decide to proceed in the same official language. Despite the use of only one procedural language, the court is obliged to provide simultaneous translation at the request of a party, presumably because the latter is unable to understand adequately evidence[104] or arguments presented in a given official language. The *Act* also requires that every judge or

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[102] "Federal court" is defined in Subsection 3(2) of the *Official Languages Act*: "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."

[103] See Subsection 15(2) of the *Official Languages Act* of Canada, Revised Statutes of Canada, 1985, c. 31 (4th Supplement). The *Act* also states that a court may provide for simultaneous translation to members of the public in attendance where it "considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable" (Subsection 15(3) of the *Act*).

[104] The *Act* recognizes that witnesses may testify in the official language of their choice: "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" (Subsection 15(1) of the *Act*). The language of testimony may vary from the general language of the proceedings and hence the presence of an interpreter would be required if a party so requested.

other officer who hears the proceedings is able to understand the language chosen by the parties (and their counsel) without the assistance of an interpreter. (With respect to tribunals other than the Supreme Court of Canada, the Federal Court and the Tax Court of Canada, Section 17 of the *Act* foresees the enactment of rules, by the Governor in Council, which are deemed necessary to comply with Sections 15 and 16, although none have so far been adopted.)

Civil litigation before federally constituted courts may also involve the Crown in right of Canada or federal institutions (as defined in the *Act*) as parties. In such cases, the *Official Languages Act* provides rules related to the official language which should be used by counsel representing the federal interest. The *Act* requires the federal Crown or institution to use, "in any oral or written proceedings, the official language chosen by the other parties unless it is established...that reasonable notice of the language chosen has not been given".[105] Where the parties fail to choose or agree on the procedural language, federal counsel is directed by the *Act* to use such official language as is reasonable in the circumstances.

As can be appreciated, Part III of the *Official Languages Act* underscores the duties of both federally constituted courts and federal institutions to deal with, and respond to, civil litigants in the official language of their choice. Where private parties only are involved in litigation, the *Act* facilitates individual choice of language by providing for simultaneous translation at the request of a party, a guarantee of particular importance where the parties proceed in different official languages. The desire to facilitate individual choice of language is also evident in provisions of the *Act* which require (as regards federal institutions) the use of bilingual pre-printed forms and the translation of details written in one official language into the other official language at the request of any party upon whom they are served.[106] In addition, any final decision made by a federal court arising out of proceedings conducted in whole or in part in both official languages must be issued simultaneously in both languages.[107] However, the *Act* clearly states that requirements for two-language publication shall not be construed so as to prohibit the oral delivery in only one official language of any decision or judgment, a disclaimer no doubt felt necessary because of constitutionally entrenched language rights applicable to federally constituted courts.

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[105] See Subsection 18(a) of the *Act*.

[106] See Subsection 19(1) of the *Act*:
The pre-printed portion of any form that is used in proceedings before a federal court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages.

[107] See Subsection 20(1) of the *Act*. Provision is also made for the bilingual issue of decisions, orders or judgments which determine a question of law of general public interest or importance, with suitable exceptions made where the delays that would be caused by translation would be prejudicial to the public interest or unjust or damaging to any party to the proceedings. In the latter case, the *Act* requires bilingual publication at the earliest possible time. See Subsection 20(2).

4.2 Provincially Constituted Courts

As we have seen, only Manitoba, New Brunswick and Quebec are required to respect the constitutional right to use either English or French before provincial courts. While this means that no one can be precluded from using the official language of their choice, it does little to clarify what measures may be necessary to enable parties to address a court capable of understanding them directly. Moreover, the very fact that either language may be used without restraint raises very real practical problems where parties to civil litigation and their counsel do not speak the same language. Bilingual judges and other court officers no doubt enable submissions made in either language to be understood directly, but a requirement of bilingualism could clearly not be imposed on litigants themselves. At some point, recourse to translation and simultaneous interpretation becomes necessary to enable the parties and their counsel to comprehend and follow the proceedings.

Provinces subject to the constitutional right to use either official language before their courts must inevitably face the practical consequences of such language freedom, whether it be through the development of informal practices or the adoption of statutory and regulatory measures. This is also true in provinces where the constitutional right does not apply, but where governments have demonstrated a desire to enhance the use of both official languages before the courts.

New Brunswick

Prior to the proclamation in 1982 of Section 19 of the *Canadian Charter of Rights and Freedoms*, which constitutionally entrenched the right to use either English or French before the courts of New Brunswick, that province had adopted provisions in its own *Official Languages Act* which recognized the general principle that "in any proceedings before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage."[108] The same *Act* gave the Lieutenant-Governor in Council the power to enact regulations determining the application of this provision, where numbers warranted, the spirit of the *Act* so required, or it was deemed necessary to so provide for the orderly implementation of the *Act*.

Constitutional recognition of the status of both official languages occurred with the adoption of the *Canadian Charter of Rights and Freedoms*, Subsection 19(2) of which declares that: "Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established of New Brunswick."

Amendments to the *Official Languages of New Brunswick Act* in 1990, while retaining the notion that a person should not be placed at a disadvantage because of the official language used, provide that "a person who is a party to proceedings before a court has the right to be

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[108] See *Official Languages of New Brunswick Act*, Revised Statutes of New Brunswick (1973), c. O-1, Subsection 13(1).

heard by a court that understands, without the need for translation, the official language in which the person intends to proceed:"[109] This amendment was clearly meant to address the issue of the linguistic capacity of judges and other court officials and thus to enhance the use of the minority official language as a language of procedures. Ensuring that court personnel can directly understand litigants in their official language of choice arguably flows from the principle that a litigant should not be placed at a disadvantage because of that choice. Lack of sufficient personnel to meet this new requirement was foreseen in the 1990 amendments, and provision therefore made for the temporary appointment of persons who could directly understand the official language used by a litigant.

To encourage the use of the minority official language in civil proceedings, the *Insurance Act* was amended in 1986 so as to require that legal counsel engaged by any insurance company to represent the interests of an insured person speak the official language chosen by that person.[110]

Even with these amendments in place, the need for translation facilities to serve the interests of parties (and counsel) who proceed in different official languages must still be faced. A number of provisions in the *Rules of Court* of New Brunswick relate to this issue. With regard to examinations for discovery, Rule 33.06(3) ensures that an interpreter will be appointed, at no cost to the parties, where the official language in which an examination is to take place is not understood by the witness.[111] The right to have interpretation at the trial is also established by Rule 39.05(2), provided seven days notice is given to the clerk of the court that a party intends to proceed or present evidence in an official language different from that of other parties.[112] The need for an interpreter to be present at the hearing is then set out in a Certificate of Readiness to which the clerk of the court gives effect and which a party is required to confirm four days before the trial.

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[109] See *An Act to Amend the Official Languages of New Brunswick Act*, Statutes of New Brunswick, 1990, Chapter 49.

[110] See R.S.N.B., c. I-12.

[111] Rule 33.06(3) reads as follows: "Where the examination is to be carried out in an official language other than the official language understood by the witness, the examining party shall advise the clerk of the judicial district in which the examination is to be held; the clerk shall then appoint an interpreter, at no cost to the parties, who shall be sworn to accurately interpret the administration of the oath and the questions to be put to the person being examined and his answers." The right to request an interpreter is also set out in the New Brunswick *Regulations* 86-2. See Section 3 of those regulations.

[112] Rule 39.05(1) provides: "On a motion or application, a party who intends to proceed in or present evidence in an official language other than the official language in which any other party intends to proceed or present evidence, shall so advise the clerk at least 7 days before the hearing." Paragraph (2) of the same rule provides: "On being advised pursuant to paragraph (1), the clerk shall arrange to have an interpreter present at the hearing."

The *Rules of Court* also facilitate the use of either official language by requiring the use of forms in bilingual format, although a form may be completed in only English or French at the option of litigants and their counsel.[113]

Consultations with members of the Association des juristes d'expression française du Nouveau-Brunswick provided information regarding the uneven application of language rights from one region to another. Implementation is least problematic in regions of the province where there is a significant concentration of Francophones. Numerical strength enhances the frequency with which a minority language is used across a broad range of social activities, giving it a status which is also reflected in the frequency of its use before the courts. However, in areas of mixed population there is a tendency for court proceedings to be conducted automatically in English unless there is a specific demand to use French. Unfortunately, a request to use French can frequently result in costly delays, in part caused by the limited number of bilingual judges. This has a deterrent effect on the use of French as a language of proceedings. We were thus advised that the linguistic capability of candidates for judicial appointment should be given a higher priority than would appear to be the case at the present time.

The linguistic capability of judges is also an issue at the level of the Court of Appeal. Four of the six judges of this court are currently bilingual and able to preside over appeals in either English or French. Some of the lawyers consulted took the position that all members of the Court of Appeal should be bilingual in order to solve the problem of unequal access. Inequality of access is considered to be inherent in the present situation, for litigants who proceed in English are given a choice of six judges before whom they can potentially appear, while those who proceed in French find their choice reduced to four.

Individual bilingualism also greatly enhances the efficiency and fairness of court proceedings, in the sense that it allows judges and lawyers to change from one official language to the other, depending upon the language being used by a particular witness before the court, and permits direct comprehension of any arguments being presented. Recourse to interpretation inevitably slows the process down, creating a burden on all those involved, and potentially resulting in unfairness to one litigant or the other. Such consequences explain why parties who might otherwise proceed in French will agree, once it is clear that adverse parties and legal counsel are English-speaking and unilingual, to use English as the procedural language.

We were also informed that the ability to use the minority language in the legal process generally is dependent on a greater active offer of service in either official language. It would appear that although services can eventually be had in French if requested, significant delays are often generated by such a request. For example, the availability of form contracts such as those used for mortgages and insurance policies leaves much to be desired. Indeed, it would appear that even chartered banks operating in New Brunswick have great difficulty

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[113] See Rule 4.08 (3)4.

in producing mortgage forms in the French language. Too often a request for service in French is seen as a disruption of normal patterns; and attempts to respond to it often result in delays or the inability to meet the request. The active offer of service in both official languages is thus seen as essential to breaking down attitudes and patterns of behaviour which inhibit the use of the minority language. In other words, positive and continual efforts are needed to encourage the use of the minority language as guaranteed in constitutional and statutory law.

