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BILINGUALISM IN THE ADMINISTRATION OF JUSTICE IN NEW
BRUNSWICK
FROM 1963 TO 1989

THESIS SUBMITTED FOR THE DEGREE OF M.A. (TRANSLATION)

by
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University of Ottawa
School of Translators and Interpreters
1990

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PREFACE

I would like to thank the many individuals who helped me in various ways in writing this thesis.

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INTRODUCTION

Since the publication of the Report of the Royal Commission on Bilingualism and Biculturalism and the enactment of the federal Official Languages Act two decades ago there has been a considerable increase in French language services offered throughout Canada. While the extension of French language educational rights has, perhaps, attracted more attention than any other aspect of bilingualism, important changes have also taken place in the way in which the official languages are used in the judicial system. It is the latter aspect of bilingualism which is the subject of this thesis.

In Canada the starting point of constitutional guarantees for official languages is s.133 of the British North America Act or the Constitution Act, 1867. Section 133 reads as follows:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages 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.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

Basically, s. 133 made French and English 'official' languages of Canada and of Quebec for certain purposes, and provided some protection for English language rights in Quebec and French language rights elsewhere in the country.

The guarantees found in s. 133 were, however, implemented in a very limited fashion in the judicial system before the enactment of the federal Official Languages Act in 1969. Although one had the right, in theory, to use either official language before the 'courts of Canada',¹ there were very few bilingual court officials and interpretation services were minimal so that, in reality, these 'courts of Canada' were English language courts. Moreover, courts in most of the provinces functioned in English. It was only the Quebec courts that were able to provide services in both official languages since that province had a bilingual legal profession and bilingual court personnel. Before 1970, even the judgments of the Supreme Court of Canada, Canada's highest court, were not systematically translated. Cases which reached that court were almost always argued in English since of the nine Supreme Court judges, only the three from Quebec were sure to be fluent in French.² Simultaneous interpretation services for the two official languages were not provided for all cases as a matter of course in the Supreme Court of

¹ The 'courts of Canada' are the Supreme Court of Canada, the Federal Court (which prior to 1971 was called the Exchequer Court) and the courts of the Yukon and the Northwest Territories.

² Even now, some francophone lawyers will argue in English rather than rely on the services of an interpreter.

Canada until 1986. Nevertheless, although s. 133 did not, in itself, ensure that Canada would have a bilingual judicial system, it did provide the basis for the subsequent expansion of language guarantees. As Chief Justice Laskin said in holding that the federal Official Languages Act was constitutionally valid, the rights provided for in s. 133 can be extended without a constitutional amendment.

. . . if its [s. 133] provisions are respected there is nothing in it or in any other parts of the British North America Act . . . that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature.³

Indeed, language rights were extended in 1969 with the enactment of the Official Languages Act,⁴ one of the purposes of which was "to clarify the scope of bilingualism in the judicial system".⁵ Section 5 provides that all orders, judgments and rules of procedure of courts of federal jurisdiction shall be bilingual, that the decisions of judicial and quasi-judicial bodies are to be

³ Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182 at 192-193.

⁴ R.S.C. 1970, c. O-2.

⁵ Michel Bastarache, "Bilingualism and the Judicial System," Language Rights in Canada, ed. Michel Bastarache (Montreal: Les Éditions Yvon Blais Inc., 1986) 141. (Hereafter referred to as Michel Bastarache, 1986a).

translated into the other official language and that both versions are to be issued simultaneously.⁶ Section 11 provides that a person giving evidence before a federal judicial body⁷ and the accused in criminal proceedings⁸ may give evidence in either official language. It also provides for simultaneous interpretation when necessary in the courts of the National Capital Region and in the courts of districts designated as bilingual.⁹ While these provisions were not all implemented immediately - for example, it was not until 1983 that the judgments of the Supreme Court of Canada were "issued in both official languages" simultaneously as required by s. 5 (1) of the Act¹⁰ - they did contribute, although in some cases only in the long run, towards the improvement of French language services in the judicial system.

Language rights in criminal proceedings were further extended in 1979 when Part XIV.1, "Language of Accused", of the Criminal Code came in force in New Brunswick, Ontario, the Yukon Territory,

⁶ Michel Bastarache, 1986a: 143.

⁷ Official Languages Act, R.S.C. 1970, c. O-2, s. 11(1).

⁸ Official Languages Act, s. 11(3).

⁹ Official Languages Act, s. 11(2) . The idea of bilingual districts has never been implemented.

¹⁰ Michel Bastarache and Saul Schwartz, "La place du français dans la Common Law," Legal Education in Canada (Montreal: Federation of Provincial Law Societies, 1987) 524.

and the Northwest Territories. Section 462.1 of Part XIV.1 requires that an accused must be advised of his right to:

. . . be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused, or if the circumstances warrant, who speak both the official languages of Canada.¹¹

It was not clear, however, whether the right to choose either language applied to an accused fluent in both English and French and whether it covered the pre-trial stages of proceedings.¹²

In 1982, when the Constitution Act, 1867 was amended to include the Canadian Charter of Rights and Freedoms, official language rights in the judicial system were confirmed. Section 14 of the Charter, under the heading "Legal Rights", provides as follows:

A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

¹¹ An Act to amend the Criminal Code, S.C. 1977-78, c. 36. In the newly revised Criminal Code, Part XIV.1, s. 462.1 became Part XVII, s. 530. See also more recent changes brought about by the enactment of a revised Official Languages Act by Parliament in 1988, *infra*, p. 112.

¹² Michel Bastarache, 1986a: 145.

Sections 16 to 22 of the Charter under the heading "Official Languages of Canada", basically reiterated the provisions of s. 133¹³ and extended official language status to French and English in the province of New Brunswick. Section 16(1) and (2) provided that English and French "have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada" and "in all institutions of the legislature and government of New Brunswick". This means that in all courts of Canada and in all courts of New Brunswick, all citizens are guaranteed equal access to justice in the official language of their choice.

The enactment of these language guarantees did not, however, ensure immediate implementation of bilingualism in the courts. Bilingualism in Canada's judicial system is complicated by the question of which level of government, federal or provincial, has jurisdiction over the administration of the various courts. Although the federal government has jurisdiction over the Supreme Court of Canada, the Federal Court and the courts of the Yukon and the Northwest Territories,¹⁴ each province has responsibility for the administration of justice within its boundaries¹⁵ and for all cases involving civil matters, and even though the federal government has

¹³ The Province of Quebec is not mentioned since it was not a party to the amendment.

¹⁴ Constitution Act, 1867, s. 101.

¹⁵ Constitution Act, 1867, s. 92(14).

jurisdiction over criminal law, the provinces are responsible for the administration of justice in provincial courts of criminal jurisdiction. While s. 16(3) specifically provides that the Charter does not "limit the authority of Parliament or a legislature to advance the equality of status or use of English and French," not all provinces or territories have moved to provide bilingual services in their courts. The situation in various jurisdictions will be outlined briefly below.

Quebec

As we have seen, s. 133 provides basic guarantees with respect to the use of the official languages in the Province of Quebec. As far as the courts in that province are concerned, a generally bilingual bar has always meant that there was sufficient flexibility to provide trials at all levels in either English or French or in both languages at once. Although the government of René Levesque attempted to by-pass these constitutional guarantees in order to promote the French language within Quebec,¹⁶ the 1979 Supreme Court of Canada decision in Attorney General of Quebec v. Blaikie (No. 1) held that the Province of Quebec did not have the power to, in effect, amend s.133.¹⁷

¹⁶ Bill 101, Charter of the French Language, R.S.Q. 1977, c. C-11, ss. 11, 12, 13. See also, A. Prujiner, "Le bilinguisme judiciaire au Québec," Cahiers de Droit 24 (1983) 41-53.

¹⁷ [1979] 2 S.C.R. 1016.

Ontario

Although Ontario is not obliged, constitutionally, to provide legal services in French, it has the largest francophone minority in Canada with a francophone population of approximately 424,720¹⁸ and it has been the provincial government's policy over the past twenty years to recognize French language rights in the legal system, whenever possible. In Ontario, criminal trials regularly take place in French under s. 462 of the Criminal Code. Moreover, s. 135 of the Courts of Justice Act provides that the "official languages of the Courts are English and French,"¹⁹ and in certain districts designated as bilingual, it allows a party to request a bilingual judge. When there is a request for a French trial in a region where bilingual officials are not available or where there are insufficient French-speaking citizens for a bilingual jury, the justice system will either bring in bilingual officials or change the location of the trial to accommodate the request. However, despite these provisions, Ontario still does not have a justice system in which both French and English have equal status. French language services are often provided through interpretation and translation and there is no requirement that the judgment be handed down in both official languages.²⁰

¹⁸ Statistics Canada, 1986 census.

¹⁹ S.O. 1984, c. 11.

²⁰ Ontario, Ministry of the Attorney General, Justice in Either Language. (pamphlet). When interpreters are required in either criminal or civil trials, the cost is born by the province.

Manitoba

Section 23 of the Manitoba Act of 1870 contained a provision almost identical to s. 133 of the Constitution Act, 1867.²¹ Section 23 was in force until 1890 when it was repealed and replaced by the Manitoba Official Language Act which made English the only official language of the province.²² After several unsuccessful attempts to have the 1890 English-only law struck down,²³ the Franco-Manitoban community was finally successful when, in the case of Attorney General of Manitoba v. Forest,²⁴ the Supreme Court of Canada ruled that the 1890 Official Language Act was invalid because it abrogated a constitutional right. However, it was only from 1982 on that legislation was enacted in both official languages and amendments and private acts may still remain in English only.²⁵

²¹ S.C. 1870, c. 3:

Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

²² S.M. 1890, c.14.

²³ The earlier attempts occurred in 1909 and 1916. See Alfred M. Monnin, "Le Statut juridique du français au Manitoba," Revue de l'Université de Moncton 12 (1979): 34.

²⁴ [1979] 2 S.C.R. 1032.

²⁵ Michel Bastarache, "Commentaire sur la décision de la Cour suprême du Canada dans le renvoi au sujet des droits linguistiques

In the 1985 decision in Reference re Language Rights of Manitoba, the Supreme Court said that all Manitoba statutes would have to be translated since the purpose of the constitutional guarantee was "to ensure full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike".²⁶ While this represented a considerable victory for francophones in Manitoba, other efforts at expanding French language services, including legal services, have not been successful. The policy of the Pawley government in 1983-84 to extend French language services to government agencies and boards had to be abandoned when it met with considerable political opposition,²⁷ and in the case of Bilodeau v. Attorney General of Manitoba²⁸ the Supreme Court of Canada held that a summons for a traffic violation which was issued in English only was valid.²⁹

au Manitoba, jugement rendu le 13 juin 1985," McGill Law Journal 31 (1985): 94.

²⁶ [1985] 1 S.C.R. 721 at 739.

²⁷ Russell Doern, The Battle over Bilingualism. The Manitoba Language Question 1983-1985 (Winnipeg: Cambridge Publishers, 1985).

²⁸ [1986] 1 S.C.R. 449.

²⁹ The Court came to a similar conclusion in the case of MacDonald v. City of Montreal, [1986] 1 S.C.R. 460.

Saskatchewan and Alberta

The provision which forms the basis for official language rights in Saskatchewan and Alberta is s. 110 of the Northwest Territories Act.³⁰ This provision is virtually identical to s. 133 of the Constitution Act, 1867 and has applied in those provinces since 1905 when the Saskatchewan Act and the Alberta Act provided that "Acts and ordinances then in force in the Northwest Territories shall continue to apply to the new Provinces subject to subsequent amendment or repeal."³¹ However, bilingualism was never implemented in Saskatchewan or Alberta courts and did not become a real issue until the 1980's when the question of the right to a criminal trial in French came before the courts of those provinces. It was held in both Reference re the Use of French in Criminal

³⁰ R.S.C. 1906, c. 62.

Either English or French language may be used by any person in the debates of the Legislative Assembly of the Territories and in the proceedings before the courts; and both those languages shall be used in the records and journals of such Assembly; and all ordinances made under this Act shall be printed in both those languages: Provided, however, that after the next general election of the Legislative Assembly, such Assembly may, by ordinance or otherwise, regulate its proceedings, and the manner of recording and publishing the same; and the regulations so made shall be embodied in a proclamation which shall be forthwith made and published by the Lieutenant Governor in conformity with the law, and thereafter shall have full force and effect.

³¹ André Braen, "Bilingualism and Legislation," Language Rights in Canada, ed. Michel Bastarache (Montreal: Les Éditions Yvon Blais Inc., 1986) 99.

proceedings in Saskatchewan³² and in Paquette v. The Queen³³ (Alberta) that an accused was entitled to have a trial conducted in French even though Part XIV.1 of the Criminal Code had not been proclaimed in force in those provinces.³⁴ In the Saskatchewan case of R. v. Mercure,³⁵ the court held that s.110 is still in effect but does not constitute a constitutional right and may therefore be changed by legislation. Subsequent to that decision both Saskatchewan³⁶ and Alberta³⁷ enacted language legislation which allows limited use of French in the courts and in the provincial legislatures and which provides that s.110 of the Northwest Territories Act no longer applies.

Northwest Territories and the Yukon

In both the Northwest Territories and the Yukon Territory, neither of which has provincial status, French and English are

³² (1987) 36 C.C.C. (3d) 353.