With respect to the time period 1993-94, the use of English as a language of civil procedures before the Queen's Bench (excluding family law matters) represented 80% of the total, French represented 15%, English assisted by interpretation represented 1%, French assisted by interpretation represented 1%, and bilingual procedures represented 3%. With respect to civil appearances related to small debts, the breakdown was as follows: English 80%, French 16%, English with interpretation 1% and bilingual 3%. These figures would appear to support the contention that French is used less frequently than would be the case if Francophones exercised their constitutional and statutory language rights more completely.

Quebec

While the freedom to use either English or French before the courts of Quebec is constitutionally assured (Section 133 of the *Constitution Act, 1867*), the practical ramifications of exercising that freedom imply, as they do in New Brunswick and Manitoba, a significant level of institutional two-language capability. The judicial system in Quebec, particularly in the District of Montreal, has for many years facilitated the use of both official languages through an impressive level of individual bilingualism among the judiciary, the practising bar and other court house personnel. This is recognized by the report of the *ad hoc* Committee of the Montreal Bar,[114] to which reference has been made in Part 3 of the present study. In other words, rather than formal administrative procedures, it was widespread individual bilingualism which gave the judicial system the flexibility to respond to the linguistic requirements of each case as it arose.

The historical effectiveness with which the judicial system in Quebec has been able to deliver two-language services to the public does not mean, however, that the current situation is free of possible inadequacies. As the *ad hoc* Committee of the Montreal Bar points out:

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[114] See: *Comité ad hoc sur l'accès à la justice en anglais dans le district de Montréal*, Report, March 31st, 1995 [hereinafter *ad hoc* Committee report]. The mandate of the Committee contained four elements:

1) To inquire generally into problems of access to justice that are related to inadequate English-language services or the lack of English-language services and report on them;
2) To describe specific problems related to inadequate or absent English-language services;
3) To evaluate how serious the impact of these problems is on the justice system and the administration of justice in the District of Montreal; and
4) To suggest remedies or reforms if possible.

> We must face the reality that our past success may have to some degree lulled us into complacency with regard to the matter of language usage in the judicial system. The profession has to a large extent relied on benign neglect as an adequate means of providing bilingual services, and this is because it seemed to us at one time sufficient to meet the needs of the community, in particular, of the District of Montreal. We assumed, relying on the maxim, *le passé est garant de l'avenir*, that the demand for bilingual services would always be met automatically by a pool of lawyers, judges and administrative staff who were reasonably fluent in both languages. However, over the years benign neglect may in some instances have become simply neglect, with the result that the system of bilingual services is not always adequate to meet the needs of the District or to preserve the rights of parties and witnesses.[115]

In an effort to go beyond anecdotal accounts of alleged difficulties in gaining access in English to the courts (including administrative tribunals) in Montreal, the *ad hoc* Committee undertook a series of interviews with members of the judiciary, members of the legal profession and various public servants working within the judicial system. As a point of reference, the Committee took it to be self-evident that effective two-language capability within the judicial system would require as a minimum that:

> (i) every party or witness in a proceeding, whether before a judge or an administrative tribunal, could testify in English with the certainty that the judge or tribunal in question fully understood the language of the testimony;
>
> (ii) that ancillary services for the public and any party to a proceeding were available in both languages, and that the personnel serving in the justice system and serving the public were functionally bilingual; and
>
> (iii) that certain forms, documents and other materials on the law were available, either in bilingual version or in both English and French versions.[116]

When reviewed against these standards, access to the civil courts in English in the District of Montreal, in particular regarding point (i), is generally effective. As already mentioned, the level of two-language capability among Superior Court judges is impressive.[117] With respect to the Court of Appeal, individual bilingualism among judges is so self-evident that

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[115] See pages 1 and 2 of the *ad hoc* Committee report.

[116] See page 12 of the *ad hoc* Committee report.

[117] The *ad hoc* Committee report states at page 18: "There exists in the Superior Court of Quebec, particularly in the District of Montreal, a long tradition of bilingual judges who have come to the Bench with the ability to hear and decide cases in either English or French. To a very great extent, this tradition which has been a source of great pride for the profession, has continued to persist until this day."

the report of the *ad hoc* Committee simply takes note of it and states that: "...the issue of bilingualism does not really arise in the Court of Appeal where the level of linguistic proficiency is very high."[118]

The Civil Division of the Court of Quebec (with which the average citizen and small- to medium-sized businesses would have the most frequent contact) would appear to have a two-language capability somewhat less than that of the Superior Court. The report of the *ad hoc* Committee concludes that most, if not all, judges from this court presiding in the District of Montreal have a level of passive bilingualism "which would enable them to follow the essential elements of a trial in English" if such a trial were relatively short and free of highly technical language. However, a very small number would "experience difficulty if called upon to engage in exchanges with a witness or a lawyer in English."[119]

The report of the *ad hoc* Committee recognizes that it is difficult to assess accurately the level of functional bilingualism among judges of the Civil Division of the Court of Quebec. It will be remembered that functional bilingualism is defined by the report to mean "the ability of an individual to not only comprehend what is being said in another language, but also to communicate orally in that language, and to do so effectively."[120]

The conclusions of the report and its recommendations regarding the issue of judicial bilingualism emphasize the different levels of language proficiency which individuals may attain. The very highest level is recommended for judges presiding at trials of long duration and at trials where witnesses will be using very technical language. The particular needs of such trials have already given rise to the informal practice of selecting judges to hear them as a function of their language abilities:

> In the past it has always been, and it continues to be the practice, that such cases are assigned to judges who have the necessary proficiency to preside them without difficulty. The Committee is of the opinion that this convention is a reliable, efficient and cost-effective means to provide a large measure of necessary bilingual services to litigants, particularly in complex trials of long duration.[121]

In order to render the present practice more efficient and certain, however, the report recommends that amendments be made to both the *Superior Court Rules of Practice* and the *Rules of Practice* of the Court of Quebec to provide for the identification prior to trial of the

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[118] See page 14 of the *ad hoc* Committee report.

[119] See page 35 of the *ad hoc* Committee report.

[120] See page 19 of the *ad hoc* Committee report.

[121] See page 21 of the *ad hoc* Committee report.

language in which evidence will be presented in any given case. Such identification would be made in the certificate of readiness, thus permitting a more effective allocation of judges as well as an appropriate assignment of other personnel, such as court clerks. As the report points out:

> The result would be to oblige counsel to consider before trial what language or languages are best suited to the evidence which must be made and to remove the unfortunate element of *ad hoc*, catch-as-catch-can arrangements which now sometimes affect the trial process to an unnecessary degree.[122]

The use of both English and French during a civil trial inevitably raises the issue of the provision of interpretation. In reviewing the current situation, the *ad hoc* Committee found that a witness is nearly always examined and cross-examined in his or her official language. However, it could not conclude that this was always the case. In the view of the *ad hoc* Committee, the use of interpretation and translation should not be perceived as the normal means to deal with the use of more than one official language in the judicial process:

> It is unrealistic to imagine that the demands of the Constitution or of the administration of justice can ever be met by substituting interpreters and translators for bilingual personnel, whenever a court or tribunal is faced with an English-speaking party or witness. Interpreters and translators can never be the primary instruments of a judicial system which, by its nature, must concern itself with fine distinctions and the nuances of language.[123]

The report recommends that counsel who are not competent to examine a witness in either English or French should either retain the services of an interpreter or engage co-counsel who can complete that aspect of a case. At the same time, the report places emphasis on the appropriateness of counsel being able to examine and cross-examine a witness in the official language of the witness. This would appear to be one of the objectives which flow from the report's recommendation that appropriate amendments be made to rules of court to require the pre-trial identification of the official language in which a witness will testify:

> In the present system where no formal indication is made by either party of the languages to be used in evidence or in pleading, the result may well be delay in the trial and incoherence in the process itself. It is to state the obvious to say that everything should be done to ensure that the trial process runs smoothly and without undue obstruction. A simple modification to Rule 15

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[122] See page 33 of the *ad hoc* Committee report.

[123] See page 6 of the *ad hoc* Committee report.

would ensure that the trial judge is at ease in the language of the witnesses and that counsel are equally at ease in examining or cross-examining them.[124]

Nevertheless, a strict requirement that legal counsel use the official language of a witness appears incompatible with Section 133 of the *Constitution Act, 1867*, however desirable it may be from the point of view of trial dynamics.[125]

The question of who assumes the burden of arranging for interpretation, when necessary, from one official language to the other is difficult to resolve. Since legal counsel enjoy the constitutional right to use either language, it would seem strange to require them to provide interpretation services to the court. It would be more consistent with underlying principle to require the State to resolve the issue of comprehension among persons speaking different official languages. Nevertheless, while responsibilities in this regard remain unclear, present law in Quebec permits a trial judge to award costs of translation from one official language to the other as part of the judicial costs in any given case. In addition, policy directives of the Quebec Department of Justice do not provide for the State to assume the costs of interpretation in civil matters, as they do in criminal and quasi-criminal trials and in procedures under the *Young Offenders Act*.[126] The report of the *ad hoc* Committee recommends that this issue be revisited and that the State assume the financial burden of providing appropriate interpretation, in much the same way as it does in criminal trials.

The availability of judges able to follow proceedings in court regardless of the official language used requires, of course, that individual bilingualism among the judiciary be widespread. Believing this to be crucial to the fair and equitable administration of justice, the report of the *ad hoc* Committee recommends that functional bilingualism (which is higher than passive) be a requirement for judicial appointment to civil courts sitting in the District

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[124] See page 83 of the *ad hoc* Committee report.

[125] Erosion of two-language capability among members of the Bar was of concern to the *ad hoc* Committee. It notes in its report that "...from time to time members of the Superior Court have commented that difficulties with a second language during a trial arise most frequently from counsel themselves who may not be sufficiently trained in both English and French to carry out an examination in chief or a cross-examination in their second language." The report therefore recommends, among other things, that the Quebec Bar establish second-language training courses for its members, especially dealing with technical terminology, that it offer regular courses and annual workshops on drafting language in both English and French, and that it sponsor the preparation of reliable precedents in English. It also recommends that course materials at the Bar Course (École du Barreau), which all law graduates are obliged to attend, be made available in both English and French, and that a drafting course in English be added to its current curriculum. (See pages 92-100 of the *ad hoc* Committee report.)