³³ [1988] 2 W.W.R. 44 (Alta. C.A.). See also Michel Bastarache, "The Principle of Equality of the Official Languages," Language Rights in Canada, ed. Michel Bastarache (Montreal: Les Éditions Yvon Blais Inc., 1986) 507. (Hereafter referred to as Michel Bastarache, 1986b).

³⁴ The section was proclaimed in force in Saskatchewan on September 1, 1987.

³⁵ [1988] 1 S.C.R. 234. The Attorney General of Alberta intervened in the case.

³⁶ An Act respecting the Use of the English and French Languages in Saskatchewan, S.S., 1988-89, c. L-6.1.

³⁷ Languages Act, S.A. 1988, c. L-7.5.

languages of the Legislative Councils by virtue of s.16 (which deals with official languages) and s. 32(1) of the Charter of Rights and Freedoms.³⁸ S. 32(1) is as follows:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories;

The Northwest Territories Official Languages Act enacted on June 27, 1984, duplicates the language guarantees of the Charter and of the federal official languages legislation. It came into force on January 1, 1990. In preparation for that date, the statutes of the Northwest Territories have been translated into French and are scheduled for publication in 1990 and the Northwest Territories Department of Justice recently created the position of Official Languages Co-ordinator. Section 15 of the Northwest Territories Official Languages Act provides that government services shall eventually be provided in both official languages.³⁹ In addition, Part XIV.1 of the Criminal Code applies to both the Northwest Territories and the Yukon.⁴⁰

³⁸ Michel Bastarache, 1986a: 167.

³⁹ Official Languages Act, S.N.W.T. 1984(2), c. 2.

⁴⁰ Michel Bastarache, 1986a: 168.

New Brunswick

The constitutional protection of minority language rights which is implicit in s. 133 was extended to the large French-speaking minority in New Brunswick in 1982 by the Charter of Rights and Freedoms. However, the issue of minority language rights in the New Brunswick justice system had been a matter of some concern as early as the 1960's in that province. In December of 1968 a resolution on the subject, presented by the newly re-elected Liberal government under Premier Robichaud, was adopted by the Legislative Assembly.⁴¹ The resolution reads, in part, as follows:

En ce qui a trait à l'administration de la justice, le gouvernement croit que lorsqu'une personne est accusée devant un tribunal, elle a droit à être jugée dans la langue officielle de son choix. Conséquemment, l'objectif que vise le gouvernement est de faire en sorte que les cours et l'administration de la justice au Nouveau-Brunswick seront à la disposition du citoyen dans la langue officielle de son choix, dans toutes les procédures.⁴²

The matter of minority language rights came to a head, however, the same year when the New Brunswick Court of Appeal held that cases could not properly be conducted in French since English was the only language of the courts of New Brunswick.⁴³ That decision fuelled

⁴¹ Gérard Snow, Les droits linguistiques des Acadiens du Nouveau-Brunswick, Documentation du Conseil de la langue française, no. 17 (Quebec: Éditeur officiel du Québec, 1981) 93.

⁴² Quoted in Gérard Snow, 1981: 97.

⁴³ R v. Murphy. Ex parte Belisle et Moreau (1968) 69 D.L.R. (2d) 530.

the flames of French discontent and led the government to enact legislation to reinforce French language rights. In 1969, the province enacted the Official Languages of New Brunswick Act,⁴⁴ and in the decision in Jones v. Attorney General of New Brunswick the Supreme Court of Canada upheld the validity of s. 13 of that Act and of s. 11 of the federal Official Languages Act, both of which deal with the language of court proceedings.⁴⁵ The court said that "it was open to the provincial legislature to legislate as to the languages which might be used in courts established by the provincial legislature."⁴⁶ In 1982, when official language rights in New Brunswick were entrenched in the Constitution,⁴⁷ New Brunswick became the only officially bilingual province in Canada.

⁴⁴ R.S.N.B. 1973, c. O-1.

⁴⁵ [1975] 2 S.C.R. 182. See also Pierre Foucher, "The Right to Receive Public Services in Both Official Languages," Language Rights in Canada, ed. Michel Bastarache (Montreal: Les Éditions Yvon Blais Inc., 1986)176 footnote:

According to caselaw, language is a matter within the legislative competence of both the federal Parliament and the provincial legislatures, with each level governing language use in those areas over which they have legislative authority.

⁴⁶ Jones v. Attorney General of New Brunswick, [1975] 2 S.C.R. 182 at 183.

⁴⁷ Canadian Charter of Rights and Freedoms, 1982, s. 19(2)
 Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Conclusion

It is obvious from the brief overview presented above that the status of official languages in the justice system varies considerably from province to province. In Newfoundland, Nova Scotia, Prince Edward Island and British Columbia, the French language had no special status in courts of provincial jurisdiction until very recently.⁴⁸ In each of the other provinces there was, in theory, a right to some legal services in both English and French. It would be interesting to compare the situation of the official languages in the judicial system of each of these jurisdictions. Indeed, that was my original intention. However, it soon became apparent that the quantity of material to be analyzed - and the difficulty of obtaining some of it - would make such an endeavour too onerous. I therefore chose to limit the scope of my study to one jurisdiction: New Brunswick. New Brunswick's status as the only officially bilingual province made it the obvious choice.

Official bilingualism in New Brunswick was supposed to mean that French and English would have equal status. The provincial language legislation was inspired by "objectives of linguistic and cultural equality of opportunity."⁴⁹ The legislation was intended to correct situations where the right to use the French language in

⁴⁸ See infra, p. 112.

⁴⁹ Robert W. Kerr, "The Official Languages of New Brunswick Act," University of Toronto Law Journal 20 (1970): 478. (Hereafter referred to as Robert W. Kerr, 1970a).

some provincial institutions in New Brunswick had been "an irregularly and, on the part of English-speaking New Brunswickers, sometimes begrudgingly allowed privilege."⁵⁰ But to what degree have such situations been corrected? To what extent do the two official languages, in fact, enjoy equal status in the administration of justice? In an attempt to answer that question, this thesis will trace the path of bilingualism in the administration of justice in New Brunswick from the 1960's to the present.

The first chapter is a chronological account of events which have affected bilingualism in the administration of justice in New Brunswick. The events include the enactment of legislation and regulations by both the federal government and the provincial government as well as judicial decisions dealing with language rights in the administration of justice. The second chapter deals with implementation of the language legislation up to 1981, and the third chapter discusses steps taken by the New Brunswick government to deal with dissatisfaction with the implementation process. The fourth chapter describes institutional support for bilingualism in the provincial justice system provided by the establishment of the École de droit at the Université de Moncton, the work carried out by the Centre de traduction et de terminologie juridiques at the Université de Moncton, the implementation of bilingualism in the Department of Justice, judicial appointments and court interpretation in New Brunswick. The conclusion focusses on

⁵⁰ Robert W. Kerr, 1970a: 478.

events which have occurred since 1986 when the Supreme Court of Canada's decision in the case of Société des Acadiens du Nouveau-Brunswick was handed down. It also evaluates the status of bilingualism in this province twenty years after the enactment of the Official Languages of New Brunswick Act.

CHAPTER ONE

THE MOVE TOWARD BILINGUALISM IN THE ADMINISTRATION OF JUSTICE IN NEW BRUNSWICK

Until the 1960's the language of New Brunswick's judicial system was, officially, exclusively English. Statutes, regulations and standard forms were all printed in English. The language of court proceedings was English and orders or judgments handed down by the courts were issued in English.¹ Lawyers, even those whose mother tongue was French, received their legal training in English at the University of New Brunswick Law School, and the province's Barristers' Society² functioned in English. A disproportionate number of judges were English-speaking.³ While the common law concept of a fair hearing gave an accused who did not speak English the right to the services of an interpreter so that the court could understand him or her or so that he or she could understand the

¹ Basically there are three courts in New Brunswick - the Provincial Court where all criminal cases and all provincial summary conviction cases in the province start and where most finish as well; the Court of Queen's Bench which handles both criminal and civil matters and whose judges travel to the various judicial districts of the province; and finally, the Court of Appeal, the highest court in the province which sits in Fredericton.

² In 1986 the name of the Barristers' Society of New Brunswick was changed to the Law Society of New Brunswick or Barreau du Nouveau-Brunswick.

³ Infra, p. 98-99.

proceedings, francophones had only the privileges granted to any non-English speaking individual. The French language had no special status.

While the situation of the francophone minority in New Brunswick was no different from that of francophone minorities in other Canadian provinces in the early 1960's, New Brunswick is unique because approximately forty percent of its population of about 700,000 is French-speaking. The French character of New Brunswick stems from the origin of its early settlers who arrived from France at the beginning of the seventeenth century. By the end of that century 'Acadia', as it was then called, covered the area which now comprises southeastern Quebec, eastern Maine, Prince Edward Island, Nova Scotia and New Brunswick. The Acadians, a close-knit, independent people, were, for the most part, French-speaking and Roman Catholic, although there were Protestants and English-speaking settlers among them. In the struggle between France and England for power in the New World, the Acadians sided with neither the English nor the French and thus became known as "les français neutres" or "the neutral French". Unfortunately, their neutrality was doubted and in 1755, with British military success in Acadia, 10,000 Acadians were deported for their failure to pledge loyalty to the British cause. However, many of those deported returned when the war was over in 1763, and in 1800 there were approximately 8,000 Acadians in Prince Edward Island, Nova Scotia, and New Brunswick. By 1871, 15.7% of New Brunswick's population was of French origin and that percentage steadily increased, due in

part to an influx of francophones from Quebec, reaching 33.56% in 1931. The figure has remained more or less stable since 1961 when it reached 38.8% or approximately 280,000 individuals.⁴

Although their numbers gradually increased during the twentieth century, the French-speaking population of New Brunswick had relatively little economic or political power in the province. Then, in 1960 Louis J. Robichaud became the first Acadian premier of New Brunswick when his Liberal Party defeated the Conservative government of H. J. Flemming. Robichaud and the Liberals remained in power until 1970 and during that decade the Liberal Party's 'Programme of Equal Opportunity' produced both economic and linguistic reforms which benefitted the French-speaking population. Not only did the Liberals improve economic conditions, particularly in the French-speaking northern part of the province, but they also asserted francophone rights.⁵

The Robichaud government, re-elected in 1968 with a francophone majority in caucus, was very much in tune with the

⁴ Canadian Encyclopedia (Edmonton: Hurtig Publishers, 1985) 1233. Speaking in the legislature in 1986, Premier Hatfield said that the population figures for 1985 indicated that approximately 40% of New Brunswick's population was francophone. See Journal of Debates (Hansard) of the Legislative Assembly of New Brunswick, 1986, vol. 10, pg. 4312.

⁵ John P. Barry, "The Integration of the French and English Languages into the Justice System in New Brunswick," Revue Générale de Droit 14 (1983): 253.

sentiments and findings of the Report of the Royal Commission on Bilingualism and Biculturalism. On April 18, 1969, the Legislative Assembly of New Brunswick, strongly influenced by the Commission's report and by the federal Official Languages Act which was enacted that year,⁶ unanimously adopted the Official Languages of New Brunswick Act making both English and French official languages of the province.⁷

While the effect of the Act on the administration of justice in the province was generally positive, it certainly did not produce dramatic changes overnight. The process of change has been very gradual and the struggle to realize linguistic equality in the judicial system has been constant since 1969. However, progress towards equality is reflected in the fact that documents which were previously printed in English only are now available in both languages; aspiring lawyers may now attend law school in New Brunswick in French; legal proceedings may be conducted entirely in French, and in such cases testimony given in French is recorded in French and the judgment is delivered in French; there has been an increase in the number of bilingual judges and other bilingual personnel in the justice system; and a great deal of work has been done in the field of legal terminology to provide a French vocabulary for the common law.

⁶ Gérard Snow, 1981: 27.

⁷ R.S.N.B. 1973, c. O-1. See also Gérard Snow, 1981: 29 and Robert W. Kerr, 1970a: 478-485.

The changes mentioned briefly above have produced a judicial system quite different from the essentially unilingual English system which existed in New Brunswick in 1963 at the time of the case of Randall v. The Queen.⁸ The Randall case raised the issue of whether an interpreter must be properly qualified. It involved a bilingual accused who was convicted of armed robbery in an incident which involved several francophone co-accused. At trial, the accused was convicted on the basis of evidence given by a police officer, Constable Burbridge, who was assigned to guard duty in order to eavesdrop on the accused to obtain proof of his involvement in the robbery. The conversations overheard were in French. The police officer took notes in English on the conversations he heard in French and later gave evidence in English. He did this because: "He testified he can converse fluently in French, can read it quite a bit but is unable to write it."⁹ The accused appealed his conviction on the ground that the conversations should have been reported in the language in which they took place and that the evidence should have been translated for the court by a properly qualified translator or interpreter. In its decision, the New Brunswick Court of Appeal rejected that argument and held that an interpreter is only necessary in criminal proceedings in order that the court may

⁸ [1963] 38 D.L.R. (2d) 624. See also Michel Bastarache, "Pour réussir le bilinguisme judiciaire au Nouveau-Brunswick," Cahiers de Droit 24 (1983): 63.