[126] See: Recueil des politiques et directives , Schedule B: Directive A-6; Services d'interprètes et paiement des frais. Regarding civil procedures involving small debts, the directive stipulates that only the interpretation needs of the judge are paid for by the State: "With regard to small claims, interpreters' services are provided when required by the judge, for his needs, and the costs are chargeable to the Minister of Justice. Otherwise, the party himself requests the services of an interpreter and assumes the cost of them." *[Translation]*

of Montreal. To the extent possible, the report also recommends that the same requirement apply throughout the Province.

At the same time, the report is very supportive of language training for members of both the Superior Court and the Court of Quebec, such as that offered by the Office of the Commissioner for Federal Judicial Affairs. It takes note of current problems of budgetary restrictions and the need to ensure that judges can free themselves from judicial duties for periods of time necessary to pursue language training. The report recommends that the present program of language training be reviewed with a view to making the training better suited to the needs of the judiciary.

Bilingual judges are very important, given that witnesses are almost always examined and cross-examined in their own official language.[127] In order to avoid recourse to interpretation, a judge must be able to pass from English to French and back without difficulty. Moreover, affidavits are normally prepared in the official language of the deponent. Where this differs from the general language of the proceedings, the two-language capabilities of the judge are essential to the understanding of written evidence without relying on translation.

As already mentioned in Part 3 dealing with criminal trials, written judgments are most effectively prepared in a judge's first language. Ease of writing in one mother's tongue, pressures of time and volume of work converge to deter the frequent use of a judge's second language in writing decisions. Moreover, it must be remembered that a judge's freedom to choose the official language in which he or she will prepare a written opinion is protected in Quebec by the Constitution. Despite all these factors, the report of the *ad hoc* Committee points out[128] that "quite a few members" of the Superior Court will, where possible, draft their decisions in the official language of the losing litigant, thus facilitating the filing of an appeal. Yet the fact remains that almost all Montreal lawyers consulted by the Committee "observed that the language in which a decision was drafted frequently did not correspond to the language of the trial."[129]

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[127] In order to place a witness at ease regarding the language of testimony, the report of the *ad hoc* Committee recommends that the court clerk read the following bilingual statement: "Vous avez le droit de témoigner en français ou en anglais. Dans quelle langue préférez-vous le faire? You have the right to give your evidence either in English or in French. In which language do you wish to give your evidence?"

[128] See page 28 of the *ad hoc* Committee report.

[129] See page 29 of the *ad hoc* Committee report.

As a matter of policy, the Quebec Department of Justice undertakes to translate a judgment from one official language to the other on the request of a litigant.[130] The right to a translated judgment is also now provided for in Section 9 of the *Charter of the French Language*: "Every judgment rendered by a court of justice and every decision rendered by a body discharging quasi-judicial functions shall, at the request of one of the parties, be translated into English or French, as the case may be, by the civil administration bound to bear the cost of operating such court or body."

Surprisingly, only a few of the lawyers consulted by the Committee were aware of the translation service of the Department of Justice. Among English-speaking lawyers who were aware of the service, there were complaints about the quality of translations. It was also observed (by both English and French-speaking lawyers) that the time delays involved before receipt of a translated judgment were often excessive. In view of the comments received, the report recommends that improvements be made to the translation service so as to ensure that the time delays are no longer than the period within which an appeal must be filed and that the quality of translations be reviewed.

Originating documents issued under court authority (such as writs, subpoenas, notices and other introductory documents) may, as a matter of strict constitutional law, be issued in one language only. Nevertheless, the Quebec Department of Justice maintains a long list of court documents which are available in English. The *ad hoc* Committee points out, however, that only a few of these documents, those most frequently requested by legal counsel, are routinely kept in stock at the Montreal Courthouse. Otherwise, a delay of two days is incurred before an English-language document is produced. With respect to those who receive formal court documents, policy directives make it clear that they have no right to require that a translation be produced.[131]

Given the problems which may arise from lack of comprehension by persons who are served with an originating document written in an official language they do not understand, the report of the Committee recommends that all writs of summons, subpoenas and all similar documents issued under the authority of a court should be in bilingual format. Until such time as that recommendation is implemented, however, the report recommends that the Bar of Montreal, in association with the Quebec Department of Justice, ensure that such documents are always and readily available in both English and French.

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[130] See: Recueil des politiques et directives, Directive en matière de communications judiciaires, Section 2(A). Referring to judgments and related procedures, the directive provides: "Whether they are written in English or in French, these procedures are translated into the other language upon written request from a party to the litigation addressed to the Director of the civil section". *[Translation]*

[131] See: Directive en matière de communications judiciaires, Paragraph 2(A)(b). Referring to procedures unrelated to written judgments, the directive provides: "The person receiving such procedures may not require their translation". *[Translation]*

Beyond the two-language capabilities of the judiciary and members of the practising Bar, the report of the *ad hoc* Committeé also reviews the issue of bilingualism among other court house personnel. It points out that concerns have been raised (by English-speaking counsel) about the accuracy of minutes of proceedings prepared by court clerks in their second language. The Committee feels that it is important to have a system of review of minutes of proceedings whenever they are drafted in a clerk's second language. In addition, the report recommends that policies be put in place which would provide for the evaluation and monitoring of the language fluency of those who occupy such positions.

With respect to court house personnel who work outside the courtroom, the report takes note that there is a general perception among lawyers that they are essentially unilingual in French. Moreover, signs and notices posted in the Montreal court house are invariably in French only. As a result, English is rarely used in conducting business related to the legal process in general. It therefore recommends that services to the public in English be enhanced, that the public be made aware of the available of such services by suitable notices and that signs and notices be routinely posted in both official languages.

Seen as a whole, the two-language capability of the court system in the District of Montreal ensures that actual legal proceedings can be conducted in English or French. Civil litigants and witnesses will almost invariably appear before a judge capable of speaking their official language. At the same time, however, the *ad hoc* Committee has identified certain weaknesses in the delivery of two-language services which merit attention. Its recommendations range from suggested amendments to *Rules of Court* which would require the identification of the official language of witnesses, to enhanced support for language training for judges and members of the Bar, to improvements in translation services of judgments, to increased two-language capability among general personnel in the Montreal Courthouse.

Outside the District of Montreal, the report offers little upon which firm conclusions can be drawn. It does note, however, that both English- and French-speaking legal counsel tell of numerous experiences in other districts "where either the trial judge or opposing counsel had been incapable of dealing with a case involving English witnesses." Presumably the problems encountered relate to not being able to understand a witness who testifies in English, or to the incapacity to examine the witness in English. As the report points out: "...many counsel assumed that they would never choose to plead a case in English in these districts, since the problem of language comprehension would make pleading in English detrimental to their case. One does not have to go far from Montreal to encounter this problem."[132] The suggested amendments to the *Rules of Practice* of both the Superior Court and the Court of Quebec (so as to require the pre-trial identification of the language in which witnesses will testify) would, the Committee believes, be useful in resolving some of the problems encountered in judicial districts outside Montreal.

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[132] See page 84 of the *ad hoc* Committee report.

Our own consultations, for example, in the Quebec City, Eastern Townships and Gaspé Peninsula (Gaspé and New Carlisle) regions, where English-speaking communities are found, have led us to conclusions similar to those of the *ad hoc* Committee. The inadequate two-language capability of staff at court houses, the unavailability of interpreters and certain cases where the lack of sufficiently bilingual judges was noted, are all factors that lead us to similar conclusions. The people with whom we met regretted the absence, in civil cases, of the kind of linguistic guarantees that are recognized in criminal cases, and the limited protection afforded by Section 133 of the *Constitution Act, 1867.*

In some cases, the client prefers that his or her counsel use the official language of the judge or the language which would appear to be that in which the judge will best understand the evidence and the arguments. As a result, counsel has to whisper into the client's ear the gist of the testimony of a witness or of his/her representations to the court. We were told of several cases where the client literally understood nothing of the evidence or the questioning of another witness, nor of the judge's remarks to counsel.

Finally, interpretation, when available as needed, prolongs the trial. In addition, the costs of interpretation and the possibility of having to bear them are other factors that have an adverse impact on access to justice in English in these regions.

Manitoba

The right to use either English or French before the courts of Manitoba is constitutionally protected by Section 23 of the *Manitoba Act, 1870.* While the scope of this right is limited in terms of the correlative obligations it imposes on the State to ensure that courts can operate directly in both languages, as explained earlier, the practical consequences of using the minority official language must nevertheless be faced. At the very least, steps must be taken to enable litigants, legal counsel and other court house personnel to understand one another. For example, where litigants use different official languages, a system of translation of written documents, and possibly interpretation at trial, would seem unavoidable. Only where the parties and lawyers proceeded in the same official language, and were understood directly by the presiding judge and other courtroom personnel, could one dispense with translators and interpreters.

The Court of Queen's Bench has adopted a set of written policies which address the administrative issues inherent in exercising the right to use the minority official language before the court, policies which appear to have been adopted unofficially by the Manitoba Provincial Court as well. The policies require that where a statement of claim is submitted in French, the court clerk must send a copy to the chief administrator (Director) of the Court of Queen's Bench, who in turn sends the document to Translation Services. This is done automatically, since it has been found that in 90 to 95% of cases begun by way of a statement of claim in French, the opposing party (or counsel) requests an English translation. Once the translation is completed, the Director must ensure that it is submitted to the Clerk of the Court and that it becomes an integral part of the court record. The policies also

provide that where the statement of defence is submitted in French as well, the clerk should not send a copy to the Director, it being assumed that the case as a whole will then proceed in French. Should a party wish a document translated from English into French, the policies require that a written request to this effect be made to the Director of the Court.

With respect to interpretation needs at trial, the policies require that applications be co-ordinated by the Director, given the fact that resources are limited. The policies also state that where testimony given at trial must be interpreted, such interpretation is done consecutively only. Arguments and oral submissions, on the other hand, are to be interpreted simultaneously.

It should be pointed out, however, that the policies address only the issue of interpretation and translation which arise in actual proceedings before the court. Communications held outside the court, such as examinations for discovery and hearings held in a lawyer's office, are not regulated by the policies. As a result, translation, interpretation and transcription needs arising in these contexts must be assumed by the parties. Expenses incurred by a party in this regard are considered disbursements and fees taxable at the conclusion of litigation.

Administrative issues inherent in exercising the right to use the minority official language have also been addressed by the Manitoba Court of Appeal. Part III of the *Rules of Court* of the Manitoba Court of Appeal (called the *Language Rules*) sets out the parameters governing the use of English and French. Rule 112 stipulates that an initiating document must be in either English or French. As a general principle, the language of procedures during the appeal corresponds to that of the initiating document, unless a party makes application for an order regarding the use of more than one official language.[133] In such cases, an order of language directions is issued by the registrar or a judge, an order which "shall regulate the mode of exercise of the right to use English and French in the proceeding." (Rule 120)[134]. Although the full extent of such an order is left undefined by the Rules, it is stipulated that translation of documents may be required, in which case the Court Services Branch assumes

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[133] Rule 113 provides for such an application:
"Where
(a) a party wishes to exercise his or her right to use a language other than that of the initiating document;
(b) a party wishes to use a language other than the language used by that party in the forum from which appeal is being taken; or
(c) testimony of witnesses or written exhibits were tendered on behalf of a party in both the English language and the French language in the forum from which appeal is being taken;
that party shall file with the registrar a notice to determine the language directions on appeal, within 14 days of service of an initiating document."

[134] As previously mentioned in the part of this study devoted to the criminal process, the French-speaking lawyers' association of Manitoba considers this rule as potentially in conflict with Section 23 of the *Manitoba Act, 1870*, in the sense that it may place unjustified constraints upon the constitutional freedom to use either official language before the courts of Manitoba.

responsibility, and that the Department of the Attorney General may be required to supply simultaneous interpretation for oral hearings (Rules 121 and 122).

With respect to orders and certificates of decision issued by the Manitoba Court of Appeal, the Rules provide that they shall be in both English and French in all cases where an order of language directions has been made; otherwise they shall be in the language of the initiating document (Rule 125). Reasons for judgment and decisions of the court may also be issued in both languages where an order of language directions has been made (Rule 124).

The Rules remain silent on the issue of the language capabilities of a judge sitting on appeal initiated in French, thus implying that the use of simultaneous interpretation by an Appeal Court judge may be adequate in such a context. It would appear that appeal procedures in which French is used are rare and that they normally take place in a courtroom equipped with simultaneous interpretation. We were informed that in the past year only one case in the Court of Appeal was commenced in French, but that in the course of the hearing the appellant switched to English because the bench had difficulties fully comprehending and using the French language comfortably.

The practical consequences of using the minority official language, i.e., the need to provide for translation of documents, have also been addressed in legislation. For example, statutes which establish various courts contain provisions allowing for the extension of time delays in the legal process in order to allow for the translation of initiating documents or other written submissions.[135] Part III of the *Rules of Procedure* of the Court of Appeal also contain provisions which regulate the administrative steps that must be taken when the minority language is used.

It would appear that civil proceedings are only infrequently conducted in the French language in Manitoba. For example, before courts exercising jurisdiction in the area of family law, we were informed that approximately one case per month may be heard in French. Criticism of the situation which prevails in the latter courts is to a great extent centred on the fact that no full-time French-speaking judge is assigned to hear such matters. Where French language proceedings are requested, a judge is assigned to the case on an *ad hoc* basis.

Out of a total of 15,000 civil proceedings per year conducted in Manitoba, about 24 may be commenced in French, a figure which corresponds to the number of requests for translation

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[135] Section 32 of the *Court of Appeal Act*, R.S.M. 1987 (vol. 1), c. C240 provides: "Notwithstanding this or any other *Act* of the Legislature, for the purposes of allowing time for obtaining a translation from French into English or English into French of any document filed in the court or served on a party in an action or proceeding in the court, a judge of the court may extend the time within which, or postpone the day before or by which, any further document is required to be filed in response or any proceeding is required to be taken under any *Act* of the Legislature." Provisions with a similar effect are found in Section 98 of the *Court of Queen's Bench Act*, S.M. 1988-89, c. 4 - C280; and in Section 51 of the *Provincial Court Act*, R.S.M. 1987, c. C275.

from French to English. In addition to this number, there may be between 10 and 20 cases in Small Claims Court which are commenced in French. Generally speaking, civil proceedings in which French is used by one of the parties are, in effect, bilingual proceedings.

The language in which judgment is issued corresponds to the language of the trial; thus, in the case of bilingual trials, the judgment will be issued in both English and French. The translation service for dealing with statements of claim and other initiating documents is also available to provide translation of judgments when they must be issued in both official languages.

From an administrative point of view, we were informed that there is a significant lack of bilingual staff within the court system to facilitate the filing of documents in French. The lack of bilingual staff results in a marked unfriendliness to the use of French and even some unpleasant encounters. The lack of two-language service extends to the level of Masters of the Court of Queen's Bench who have a limited jurisdiction to hear interim or pre-trial applications. It would appear that no Master is currently able to hear adequately an application in French.

Ontario

By way of statute (the *Courts of Justice Act*[136]) Ontario has declared that English and French are the official languages of its courts. However, territorial qualifications in the *Act* give French a lesser status than English. For example, the *Act* declares that "all hearings in courts shall be conducted in the English language and evidence adduced in a language other than English shall be interpreted in the English language", and that "documents filed in courts shall be in the English language or shall be accompanied by a translation of the document into the English language certified by affidavit of the translator", except where the use of French is otherwise provided for by the *Act*.[137]

The exceptions in the *Act* essentially carve out a place for what are referred to as bilingual proceedings, which a party to any action before the courts of Ontario has the right to require. Where the right is exercised, a number of rules apply.[138] If hearings are to be conducted

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[136] Revised Statutes of Ontario 1990, c. 43, Section 125.

[137] See Subsection 125(2) of the *Courts of Justice Act*, ibid.

[138] These rules are found in Subsection 126(2) of the *Act*:
126(2) The following rules apply to a proceeding that is conducted as a bilingual proceeding:
1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.
2. If a hearing that the party has specified is held before a judge and jury in an area named in Schedule 1, the jury shall consist of persons who speak English and French.

before a judge (or other officer) sitting alone, then they must be presided over by a judge (or other officer) who speaks English and French. In addition, "Evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given", thus ensuring that other officers of the court such as court reporters are also bilingual. The same rule applies with respect to any oral evidence given at an examination out of court. The *Act* also requires the court to provide interpretation of any oral evidence or submission, at the request of a unilingual party or counsel. Regulations under the *Act* establish modalities by which notice is to be given that a party intends to exercise his or her right to a bilingual proceeding.[139] It should be remembered that the use of French beyond the trial process *per se*, for example in interlocutory motions, is subject to the judge or officer's discretion pursuant to Subsection 126(2)4. It should be noted as well that, where all parties to an action are French-speaking, the procedures are conducted exclusively in French. In other words, regardless of the terminology in the *Act*, unilingual French-language procedures are allowed in Ontario.

Where the hearing is to be conducted before a judge and jury, the right to bilingual proceedings, as described above, is restricted to certain territories set out in Schedule 1 to the *Act*.[140] Presumably this provision was motivated by the practical difficulties of empanelling bilingual juries in areas where the minority language population is small. It is possible, however, to transfer a trial to one of the bilingual territories. Beyond the regions

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3. If a hearing that the party has specified is held without a jury, or with a jury in an area named in Schedule 1, evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.
4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.
5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it was given.
6. In an area named in Schedule 2, a party may file pleadings and other documents written in French.
7. Elsewhere in Ontario, a party may file pleadings and other documents written in French if the other parties consent.
8. The reasons for decision may be written in English or French.
9. On the request of a party or counsel who speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraphs 2 and 3 and at examinations out of court, and translation of reasons for a decision written in the other language.

[139] See *Regulation 185*, Sections 2 and 3; Revised Regulations of Ontario 1990.

[140] Schedule 1 includes the counties of Essex, Kent, Prescott and Russell, Renfrew, Simcoe, and Stormont, Dundas and Glengarry; the territorial districts of Algoma, Cochrane, Kenora, Nipissing, Sudbury, Thunder Bay, and Timiskaming; the County of Welland as it existed on December 31, 1969; The Regional Municipality of Hamilton-Wentworth, the Regional Municipality of Ottawa-Carleton; the Regional Municipality of Peel, the Regional Municipality of Sudbury, and the Municipality of Metropolitan Toronto. This schedule contains additions made in 1994 (Statutes of Ontario, 1994, c.12, s.43(3)).

set out in Schedule 1 to the *Act*, the right to bilingual proceedings is applicable only to hearings before a judge (or other officer) sitting alone.

With the exception of the Family Court of the Ontario Court (General Division), the Provincial Division of the Ontario Court and the Small Claims Court,[141] territorial restrictions also apply regarding the filing of pleadings and other documents in the French language. Only in areas identified in Schedule 2 to the *Act* is this allowed, or where the other parties consent, a qualification which considerably diminishes the scope of the general right to bilingual proceedings.[142] With respect to proceedings before the three courts where territorial restrictions do not apply, i.e., before the Family Court, the Provincial Division of the Ontario Court and the Small Claims Court, the *Act* requires the court to provide a translation of any document or process, at a party's request.[143]

As mentioned in Part 3 of this study regarding criminal trials, recent amendments to the *Courts of Justice Act* impose a particular obligation on the Crown in right of the province when prosecuting provincial infractions. In effect, when a prosecution under the *Provincial Offenses Act* is being conducted as a bilingual proceeding, the prosecutor must be able to speak both English and French.[144] Where both the presiding judge and the prosecutor speak English and French, the use of French as a language of procedures is assured.

In proceedings before courts where none of the above provisions apply, the *Act* provides that a party acting in person may make submissions in French, or a witness may give oral evidence in French, with the court being obliged to provide translation into English.[145] This provision presumably covers jury trials in regions not listed in Schedule 1 where a Francophone party not represented by counsel makes submissions in French, or where a witness chooses to testify in French.