⁹ R. v. Randall, (1963), 38 D.L.R. (2d) 624 at 626.

understand a witness or in order that an accused may understand the case being made against him. The court said as follows:

We fail to see any reason in principle against a witness in criminal proceedings giving in the language of the forum, familiar to the accused, the substance of material conversations in another language to which the accused was a party.¹⁰

Randall's appeal was not successful but it did raise the issue of language rights in the New Brunswick legal system. While the common law right to due process meant that a unilingual francophone accused had the right to the services of an interpreter, prior to the 1970's in New Brunswick there was very limited provision made officially for translation and interpretation in the courts. It was, in fact, the practice in courts of first instance in certain regions of the province to conduct preliminary hearings and even trials entirely in French without translation in criminal or quasi-criminal proceedings when all the participants were French-speaking. The legal validity of such proceedings was, however, always open to question and, without guidelines, it was not clear whether a French transcript or an English transcript of evidence which had been given in French was valid. I do not know of any case involving a transcript in French but the 1966 case of R. v. Kelly¹¹

¹⁰ R. v. Randall at 628-629.

¹¹ Unreported decision dated December 9, 1966.

involved an appeal on the grounds that evidence given in French was not properly recorded.¹²

The Kelly decision is interesting both because it states that "English is the only language of the courts of New Brunswick for the conduct of proceedings therein"¹³ and because, like the Randall case, it gives us some insight into expectations regarding translation and interpretation of judicial proceedings in New Brunswick at that time. The case involved an appeal from a conviction on a charge of theft where the preliminary hearing was conducted entirely in French by mutual agreement because all of the participants were French-speaking. However, the proceedings were transcribed in English by a bilingual stenographer.

Kelly was accused of having stolen a wallet belonging to one Albénie Plourde. With the consent of counsel for both parties, Plourde's evidence at the preliminary hearing was given in French. The court stenographer, Yolande Mazerolle, recorded the testimony in French and later transcribed it in English. She testified as follows at the trial

¹² Gordon F. Gregory, "La Pratique de la common law en français au Nouveau-Brunswick: Nouveaux développements," Revue de l'Université de Moncton 12 (1979): 130.

¹³ Unreported Court of Appeal decision, p. 4.

Q. Mrs. Mazerolle, do you remember in which language Albénie Plourde - whose evidence appears on page 4 and several pages afterwards - took place?

A. It was said in French and I translated in English.

Q. There was no official translator - was there?

A. No, there wasn't.

Q. So you took the evidence in French and translated it when you transcribed it into the English language?

A. Yes, that is right.¹⁴

On the morning of the trial before judge and jury, Albénie Plourde suffered a heart attack and was unable to give evidence. Therefore, the evidence he had given in French at the preliminary hearing and which had been transcribed in English was read aloud in court in English. Kelly was subsequently found guilty and sentenced to seven years in Dorchester Penitentiary. Kelly felt that the sentence was rather stiff for the crime he had committed, especially since the wallet contained no money. He appealed in part on the ground that "the evidence of the said Albénie Plourde taken at the Preliminary Hearing is inadmissible", arguing that the stenographer was not a properly sworn interpreter and that the accuracy of the transcription could not be guaranteed.¹⁵ The appellant's factum makes the following claim at page 4:

¹⁴ Transcript of the trial, p. 27.

¹⁵ Appellant's factum, p. 3.

In the case where an interpreter is required, it is a well known fact that the interpreter must be sworn according to law.

and at page 5, the appellant's argument is summarized as follows:

In view of the very strong possibility of error, it is respectfully submitted that in any event, the evidence of Albénie Plourde, taken down at the Preliminary Hearing is inadmissible and should not have been allowed to be read *viva voce* in open court at the trial because of possible faulty interpretation.

The respondent argued that the transcript was valid because the stenographer had sworn on oath that it was accurate.¹⁶

The court agreed with the respondent that the evidence of Plourde was properly received at the trial. And indeed, it is quite possible that Mrs. Mazerolle was as well qualified if not better qualified than many of the individuals working as casual interpreters in the court system in the 1960's and 1970's, for until 1987 there were no formal qualifications required for court interpreters in New Brunswick.¹⁷ Being a court stenographer, she would at least have been familiar with what went on in a courtroom. In its decision, the court took the opportunity to affirm that English was the only language in which a case could be conducted in the

¹⁶ Respondent's factum, p. 3. Unlike Constable Burbridge in the case of R. v. Randall, Mrs. Mazerolle did appear to be able to write in both English and French.

¹⁷ Wilfred Alliston, "La Réforme de l'Interprétation judiciaire au Nouveau-Brunswick," TÉLÉ-CLEF (1987): 26-27.

courts of the province¹⁸ and that, therefore, evidence could not be presented in French but would have to be translated into English.

In 1967, the year following the Kelly appeal, a first tentative step toward asserting the linguistic rights of the French-speaking population before the courts was taken by the Robichaud government when it amended s.23 of the Evidence Act by adding subsection 23C which reads as follows:¹⁹

In any proceeding in any court in the Province, at the request of any party, and if all the parties to the action or proceedings and their counsel have sufficient knowledge of any language, the Judge may order that the proceedings be conducted and the evidence given and taken in that language.

Although the expression "any language" was used in the provision, it is clear that the intention was to extend the language rights of francophones in New Brunswick beyond the mere right to an interpreter. Hence the government's amendment to the Evidence Act both validated the existing practice of conducting trials in French and promoted the equality of English and French.

It would seem that the amendment to the Evidence Act was intended to apply to proceedings in both civil and criminal courts in

¹⁸ Gordon F. Gregory, 1979: 130-131.

¹⁹ R.S.N.B. 1952, c. 74, s. 23C, am. S.N.B. 1967, c. 37, s. 1.

the province. It was not long, however, before the amendment's applicability to criminal trials was put to the test. The 1968 case of R. v. Murphy, Ex parte Belisle and Moreau²⁰ involved a decision by a Judge Murphy of the Magistrate's Court in Moncton who refused to allow a charge of mischief against two francophones, Belisle and Moreau, to be dealt with in French.²¹ The case reached the New Brunswick Court of Appeal where the appellant raised the issue of whether provincial legislation could govern such matters as the language of criminal proceedings. The issue concerns certain powers allocated to the provinces and the federal government under the Constitution Act, 1867. Section 92(14) of the Constitution Act, 1867,²² clearly gives the provinces jurisdiction over the administration of justice in courts of civil and criminal jurisdiction

²⁰ (1968) 69 D.L.R. (2d) 530. See also Robert W. Kerr, "Regina v. Murphy and Language Rights Legislation." University of New Brunswick Law Review 20 (1970): 35-48. (Hereafter referred to as Robert W. Kerr, 1970b).

²¹ The accused were students from Quebec who were accused of having delivered a pig's head to Mayor Leonard Jones of Moncton. See Gérard Snow, 1981: 57.

²² S. 92(14) reads as follows:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, -

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction and including Procedure in Civil Matters in those Courts.

in the province but s.91(27) of the Act says that Parliament shall have exclusive jurisdiction over "the criminal law, . . . including the procedure in criminal matters".

Mr. Justice Hughes of the New Brunswick Court of Appeal held in his decision in the above-mentioned case that the amendment to the Evidence Act was unconstitutional and that, as the law stood at that time, proceedings in criminal cases in New Brunswick could only be in English. He decided that the new s. 23C of the Evidence Act did not actually deal with evidence but rather, with procedure and that since "procedure in criminal matters" comes under federal jurisdiction, s. 23C was unconstitutional. In other words, language was a matter of procedure and not a matter of evidence, and therefore only Parliament, and not a provincial legislature, could change the law. Mr. Justice Hughes ruled that criminal proceedings involving a francophone would have to be conducted in English with the services of an interpreter:

In holding as we do, that the law in force in this Province requires that criminal proceedings in all provincial Courts be conducted in English, we point out that protection is afforded to the rights of an accused person who is ignorant of the English language when the evidence given at the proceedings is translated to him, and his own testimony is translated to the Court. It cannot be assumed that any unfairness will result to him where this procedure is followed.²³

²³ R. v. Murphy. Ex parte Belisle and Moreau (1968), 69 D.L.R. (2d) 530 at 535-536.

Thus, even if the accused, the lawyers and the judge were all francophones, a criminal matter could not be tried in French in New Brunswick at that time.²⁴

In a later decision, Jones v. Attorney General of New Brunswick, Chief Justice Laskin of the Supreme Court of Canada said that the Supreme Court would not have accepted the argument put forth in the Murphy case that the province had no jurisdiction to enact legislation which would apply to matters of federal jurisdiction.²⁵ He pointed out that, in the absence of federal legislation with respect to language of proceedings in an area of exclusive federal jurisdiction, the amendment to the Evidence Act would be valid because s. 92(14) of the Constitution Act, 1867 would justify its existence since there is overlapping of jurisdiction "under the doctrine of concurrency of legislative authority subject to the paramountcy of federal legislation".²⁶

Shortly after the decision in R. v. Murphy was handed down, the federal Official Languages Act was passed by Parliament.²⁷ Although s. 11(3) of the Act ensured that criminal proceedings could

²⁴ Robert W. Kerr, 1970b: 41.

²⁵ [1975] 2 S.C.R. 182 at 197-198.

²⁶ Jones v. Attorney General of New Brunswick et al, [1975] 2 S.C.R. 182 at 198.

²⁷ R.S.C. 1970, c. O-2.

be conducted in either official language, that guarantee was weakened by the fact that the judge was given a great deal of discretion in deciding which language would be used. Also, in order to extend the language rights embodied in the federal Official Languages Act to civil matters in the province, it would be necessary for the province to pass its own language legislation.²⁸ A few months after the federal legislation was enacted, the Official Languages of New Brunswick Act was passed.²⁹ The provincial government's language reforms were based on the recommendations of the Royal Commission on Bilingualism and Biculturalism and some provisions of the provincial Act closely resembled those of the federal Official Languages Act. The provincial Act made both French and English official languages of the province and, with respect to the administration of justice, the Act provided that provincial statutes and "other documents introduced into the Legislative Assembly"³⁰ would be printed in both languages and that a party coming before the courts could be heard in the official language of his choice. This last provision opened the door to equality of the two languages in all courts in New Brunswick in civil matters.

However, while the New Brunswick legislation permitted the use of either official language in judicial proceedings, it did not

²⁸ Official Languages Act, s. 11(4).

²⁹ R.S.N.B. 1973, c. O-1.

³⁰ Section 5(2).

give French and English equal status before the courts. Originally, s. 13 read as follows:

(1) Subject to section 15, in any proceeding 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.

2) Subject to subsection (1), where

(a) requested by any party, and

(b) the court agrees that the proceedings can effectively be thus conducted;

the court may order that the proceedings be conducted totally or partially in one of the official languages.

While the section made it clear that French could be used in the courts of New Brunswick, it fell short on several counts. The effect of the provision was not to make it obligatory to allow proceedings to be conducted in French but only to permit proceedings to be conducted in French.³¹ The provincial Act gave the judge a great deal of discretion in determining the language of proceedings and in deciding whether or not translation facilities would be provided. Section 13(2) b) of the Act³² which says that a person may be heard in the official language of his choice ". . . where the court agrees that the proceedings can effectively be thus conducted" made it

³¹ Gérard Snow, 1981: 37.

³² This section was amended in 1982. Infra, p. 68.

relatively easy for a court to avoid implementing the provisions of the Act if it so desired.³³ In addition, the Act contained no mechanism for monitoring its implementation or dealing with violations of its provisions,³³ and there was no requirement that decisions and orders be published in French as was the case under s. 5 of the federal Act.³⁴ Finally, although the Act was passed in 1969, only sections 1, 2, 3, 5, 11, 14 and 15 came into force at that time. The minimal protection with respect to the use of the official languages in the courts of the province under s. 13 did not come into force until December 1972.

Before s. 13 came into force, the case of Université de Moncton v. Blanchard³⁵ came before Mr. Justice Barry of the New Brunswick Court of Queen's Bench in May of 1970. Mr. Justice Barry held that it was still not possible to have a civil trial conducted in French on demand in the province. The case involved a francophone student, Blanchard, who had protested against the university's refusal to admit him. The university finally decided to take legal proceedings against him to bar him from the campus. Blanchard chose to represent himself at trial and he requested that the proceedings be

³³ Robert W. Kerr, 1970b: 43.

³³ Stephen A. Scott, "Judicial Guarantees," Language and Society 17 (1986): 32.

³⁴ Michel Bastarache, 1983: 57-58.

³⁵ (1970), 2 N.B.R. (2d) 679.

conducted in French. That request was denied and, although simultaneous interpretation was provided by the Court, Blanchard did not make use of the service. In his decision, Mr. Justice Barry said as follows:

The defendant . . . appeared for himself at the trial and insisted that all proceedings be conducted in the French language. Such is not yet possible in this Province, but substantial progress has been made to that end and, in the interval, simultaneous translation facilities were made available for this trial by the Department of Justice from Fredericton.³⁶

When he mentioned "substantial progress", Mr. Justice Barry was probably referring to s. 13 of the Official Languages of New Brunswick Act.³⁷ For francophones, this certainly did represent "progress" from the position taken by the court in the Murphy case when it was held that "the use of the English language is part of the law of the Province and applicable to proceedings in all provincial Courts".³⁸ However, in the Blanchard case, the court was technically not obliged to order that proceedings be conducted in French since s.13 was not yet in force and, even if it had been in force, the judge would still have had considerable discretion in determining the language of proceedings. The reality, at that time,

³⁶ Université de Moncton v. Blanchard (1970), 2 N.B.R. (2d) 679 at 679.