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[141] These courts are identified in Subsection 126 (4) of the *Act*, which was amended in 1994 to include the Family Court; (S.O. 1994, c.12, ss. 43(2)).

[142] Schedule 2 includes the counties of Essex, Kent, Prescott and Russell, Renfrew, Simcoe, and Stormont, Dundas and Glengarry; the territorial districts of Algoma, Cochrane, Kenora, Nipissing, Sudbury, Thunder Bay, and Timiskaming; the County of Welland as it existed on December 31, 1969; the Regional Municipality of Ottawa-Carleton; the Regional Municipality of Peel; the Regional Municipality of Sudbury, and the Municipality of Metropolitan Toronto. This list includes additions made in 1994 (Statutes of Ontario, 1994, c. 12, ss.43(3)).

[143] See Subsection 126(6) of the *Act*.

[144] The following subsection (to come into force upon proclamation) was added to Section 126 of the *Courts of Justice Act*:

> (2.1) When a prosecution under the *Provincial Offenses Act* by the Crown in right of Ontario is being conducted as a bilingual proceeding, the prosecutor assigned to the case must be a person who speaks English and French. (Statutes of Ontario, 1994, c.12, s.43(1))

[145] See Subsection 126(7) of the *Act*.

With respect to appeals from decisions rendered in the context of bilingual proceedings, the *Act* recognizes the right of a party to require that they be conducted before a judge or judges who speak both English and French. Where the right is invoked, rules regarding language usage for bilingual trials apply, with any necessary modifications.[146]

The combined effect of these legislative provisions gives broad scope to French as an official language of civil procedures in Ontario. Before any court presided over by a judge sitting alone, a party has the right to require that his or her case be heard by a judge who understands French directly, that testimony heard at pre-trial proceedings and at trial be received and recorded in the language in which it is given, that submissions made be so received and recorded as well, and that reasons for judgment be provided in French.[147] Nevertheless, the right to submit written documents and pleadings in French is still subject to territorial restrictions, as is the right to have a jury trial before a judge and jury who speak French. These restrictions appear to be related to practical difficulties which inevitably arise in areas where the absolute or relative size of the French-speaking population is small.

The very phrase "bilingual proceeding" implies that interpretation services will often be necessary in order to facilitate the comprehension of everyone involved. As already mentioned, the *Courts of Justice Act* specifically recognizes that a unilingual party or counsel has the right to interpretation of oral testimony and submissions given during the course of bilingual proceedings.[148] The type of interpretation and to whom it is offered are clarified in regulations adopted by Ontario in 1990. There we find that interpretation is given three alternative meanings: consecutive, simultaneous and whispered.[149] As a general rule, the regulations require that interpretation be consecutive. However, the Deputy Attorney

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[146] Subsection 126(3) of the *Act* provides:
When an appeal is taken in a proceeding that is being conducted as a bilingual proceeding, a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French; in that case subsection (2) applies to the appeal, with necessary modifications.

[147] It should be noted that the *Courts of Justice Act* (Paragraph 126(2)(9)) taken literally recognizes a right to a French translation of a decision written in English only for parties or counsel who are unilingual. It would appear anomalous to deny a French-speaking party access to a judge's decision in his or her official language solely on the basis of his or her understanding of English.

[148] The obligation of the Ministry of the Attorney General to provide interpretation into English or French is also recognized in the *Rules of Civil Procedure*. See Rules 34.09(2) and 53.01(6).

[149] See *Regulation Re Use of French Language*, R.R.O. 1990, Reg. 185; Amended O. Reg. 681/92, in force November 16, 1992. The types of interpretation are defined as follows: "Consecutive" means given during periodic pauses in the material being interpreted so as to be heard by every person present; "Electronic simultaneous" means given concurrently with the material being interpreted and communicated by an electronic amplification and distribution system so as to be heard by every person present who uses an individual electronic apparatus for the purpose; "Whispered" means given concurrently with the material being interpreted so as to be heard only by the persons in the interpreter's immediate vicinity.

General may, at the request of a party, authorize the use of electronic simultaneous interpretation if satisfied that the special circumstances of the case justify the expense.[150] Where a party's request is refused the court may still order such interpretation if it deems it essential to the proper administration of justice.

In prosecutions before the Ontario Court (Provincial Division) the general rule does not apply. In such cases (and where the prosecutor is an agent of the Attorney General), whispered interpretation is provided to the defendant only, unless he or she expressly requests that the whole proceedings be interpreted, in which case the interpretation is consecutive. Where a witness speaks neither official language, the language (English or French) of examination, cross-examination and interpreted answers is determined by the judge (based on the official language understood by all counsel) and the defendant is provided with whispered interpretation if required due to lack of comprehension.[151] Otherwise, witnesses are allowed to chose the official language in which questions will be posed.

Mention should also be made of the gradual extension of bilingualism into the legislative process of Ontario, since access to statutes in both official languages is very important to the effective exercise of the right to use either language before the courts. As of January 1, 1991, all public Bills placed before the Ontario legislature must be presented and adopted in both English and French. Public general statutes adopted and published prior to that date were to be translated before the end of 1991 and subsequently presented to the legislature for enactment.[152] There is no strict legal requirement to make regulations available in French, though the law does require their translation where appropriate (in the opinion of the Attorney General) and their subsequent submission for formal adoption.

The extensive legal framework which currently exists regarding the use of French before courts of civil jurisdiction in Ontario should, in principle, be a welcome catalyst for significant change of past unilingual realities. However, as pointed out in Part 3 regarding

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[150] See Section 7 of *Regulation 185*, which also recognizes the discretion of the court to order electronic simultaneous interpretation as well.

[151] See Section 8 of *Regulation* 185.

[152] The present legal requirements regarding the use of English and French in the legislative process are found in Subsections 3 and 4 of the *French Language Services Act* (Statutes of Ontario, 1986, c. 45):

> 3(1) Everyone has the right to use English or French in the debates and other proceedings of the Legislative Assembly. (2) The public Bills of the Legislative Assembly introduced after the 1st day of January, 1991, shall be introduced and enacted in both English and French.
> 4(1) Before the 31st day of December, 1991, the Attorney General shall cause to be translated into French a consolidation of the public general statutes of Ontario that were re-enacted in the Revised Statutes of Ontario, 1980, or enacted in English only after the coming into force of the Revised Statutes of Ontario, 1980, and that are in force on the 31st day of December, 1990. (2) The Attorney General shall present the translations referred to in subsection (1) to the Legislative Assembly for enactment.

criminal trials, Professor Cousineau's report on the use of French in the judicial system has identified persistent institutional barriers to the exercise of existing rights.[153] Upwards of 80% of Francophone litigants (and specifically accused) are choosing English as the language of proceedings. Possible causes of the under-utilization of French range from delays, additional costs, inadequate access to French-speaking judges, unilingual court house services and the lack of up-to-date sample pleadings and precedents in the French language, to unfamiliarity with legal terminology in French. (It should not be forgotten, however, that sample pleadings and precedents are available through *Le Guide du praticien*, published by the Association des juristes d'expression française de l'Ontario, Ottawa, 1991, and that the *Ontario Rules for Civil Procedure* are issued in both English and French, both versions being annotated.)

Generally speaking, the report of Professor Cousineau suggests that there is a need to emphasize a greater active offer of service in, or promotion of, French in the civil process of the province. The report recognizes that progress has been made over the past 10 years in a number of these areas, such as the presence of several judges who can now read pleadings drafted in French and hear testimony and arguments in that language without an interpreter, the increased numbers of lawyers practising common law who have received legal education in French and the increased availability of sample pleadings and precedents in French for correspondence, orders and decisions.

Nevertheless, the report points out that even in areas where the French-speaking minority is proportionally high there is often a lack of bilingual judges. In Cornwall, for example, where the Francophone population is 34%, there was no judge capable of hearing cases and motions in French at the time the report was completed.[154] Fortunately, this deficiency has been addressed with the recent appointment of two Francophone judges to the Provincial court and one to the General Division of the Superior court. Even where bilingual judges are theoretically available, however, such as in Ottawa, requests for proceedings in French often result in costly delays. Some of this is caused by administrative failures, as was emphasized by a lawyer practising in Ottawa:

> It is not unusual to appear at a hearing before a unilingual English judge when all the proceedings were drafted in French and the request for bilingual proceedings was duly filled out. The judge is unable to hear the case and suggests to the lawyers that they appear before a bilingual or francophone judge. The problem arises when there is no judge available. This can have

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[153] *The Use of French Within the Ontario Judicial System: An Unrealized Right*, prepared by Professor Marc Cousineau for the Ontario Ministry of the Attorney General, September 1994. The report itself should be consulted for details on the sampling of litigants, lawyers and judges, the questionnaires used, and the various findings and recommendations.

[154] See Cousineau, ibid., at 32.

serious consequences, particularly in cases where an order is required on an emergency basis.[155]

Proceedings which take place before a Master are also hindered by the fact that in Ottawa, Cornwall and Windsor the persons occupying these positions are unilingual in English. The lack of French-language services was also documented in offices of the Registrar and the Sheriff in a number of the jurisdictions studied.

Professor Cousineau's report identifies the lack of active offer of service in French across a broad spectrum of the civil process, combined with a reluctance of lawyers (even French-speaking) to recommend to or even advise their clients that they may conduct their cases in French, as factors which greatly narrow the practical scope of the legal right to use the minority language. It is for this reason that the report includes a long list of recommendations designed to improve the ability of the legal system to facilitate actively the use of French.

Saskatchewan

The *Saskatchewan Act, 1905*, which established the province, includes no specific reference to the status of English and French before the courts. However, Section 110 of the *North-West Territories Act* (which was in force in 1905) permitted the use of both languages[156] in much the same way as Section 133 of the *Constitution Act, 1867* and Section 23 of the *Manitoba Act, 1870.*

Following the creation of the province, institutional unilingualism in the courts was pursued as a matter of course and little attention was paid as to whether Section 110 continued to have force of law within the province, although no specific legislation was adopted purporting to repeal it. It was not until the early 1980s that the right to use French before the courts established by Saskatchewan became a focal point for litigation. The case ultimately reached the Supreme Court of Canada, where it was determined that the language rights protected by Section 110 were in fact still in force.[157]

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[155] Cousineau, *supra*, note 153 at 32.

[156] With respect to courts operating within the Northwest Territories, Section 110 provided that "either the English or the French language may be used by any person...in the proceedings before the Courts".

[157] *R. v. Mercure* [1988] 1 S.C.R. 234. The Supreme Court ruled that clear and precise legislation was necessary to repeal the protection accorded under Section 110 of the *North-West Territories Act*, a protection that continued as part of the law in force in Saskatchewan after it became a province. As the Court said: "It must also be underlined that no mention is made of language at all in the various *Acts* that restructured the Saskatchewan judicial system, so it is not easy to see how there could be an implied repeal of Section 110." (p. 264) After having considered the arguments for implied repeal, the Court added: "All there is left, then, to establish an inference that English is the language of the courts is that certain rules of court and court forms were written on the assumption that the judicial system would operate in English. But that is the same assumption, and the same reality, that

However, the Supreme Court also decided that Section 110 could be amended or repealed by the legislature of Saskatchewan and hence did not benefit from constitutional entrenchment. This is a crucial dimension of the judgment, for it accords Saskatchewan the legislative jurisdiction to diminish or even abolish language rights of the same nature as those which the provinces of Manitoba, New Brunswick and Quebec are constitutionally enjoined to respect.

In 1988 Saskatchewan enacted legislation that both abolished the application of Section 110 in the province and provided a new, but diminished, statutory basis for the use of English and French before the courts.[158] The *Language Act* declares that any person may use English or French in proceedings before the courts identified in the *Act*, though it provides no clarification regarding how the language of procedures should be established, the language abilities of judges or other court officials, or the manner in which recourse may be made to translation. Details of this nature are left to the rules of court adopted by each court subject to the provisions of the *Act*.

By the terms of the *Language Act*, the rules of procedure before the courts of the province were required to be printed and published in both English and French before January 1, 1994. This requirement has been met, although no substantive provisions have ever been adopted which speak specifically to administrative adjustments that must be made in order to accommodate the use of French before the courts.

The *Languages Act* also abolished mandatory bilingualism in the legislative process (provided for under Section 110 of the *North-West Territories Act* in force in 1905) and declared all past statutes adopted in English only to be valid. The obligation to enact, print and publish statutes in both languages was replaced by a discretionary power vested in the executive arm

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prevailed before these rules were enacted and, indeed, before the *Saskatchewan Act* came into effect when, for reasons already given, there can be no doubt that Section 110 was the law. Apart altogether from this, can it be supposed that a rule of law so deeply rooted in the history of this country could be swept away by a side wind like the preparation of court forms and the like? How could a statute, particularly one so fundamental as this, be repealed in this fashion?" (p. 265).

[158] *An Act respecting the Use of the English and French Languages in Saskatchewan*, Statutes of Saskatchewan Ch. L-6.1, otherwise known as *The Language Act*. With respect to the courts, Subsection 11(1) permits the use of either English or French by any person in proceedings before specific courts: the Court of Appeal; the Provincial Court; the Court of Queen's Bench; the Surrogate Court; the Traffic Safety Court; and the Unified Family Court. Subsection 11(2) provides that these courts may make rules for the purpose of carrying into effect the right to use either language before the designated courts or for the purpose of providing for any matters not fully or sufficiently provided for in Section 11. Where rules of court are provided for with respect to this right, ss. 11(3) requires them to be printed and published in both languages, although Subsection (4) declares that the rules of practice in these seven courts, as well as those of all other judicial or quasi-judicial tribunals, are valid notwithstanding that they are made, printed and published in English only. In addition, Subsection (5) declares that the rules of practice of these seven courts shall be printed and published in both English and French not later than January 1994. Quite clearly, questions that arise regarding the language of procedures, linguistic abilities of judges and other court officers, recourse to translation, etc., are all matters that can be addressed by the rules of court of those courts identified under Section 11 of the *Language Act*.

of government to provide for the enactment, publication and printing of any past or future provincial statute in English and French.

In the same year as passage of the *Language Act* (1988), Saskatchewan signed a general agreement with the federal government pertaining to the advancement of the status and use of English and French. This five-year agreement was meant to provide a framework for co-operation between the two levels of government, and to facilitate the negotiation and implementation of subsidiary agreements related to (amongst other things): a) the enactment, printing and publishing of laws in French and b) the use of French in the courts. Three subsidiary agreements were also signed that dealt with these matters. Accordingly, Saskatchewan declared its commitment to adopt all provincial statutes and regulations of public importance in both English and French as early as was reasonably possible. In addition, Saskatchewan undertook, as early as possible, to translate into French and to enact, print and publish in both official languages all existing statutes and regulations of public importance. A list of 38 statutes was appended to the agreement, regarding which the province undertook to begin the process of translating into French and subsequently to enact, print and publish in both official languages.

In light of a recent case in Saskatchewan, *R. v. Rottiers*,[159] it would appear that little progress has been made over the last six years in making statutes of public importance available in French. The Rottiers case essentially dealt with the unfairness to Francophone accused created by the unavailability of provincial legislation in French. In order to conduct his defence (for an alleged breach of a municipal regulation), Mr. Rottiers requested access in French to four provincial statutes. The position of Mr. Rottiers was in part based upon the federal-provincial agreement referred to in the previous paragraph (*Canada-Saskatchewan Subsidiary Agreement, 1988*).

Two of the statutes requested by Mr. Rottiers, in particular the *Highway Traffic Act*, were unavailable in French. This *Act* was clearly one of public importance. Moreover, the judge found that "[the] Government of Saskatchewan has done nothing in six years to meet the requirements of the contract (i.e. the *Subsidiary Agreement*)" [*our translation*]. Having regard to fairness to the accused, the judge was drawn inexorably to the conclusion "that a person who elects to speak French at trial in Saskatchewan must have access to relevant legislation in French." He further concluded:

> Without this guarantee the right to use French at trial is hollow and illusory. Certainly, the person who litigates in French will not be in so strong a position before the courts in Saskatchewan as the person who litigates in English. Thus the issue becomes one of fairness and is touched by article 7 of the *Charter*, which requires that no one will be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice; and/or

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[159] *Supra*, note 74.

> by article 11(d) of the *Charter*, which guarantees each citizen's right to be presumed innocent unless found guilty in a fair...hearing. The fairness-based approach which leads to the conclusion that an accused person must have full access to the facts (s)he faces leads to the conclusion that an accused person must also have access to the relevant legislation in her (his) official language.

Since there was no indication that the relevant legislation would ever be made available in French, the judge ordered that the proceedings against Mr. Rottiers be suspended (i.e., ordered a stay of proceedings). The Saskatchewan Court of Queen's Bench overturned this Provincial Court judgment, and in so doing pointed out that the government of Saskatchewan has full legislative authority to determine if provincial statutes will be published in both English and French. On this point, the *Language Act* clearly does not require *Acts* of the provincial legislature to be enacted, printed or published in both languages. Nevertheless, the issues raised in the case do underscore the important link between the right to use either official language before the courts and access to bilingual legislation. The absence of the latter greatly diminishes the effectiveness of being granted the right to use either language in the judicial system.

It would appear that civil proceedings in which French is used as a procedural language are extremely rare, despite the fact that both the Provincial Court and the Court of Queen's Bench do have at least one fluently bilingual judge. This is also the case with respect to the Court of Appeal. We have been told, however, that the administrative apparatus of the court system functions almost exclusively in English.

Alberta

In light of the relevance of the Supreme Court's decision in *R. v. Mercure* to its own situation, Alberta also adopted language legislation in 1988 which declares that Section 110 no longer applies to matters within its legislative jurisdiction.[160] The only language right before the courts recognized by the legislation is that of any person to use English or French in oral communications in proceedings before designated courts. All other matters were left to be clarified by regulations adopted by the Lieutenant Governor in Council or provided for in rules of court already in force. The right to use either language before the courts of the province is thus considerably more restricted than under the equivalent legislation in Saskatchewan.

No regulations have yet been adopted by Alberta. As to the *Rules of Court*, they are completely silent regarding the language of procedures. We have been told that the Court of

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[160] *Languages Act*, Statutes of Alberta, c. L-7.5. Subsection 4(1) of the *Act* provides that any person may use English or French, but only in oral communications in proceedings before designated courts, i.e., the Court of Appeal; the Court of Queen's Bench; the Surrogate Court; and the Provincial Court. Subsection 4(2) provides that the Lieutenant Governor in Council may make regulations for the purpose of carrying into effect Section 4 or for any other matter not sufficiently provided for in Section 4 or in the rules of the designated courts already in force.

Appeal of the province is prepared to accept documents written in French, even though there are no written rules on the subject. The Court of Appeal has not yet ever heard an appeal in French, a fact which most likely reflects the lack of opportunity to use French at the trial level.

Generally speaking, both the Court of Queen's Bench and the Court of Appeal are receptive to the use of French, despite the lack of an administrative structure able to provide two-language support. We were told of an adoption case involving Francophone clients where the judge himself changed the language of procedures from English to French when it became clear that the parties spoke very little English. The fact that the judge was bilingual was merely a happy coincidence.

The rarity of French as a language of legal texts (the lack of precedents making them much more time-consuming to prepare) and the absence of any right to submit written documents to the courts in French all but precludes its use in, for example, the preparation of wills. As a result, legal counsel are placed in the position of having to explain to Francophone clients, by way of interpretation into French, the meaning of their last will and testament, drafted in English.

British Columbia

The Supreme Court rules in British Columbia require explicitly that any documents filed before the courts be in the English language.[161] Transcripts of oral evidence must also conform to this basic rule. The validity of this rule, attacked as being discriminatory and therefore contrary to Section 15 of the *Canadian Charter of Rights and Freedoms*, was upheld by the British Columbia Court of Appeal.[162]

The impediment to the use of French in the civil process in British Columbia was looked upon with disfavour by the Canadian Bar Association which in 1992 adopted a resolution requesting the government of British Columbia to amend its legislation so as to allow for the use of French in written procedures before the Supreme Court of the province (as well as before all other courts in the province). The government rejected this suggestion soon after it was submitted, citing fiscal restraints and the lack of demand for legal proceedings in French. This rejection was reconfirmed in February of 1994.