³⁷ See s. 13(2): " . . . the court may order that the proceedings be conducted totally or partially in one of the official languages".

³⁸ R. v. Murphy, Ex parte Belisle and Moreau, (1968), 69 D.L.R. (2d) 530 at 535.

was that French language services were not readily available in the justice system and proceedings involving francophones were often conducted in English, sometimes with the assistance of interpreters.

In May of 1972, again, prior to the proclamation of s. 13, the issue of a French language trial resurfaced. The Mayor of Moncton, Leonard Jones, laid a complaint against a certain Rhéal Drisdelle whom he accused of having trespassed on his property while participating in a demonstration about language policy.³⁹ Drisdelle pleaded not guilty and asked to be tried in French. Jones refused to agree to the request, saying that provincial and federal statutes permitting civil proceedings to be conducted in French were unconstitutional. Before the matter could be heard in Provincial Court, however, the Attorney General of New Brunswick intervened on the grounds that this was a constitutional issue of great significance to the province. The matter was referred to the New Brunswick Court of Appeal.

The New Brunswick Court of Appeal rendered its decision on December 19, 1972. Jones had argued that s. 11 (1), (3) and (4) of the federal Official Languages Act, s. 23C of the New Brunswick Evidence Act and s.13 of the Official Languages of New Brunswick

³⁹ The mayor, who was opposed to bilingualism in New Brunswick, was strongly provoked by the demonstration, which was organized by students from the University of Moncton to protest the fact that the government was dragging its heels in implementing the language legislation.

Act were invalid because the constitution gave neither Parliament nor the New Brunswick legislature the authority to enact legislation with respect to the official languages. The Court of Appeal disagreed. The matter was subsequently appealed to the Supreme Court of Canada which upheld the Court of Appeal's decision and said that language is a matter of both federal and provincial jurisdiction.⁴⁰ The Supreme Court held that the guarantees provided by s. 133 were minimal and that there was no prohibition on them being extended.⁴¹ It also held that language legislation enacted by either the federal Parliament or the provincial legislatures is valid so long as it is within an area of competence attributed to the government which enacted it and so long as it extends and does not restrict the basic language guarantees.

That decision effectively settled the constitutional issue and from that time it was clearly possible to have a civil trial conducted in French under s. 13 of the Official Languages of New Brunswick Act and to have a criminal trial conducted in French under s.11(3) of the federal Official Languages Act. The decision in the Jones case legitimized an important aim of those seeking to extend French language rights but, for the right to a trial in French to become a concrete reality in New Brunswick rather than a theoretical right, the province would have to make changes within the justice system.

⁴⁰Jones v. Attorney General of New Brunswick et al [1975] 2 S.C.R. 182.

⁴¹ See quotation from Chief Justice Laskin supra, p. 3.

CHAPTER TWO

THE IMPLEMENTATION OF BILINGUALISM IN THE JUDICIAL SYSTEM

Although the decision in the Jones case giving New Brunswick the right to provide French trials was considered a victory for French language rights in the courts, it remained to be seen how those rights would be implemented and just what changes s. 13 of the Official Languages of New Brunswick Act would produce in practice. Indeed, while some people envisaged dramatic changes, others claimed that there need be no changes at all since they felt that the existing system could accommodate demands for French services. Obviously, these two views were based on very different approaches to the meaning of bilingualism in the administration of justice.

One approach to bilingualism in the justice system was to regard the language legislation as symbolic. Those who took this approach thought that francophone demands for French language services in the justice system were simply a logical extension of demands for French language rights in general. They did not take the demands very seriously because they felt that francophones were simply asserting themselves and expressing their identity. They did not anticipate that the actual day-to-day demand for legal services in French would increase significantly. They predicted that the Jones decision would have little concrete effect since francophones would seldom want to exercise the right to a trial in French. Therefore there was no need for a special effort on the part of the

Department of Justice to increase the availability of French language services. In fact, some anglophones even considered that a demand by a francophone for a trial in French was an abuse of the system since most of the French-speaking population of New Brunswick could communicate perfectly adequately in either official language.

The other view of the meaning of bilingualism in the administration of justice was that the two official languages should enjoy equality of status and that, therefore, just as anglophones had the right to legal services in English, francophones were entitled to legal services in French. A francophone's right to have a trial conducted in French should not be determined on the basis of his or her knowledge of the other official language.

Official language rights in a court of law in New Brunswick are based on the fact that both English and French have a special status not enjoyed by other languages. In their language legislation, both the federal government and the New Brunswick government have stated clearly that an underlying principle of official bilingualism is the equality of the two official languages.¹ It is not clear, however, just what "equality" of the two languages means in practice.

¹ Section 2 of the federal Official Languages Act, s. 2 of the Official Languages of New Brunswick Act and s. 2 of the Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.

The fact that the two official languages enjoy equal status in New Brunswick was first given legislative recognition by the province in 1969 in s. 2(b) of the Official Languages of New Brunswick Act.

Subject to this Act, the English and French languages

(a) are the official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extends; and

(b) possess and enjoy equality of status and equal rights and privileges as to their use for such purposes.

The expression "equality of status" was used again in 1981 in s. 2 of An Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.² The section provided that the two official languages would be given equal treatment by offering:

. . . protection for the equality of status and the equal rights and privileges of the official linguistic communities . . .

However, that statute did little more than divide the two linguistic communities over the issue of language rights. In the long run, it frustrated the francophones who felt that it was a rather vague piece of legislation which provided no concrete protection. Not only did it not require the courts to give the concept of "equality" a broad interpretation, but it did not indicate how the principles it

² S.N.B. 1981, c. 0-1.1. (This legislation is commonly referred to as Bill 88).

announced were to be implemented nor did it provide sanctions for failure to follow those principles.³

"Equality of status" of the two official languages in New Brunswick is also mentioned in s. 16 (2) of the Charter of Rights and Freedoms⁴:

English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

In New Brunswick, however, "equality of status" meant different things to different people. To many, it simply meant improving translation and interpretation services. Others, however, argued that "equality of status" meant that New Brunswick should provide bilingual trials in which both languages have equal status: all court officials would be capable of using both languages with the result that translation would not be necessary and interpretation would be used only minimally. This practice is common in the Province of Quebec where there is a very high rate of bilingualism among lawyers, judges and court officials. But since the same high rate of bilingualism does not exist in New Brunswick, bilingual trials in that province would, in effect, be English language trials with interpreters provided for individuals who did not testify in

³ New Brunswick, Report of the Advisory Committee on Official Languages of New Brunswick (Fredericton: Department of Supply and Services, 1986) 4.

⁴ Canadian Charter of Rights and Freedoms, 1982.