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[161] Rule 4(2) reads: "Unless the nature of the document renders it impractical, every document prepared for use in the court shall be in the English Language, legibly printed, typewritten or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper."

[162] See *McDonnell v. Fédération des Franco-Colombiens and Attorney General of British Columbia* (1986) 6 B.C.L.R. (2d) 390.

Northwest Territories

As explained earlier, the government of the Northwest Territories adopted an ordinance in 1984 which included provisions relevant to the use of English and French before courts established by the Territorial Commissioner in Council. The Ordinance eventually became the *Official Languages Act* of the Northwest Territories.[163] The modifications made to the *Act* in 1988 were reviewed in Part 3 of this study.

Section 12 of the *Act* sets out the basic right to use either English or French before the courts in much the same way as Section 133 of the *Constitution Act, 1867* and parallel constitutional provisions. It also declares that the Aboriginal official languages "may be used by any person in any court established by the Commissioner acting by and with the advice and consent of the Legislative Assembly." The *Act* is silent about any measures necessary to facilitate the use of either English or French as procedural languages, or to support the use of official Aboriginal languages, but it does incorporate provisions regarding the issuance of final decisions, orders and judgments. In this regard, Section 13 of the *Act* requires that they be issued in both English and French where a question of law of general public interest or importance is determined, or where the proceedings were conducted in whole or in part in both English and French. The latter condition certainly implies that the basic right to use either official language can have an impact on the language of procedures. The same section also contains qualification of the underlying requirement of bilingual issuance where delays caused by translation would be prejudicial to the public interest or result in injury or hardship to any of the parties. The provisions of Section 13, which also state that nothing therein precludes the oral issuance of a decision or judgment in only one official language, essentially reproduce principles and requirements found in the *Official Languages Act* of Canada.

Regarding the publication of judgments, the *Act* also requires that a sound recording of all final decisions, orders and judgments shall be made in one or more of the official languages other than English or French, i.e., an official Aboriginal language. Copies of such sound recordings are to be made available to any person on reasonable request where a question of law of general public interest or importance is involved and where access is considered practicable in the circumstances.

The requirement that all *Acts* of the legislature in the Northwest Territories be in both English and French necessarily enhances the ability to use either language before the courts. Were legislative enactments available in English only, those who sought to proceed before

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[163] See Revised Statutes of the Northwest Territories (1988), c. O-1. The provisions of the original ordinance can be amended or repealed only by way of an amendment to the *Northwest Territories Act* of the Parliament of Canada (See Revised Statutes of Canada 1985, 4th Supplement, c. 31, Section 98). While this does not constitutionally entrench the status of English and French before the courts of the Northwest Territories, the requirement that Parliament must consent to any changes offers significant protection.

the courts in French would face a significant handicap. The same reasoning would apply to the use of Aboriginal official languages before the courts.

Under the original *Act*, it was left to the Commissioner, on the recommendation of the Executive Council, to regulate the scope of the rights to be accorded to official Aboriginal languages and the manner in which they were to be exercised. This included the manner in which provisions relevant to the use of English and French would also be applicable to the use of official Aboriginal languages. The current *Act* rewords the regulatory power of the government of the Northwest Territories, pitching it at a more general level. With respect to the courts, it provides that the government may make regulations respecting any matter considered necessary to implement the right to use an official language before the courts. This includes English and French, as well as all the official Aboriginal languages. To date, no regulations have been issued, although a draft set of guidelines has been prepared by the Legislative Assembly Committee.

With respect to English and French, forms necessary to initiate civil proceedings are available in both languages, due to the fact that these forms are enacted by way of regulation, the latter being subject to mandatory bilingual publication. As a result, matters such as divorce can proceed, at least in theory, in either English or French. The general availability of forms in the area of land titles, companies, securities and related registers provides support to the use of French in the civil process. Despite these efforts, the use of French in civil proceedings is a very rare occurrence. The federal Department of Justice, for instance, did not know of one matter in which it had been involved that was dealt with in French. It should be remembered, however, that French-speaking legal counsel in the Northwest Territories are a rare phenomenon as well. In point of fact, it would appear that at the present time there are no French-speaking legal counsel in private practice in the Northwest Territories.

Yukon

Yukon adopted its *Languages Act* in 1988. At Section 5 we find the basic right to use either English or French before the courts established by the Yukon legislature.[164] However, unlike the *Official Languages Act* of the Northwest Territories, there is no further clarification of how this right might be implemented. Both the practical ramifications of exercising the right and the restricted interpretation that has been given to it by the Supreme Court of Canada (when interpreting its constitutional correlatives) create problems which are left unresolved on the face of the *Act*. Section 12 would seem to speak to these matters in that it empowers the Commissioner in Executive Council to make regulations respecting any matter that it deems necessary to implement Section 5. More generally, recognition that other steps might be necessary to ensure adequate implementation of the provisions of the *Act* is implied in Section 10, which declares that the Government of Yukon may enter into

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[164] See Statutes of Yukon 1988, c. 13, *Languages Act*.

agreements with the Government of Canada (or any other person or body) relevant to the implementation of the *Act* or matters related to it.

As explained above when dealing with courts of criminal jurisdiction, no regulations have been adopted related to the use of English and French before the courts, with the exception of a very recent practice directive. The purpose of the practice directive issued by the Supreme Court of Yukon on May 30, 1994, was to amend Rule 4(2) of the *Rules of Court* which read as follows:

> Unless the nature of the document renders it impractical, every document prepared for use in the court shall be in the English language, legibly printed, typewritten or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper.

This was clearly in conflict with provisions in Section 5 of the *Languages Act* adopted in 1988. The directive therefore determines that Rule 4(2) shall be read subject to the *Languages Act* and that the words "English language" shall mean "English or French language". It would appear that old Rule 4(2) was not rewritten and officially replaced by one compatible with Section 5 of the *Languages Act* because of statutory provisions which adopt the practice rules of British Columbia and apply them to Yukon courts.[165] Nevertheless, it took nine years from the adoption of the original ordinance recognizing the official status of French to make the *Rules of Court* available in the French language.

We are told by the Supreme Court of Yukon that procedures related to the *Young Offenders Act*, the *Divorce Act* and the *Bankruptcy Act* are currently being reviewed and measures being developed to allow the use of either English or French.

We are also told that civil cases will be conducted in French upon request and that staff, judges, interpreters and reporters are all available. However, French-speaking counsel in Yukon informed us that two requests for small claims hearings in March and April of 1995 before a bilingual judge were refused. Public authorities offered only to provide an interpreter to facilitate the use of the French language. Moreover, the filing of a mortgage prepared in bilingual format in both English and French was apparently refused by the Land Titles Office. Legal counsel was required to cross off the French version before registration was allowed. In another matter where the defendant was proceeding in French, communications in French with opposing legal counsel resulted in a complaint being made to the Law Society. The latter refused to get involved, but did point out that one lawyer could not refuse to reply to another lawyer because correspondence was written in French. These incidents certainly leave the impression that there is less than enthusiastic support for the use of French in the civil process in Yukon.

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[165] See Section 37 of the *Judicature Act* of Yukon, R.S.Y. 1988, c. 96 and Section 12 of the *Court of Appeal Act*, R.S.Y. 1988, c. 37).

With respect to Aboriginal languages, Section 1 of the *Yukon Languages Act* recognizes their significance and expresses the desire to take appropriate measures to preserve, develop and enhance them. In addition, Section 10 empowers the Commissioner in Executive Council to make regulations in relation to the provision of services by the Yukon government in one or more of the Aboriginal languages.

Nova Scotia

The *Civil Procedure Rules* of Nova Scotia have no provisions regarding the use of English or French before courts of civil jurisdiction. The *Judicature Act* of Nova Scotia is also silent with respect to the use of either language. Nevertheless, the rules of procedure themselves, as well as the various forms used in motions and other actions before the courts of the province, are available in English only. Although not declared in law or rules of procedure, the force of tradition and practice has made English the only official language of the civil courts.

In order to review the current situation regarding the use of French before the courts of Nova Scotia, the Canadian Bar Association (CBA) resolved in 1992 to establish a special committee, with its Nova Scotia branch undertaking to implement the resolution. The members of the special committee included representatives from the Bar of the province, the judiciary, the provincial government, the CBA and its Nova Scotia Branch.

While the information the special committee collected is not comprehensive, it does indicate that French is not formally excluded as a language of trial procedures. In addition, information made available to the committee indicates that French-language documents can in fact be registered, that wills prepared in French can be probated, and that a certain number of bilingual government employees are available to assist members of the public seeking information at various courthouses. With respect to the judiciary, the committee was informed that two Supreme Court Justices are fluently bilingual, as well as two judges of the Provincial Court (one of whom sits as a judge of the Family Court).

The situation before higher courts (the Supreme Court and the Court of Appeal) gives evidence of very little use being made of the minority language. For example, we were informed that no civil trial has yet taken place in French before the Supreme Court. No current member of the Court is bilingual and able to preside at a hearing in French without the use of interpretation.

It would appear that the current capacity of the court system in Nova Scotia is sufficient to accommodate a limited number of court procedures in the French language, particularly at the lower levels. In its final report, the special committee sees the existing infrastructure as a good basis upon which officially to recognize the use of both English and French before the courts of the province. Potential demand for the use of French is anticipated particularly in the Family Court, the Probate Court and the Small Claims Court. It is also acknowledged

that the official use of French would entail the preparation of court forms and the rules of civil procedure generally in both English and French.

The cost factor associated with the increased use of French in the court system of Nova Scotia was identified as a major impediment to change. Legal costs rise as a result of translation and/or interpretation rendered necessary by the use of more than one language in court proceedings, a potentially heavy burden for a private party to assume. The special committee recognized that where these costs are not assumed by government, it is unlikely that a litigant will decide to proceed in French, unless both parties (as in family law matters) speak the minority language. However, it anticipated that the increased use of French in proceedings before Family Court, Probate Court and Small Claims Court would not generate significantly greater costs. At the time of preparing its report, the committee was aware of the position of the provincial government that no monies were available to cover increased costs associated with the use of French in the court system.

The fact that the current court infrastructure can to a certain extent accommodate the use of French is not widely known or appreciated by the Francophone population. It is generally assumed that proceedings as a matter of course take place in English, thus reducing considerably the number of requests to use the minority official language. The special committee thus felt it was important to increase public awareness of the already existing capabilities of the system. This in turn would encourage people to use French more often; and the increased demand might motivate the provincial government to improve and expand existing capabilities.

In light of its findings, the special committee recommended (not endorsed by two members: the judge and the government representative) that the *Judicature Act* be amended to allow the use of both official languages before the courts of Nova Scotia, and that changes be made to the *Civil Procedure Rules* so as to allow the use of both languages in any oral or written pleadings.

Prince Edward Island

We have been informed by the Supreme Court of the province that no provision is made for the use of French before courts exercising civil jurisdiction.

Newfoundland

As is the case in Prince Edward Island, there is no provision made for the use of French in the civil process in Newfoundland.

4.3 Summary

Wide disparities exist in Canada with respect to the use of English and French in the civil process. This can be traced in part to the fact that there is no one legislative authority which

can enact universal statutory rules, as is the case regarding the criminal process. In addition, only the courts of three provinces and those created by Parliament are bound to respect the constitutional right to use either official language in the judicial process generally. Even where constitutional protection prevails, the opportunities to use either official language vary considerably.

The foregoing overview of the situation in all jurisdictions, while necessarily incomplete, underscores the need to implement positive measures which encourage and facilitate the use of either official language before the courts. These range from the provision of a sufficient number of bilingual judges, adequate bilingual court house staff, the availability of mandatory forms and rules of court in both official languages, and a system of interpretation which facilitates communication between parties of different official languages, to the training of lawyers capable of pleading in either official language.

Increasing the use of the minority official language in the civil process, especially where such use has been rare in the past, clearly entails costs, whether this be related to the need to provide translation and interpretation, the publication of bilingual forms and precedents, higher legal fees, or the need to invest in better language training for those who are or will ultimately be working within the judicial system. One should remember, however, that significant contributions in this regard have already been made, often under the aegis of the POLAJ.[166] In addition, training of lawyers for common law practice in French is currently provided by the Universities of Moncton and Ottawa. Moreover, impressive work has been accomplished by translation centres at the above mentioned universities, as well as at the Institut Joseph-Dubuc in St. Boniface in Manitoba. Their efforts have rendered available to the legal profession a wide range of forms and precedents in both official languages as well as very valuable lexicons of legal terminology. In short, the accumulated experience of educational and translation institutions in various provinces, the work already accomplished in the area of legal terminology, and the efforts made by some court systems and members of the legal profession, provide a good basis upon which to build.

The inequities which currently exist in the use of both official languages in the civil process, even as between provinces bound by constitutional guarantees, can be decreased only by the adoption of policies founded upon an active offer of service in both English and French. It is to be hoped that such an approach will be endorsed by public authorities, and combined with necessary legal reforms in those jurisdictions which currently restrict or simply ignore the use of the minority official language.

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[166] Established in 1981, the National Program for the Integration of Both Official Languages in the Administration of Justice (POLAJ) is a joint initiative of the Departments of Canadian Heritage, Justice and Public Works and Government Services.

5.0 RECOMMENDATIONS

The general right of accused persons to a criminal trial in their official language (set out in the *Criminal Code* of Canada) was proclaimed in force in all provinces and territories on January 1, 1990, following several years of gradual implementation in a limited number of jurisdictions. Although an important step, the statutory recognition that accused persons should have access to the criminal process in their own official language is incomplete without support and encouragement from judges, lawyers, court house staff, police forces, and government departments charged with the administration of criminal justice. In short, the legal declaration of a language right depends for its efficacy on the actions of public authorities to create a positive environment in which such rights can be most effectively exercised.

The manner in which the *Criminal Code* provisions relating to the language of trial have been implemented since 1990 appears uneven and at times sporadic from one region of the country to the next. While the reasons for this are varied and complex, the need to replace relatively passive recognition of the *Criminal Code* provisions with a more pro-active approach which encourages the exercise of existing rights is evident. One cannot underestimate the importance of an active offer of service in the minority official language by public authorities. It is in this spirit that the following recommendations are made, some of them lending themselves to legislative amendment while others might be considered in the context of establishing institutional policies relevant to language of trial issues. Given provincial jurisdiction over the administration of justice, any legislative changes to the *Criminal Code* provisions dealing with language rights presuppose appropriate consultations with the provinces.

1. It is vital that accused persons be made aware of their right to be tried before a judge, and by a prosecutor, who speak their official language. Currently, the duty of a judge to inform accused persons of their right to be tried in their official language applies only if they are unrepresented. While even this duty does not appear to be respected at all times, the assumption that an accused represented by legal counsel does not require to be informed of his or her language rights is frequently erroneous. To ensure greater knowledge on the part of accused persons, it is recommended that a new mandatory form be introduced in the criminal process which apprises accused persons of their language rights and allows them to identify their preferred official language. Such a form would be required to be completed no later than the time when the accused makes his or her election as to the language of trial under Section 530 of the *Criminal Code*. It is therefore recommended that an appropriate amendment be made to Part XVII of the *Criminal Code* to ensure the timely use of such a form.

2. Where an accused fails to meet the time limits required by Section 530 of the *Criminal Code*, there are currently no criteria to guide the exercise of judicial discretion to issue an order directing in any event that trial take place before a judge, and with a prosecutor, who speak the official language of the accused. It is therefore recommended that such discretion be guided by fixed criteria relevant to the linguistic circumstances of the accused, as well as to the good faith in which a request for a minority language trial is made.

3. Where an accused person requests a minority language trial the charges and the particulars should be made available without delay in the official language of the accused. The absence of any such requirement in Section 530.1 of the *Criminal Code* has led to inconsistent policy and conflicting judicial decisions. It is therefore recommended that Section 530.1 be amended to incorporate this requirement.

4. The language in which pre-trial disclosure of evidence is made is not currently covered by Section 530.1 of the *Criminal Code*. Policy in this regard is uneven. In fairness to the accused it is recommended that Section 530.1 be amended so that, to the extent that it is reasonable to do so, documents which will be introduced as evidence at trial will be disclosed to the accused or his or her counsel in the accused's official language. The disclosure of other documents generated in the course of a criminal investigation should be subject to the same requirement only where it is reasonable in all the circumstances to undertake their translation. Otherwise, they should be disclosed in the language in which they were prepared.

5. The use of interpretation at minority language trials has sometimes given rise to questions regarding the quality of the translation. It is recommended that greater vigilance be exercised in this regard so that only qualified interpreters be used and that they be made available when requested at every step of the proceedings. The federal government should examine ways to achieve this objective.

6. When an order is issued under Section 530, both the preliminary inquiry and the trial are conducted in the official language of the accused. However, there is nothing in the *Criminal Code* which regulates the language used in other court procedures, whether in applications for judicial interim release or in interlocutory motions of various sorts. It is recommended that, once an order regarding the language of trial is issued under Section 530, all subsequent proceedings before the court related to the charges be conducted in the official language chosen by the accused. This could be accomplished by suitable amendment to Section 530.1 of the *Criminal Code*.

7. Where trial has taken place in the minority official language, it is natural to presume that on any prospective appeal legal counsel and the accused would prefer to proceed in that language as well. Currently, the *Criminal Code* makes no provision for the language of appeal proceedings, though some provincial courts of appeal accommodate the use of the minority official language. Nevertheless, the practice in this regard is uneven and the linguistic capabilities of various courts of appeal vary considerably. It is therefore recommended that the federal Department of Justice review the present situation with a view to ensuring that an accused is not prejudiced by the absence of a statutory right to conduct an appeal in the minority official language.

8. The issue of the right to a bilingual trial, i.e., a trial held before a judge or before a judge and jury who speak both English and French, is being raised more and more frequently. Difficulties arise, for example, in a situation where there are co-accused who do not speak the same official language or who are represented by unilingual legal counsel. Section 530 of the *Criminal Code* does not seem to address several issues applicable to bilingual trials. For instance, what measures apply to bilingual trials if those provided under Section 530.1 are not applicable? How can a bilingual trial be ordered where the order pursuant to Section 530 has not been made and the judge who speaks the official language of the accused does not have the discretionary power to do so? These types of circumstances do not seem to fall within the scope of Section 530 of the *Code*. It is therefore recommended that the federal Department of Justice review and assess the issue of bilingual trials to determine if a suitable amendment to Section 530 of the *Criminal Code* is required.

9. Given the current difficulties in determining with any accuracy the numbers of minority language trials which take place in any given year in the various provinces and territories, it is recommended that the federal Department of Justice put in place a mechanism for gathering statistics in this regard. Future evaluations of the manner in which language rights in the *Criminal Code* have been implemented would be greatly assisted by access to relevant statistics.

10. As previously stated, it is essential that accused persons and everyone else involved in the criminal justice system be made aware of the existing language rights in the *Criminal Code*. With this in mind, it is recommended that the federal Department of Justice review and assess the effectiveness of the mechanisms now in place which aim to disseminate such information.

11. In addition to the *Criminal Code*, a number of other federal statutes are administered by provincial courts, such as the *Divorce Act* and the *Bankruptcy Act*. Given the disparities in official language rights in the civil process before provincial court systems, it is recommended that the federal Department of Justice seek to improve the possibility of using the minority official language in court proceedings related to such federal statutes.

12. When negotiating cost-sharing arrangements with provincial and territorial governments for the delivery of legal aid, the federal government should take into consideration the need to ensure that the language rights in Part XVII of the *Criminal Code* are fully respected. It is therefore recommended that the federal Department of Justice review the manner in which access to legal aid in the minority official language is provided for under various legal aid programs to which the federal government contributes financially.

13. In light of the varying linguistic capabilities of provincial superior and appeal courts, and the impact they may have on the use of both official languages in the criminal and civil processes, it is recommended that the government of Canada place appropriate emphasis on the language capabilities of candidates for judicial appointment.

APPENDIX

SIMPLIFIED STRUCTURE OF COURTS IN CANADA

The following diagram aims to give a very general view of the judicial system in Canada, although a number of components have not been included, such as the Tax Court of Canada, the Martial Court (Trial and Appeal) as well as administrative tribunals. Reference to provincial courts should be read to include courts established by Yukon and the Northwest Territories.