English. To still others - generally francophones - the notion of "equality of status" in the administration of justice meant nothing less than that the French language would be equal in every way to the English language. The two languages would be equal in the way they were used by both citizens and officials involved with the justice system, equal with respect to the quality of services provided and equal with respect to the availability of those services. This would mean that proceedings involving francophones should be conducted entirely in French just as proceedings involving anglophones were conducted entirely in English. If francophones were always required to communicate through an interpreter when dealing with the justice system, then French did not enjoy "equality of status". Equality of status would also mean that judges should not have broad discretionary powers in determining the language of proceedings. A francophone should have an automatic right to a unilingual French trial. For cases involving parties of both official languages, precise criteria should be established to guide the court in the exercise of its discretion in determining the language of proceedings. The decision with respect to language of proceedings should be based on the language spoken by the parties to the proceedings and not on the language spoken by the lawyers or court officials.⁵ The province should provide for equality of services by hiring bilingual court personnel, and witnesses should be able to testify in their own language, through an interpreter if necessary.

⁵ John P. Barry, 1983: 262-263.

. . . les nécessités d'assurer un système judiciaire fonctionnel et de mettre en oeuvre le principe d'égalité des deux langues officielles devrait se traduire par un système qui fait toujours place à la détermination d'une seule langue des procédures dans les cas ordinaires. Dans ces cas, le droit de s'adresser au tribunal dans la langue de son choix serait respecté, mais la traduction et l'interprétation ne seraient dispensés que dans la langue des procédures et un juge effectivement bilingue, de même qu'un personnel de cour effectivement bilingue, seraient désignés pour dans les cas (sic) où les avocats choisiraient de s'exprimer au procès dans des langues différentes. Comme nous l'avons dit, l'interprétation ne représente pas une alternative valable dans un système de type accusatoire qui s'appuie sur la découverte des faits par l'interrogatoire oral des témoins, aussi faut-il éviter ce que l'on appelle communément le procès bilingue chaque fois que c'est possible.⁶

The notion that "equality of status" meant providing francophones with unilingual French trials was quite progressive in a jurisdiction where, just fifteen years before, the Court of Appeal had held that English was the only language of the courts. It is not surprising, however, that unilingual trials were preferred by francophones. There are many advantages to using just one language in court proceedings. A unilingual trial facilitates communication by enabling the judges and lawyers to speak to the parties directly. In the context of New Brunswick, this means, essentially, that francophones are not put at a disadvantage and that they enjoy the same services as anglophones. In addition, there is no need to

⁶ New Brunswick. Towards Equality of Official Languages in New Brunswick, Report of the Task Force on Official Languages (Fredericton: Official Languages Branch, 1982) 331-332.

translate documents such as pleas, transcripts, and judgments, thus avoiding inconvenience, delay, and additional expenses for both government and the parties.⁷ Unilingual trials also avoid the delays and extra costs occasioned by the need for interpretation.

However, there is no doubt that in many facets of the legal system and in many areas of the province, it was simply not possible, in the 1970's, to provide court services entirely in French and, in fact, it was not really possible to practise law in French. The Department of Justice had a limited ability to serve the public in French and many registry offices had only unilingual English staff; the Rules of Court had not been translated; many standard forms were available in English only; most commonly used legal precedents (such as wills, separation agreements, mortgages, agreements of purchase and sale) were available in English only; in some judicial districts, even districts where there was a substantial francophone population, there were no bilingual judges or bilingual crown prosecutors, and there was only one French-speaking judge on the New Brunswick Court of Appeal.⁸ It would have been impossible at that time to guarantee the right to unilingual French trials without

⁷ Committee on Integration of the Two Official Languages in the Practice of Law, Final Report (Saint John, Barristers' Society of New Brunswick, 1981) 23.

⁸ Since the Court of Appeal almost always sits in panels of three, it was necessary to use francophone judges from the court below, the Court of Queen's Bench, acting as appeal judges on an ad hoc basis when hearing an appeal in French.

delay throughout the province. Whatever view one took of the meaning of bilingualism in the administration of justice, it was clear that, in the 1970's, the justice system could not support an extension of French language services. There was a great deal of work to be done before even minimal French language services could be assured. While the Conservatives under Richard Hatfield, who succeeded the Robichaud Liberals in 1970, continued the latter's official languages policy and even gained support among the Acadian population, it became apparent that it would take more than goodwill to make the essentially unilingual judicial system bilingual. As Mr. Justice Richard, who is now Chief Justice of the New Brunswick Court of Queen's Bench, said in 1979:

Il faut bien se rendre compte cependant qu'une population qui a pratiqué le droit uniquement ou presque uniquement dans une langue ne peut pas, du jour au lendemain, acquérir une compétence et une aisance égales dans une autre langue.⁹

One concrete sign of the implementation of bilingualism was the publication in 1974 of the Revised Statutes of New Brunswick in both official languages with the French and English versions side by side. However, pursuant to the provision that private acts need not be translated, the appendix to the 1973 revision contained the text of 89 private acts in English only. And this situation was perpetuated in 1975 when the legislature passed an amendment to

⁹ Guy Richard, "Problèmes relatifs à la pratique de la common law en français devant les tribunaux du Nouveau-Brunswick," Revue de l'Université de Moncton 12 (1979): 139.

the Official Languages of New Brunswick Act adding s. 5(3) which provided that any bills introduced into the legislature to amend statutes which were, at that time, printed in only one official language did not have to be translated.¹⁰ In other words, changes to statutes which were in English only could continue to be in English only. This amendment was, understandably, not well received by the Acadian community.

However, the amendment to the provincial language legislation also added s. 15(2) which was more encouraging. It made provision for the enactment of regulations regarding the language of proceedings before the courts. It reads as follows:

15(2) The Lieutenant-Governor in Council may make regulations governing the procedure in proceedings before any court, including regulations respecting the giving of notice as he deems necessary to enable the court to exercise or carry out any power or duty conferred or imposed upon it by section 13.

It was hoped that these regulations would produce clear guidelines for implementing the provisions of the provincial legislation which pertained to the language of proceedings. Such regulations were essential because, without specific guidelines about how to proceed, there could be no uniform application of the legislation in the administration of justice.

¹⁰ Section 5(3) reads as follows:

Subsection (1) does not apply where the bill is to amend a statute printed in only one of the official languages.

In 1976, two regulations were passed dealing with language of proceedings before the courts: Regulation 76-47 (Official Languages (Documents) Regulation) dealing with the translation of documents¹¹ and Regulation 76-48 (Official Languages (Procedure) Regulation) dealing with the procedure to be followed in requesting the language of proceedings.

Regulation 76-47 establishes procedures for the appointment of "Official Translators" to translate "the transcript of a preliminary inquiry or of a trial"¹² and it provides that such translations have the same weight as the original document. In the case of a disagreement about a translation, the judge can declare the original to be the official version and the translation to be explanatory.¹³ As far as appeals are concerned, s. 9 provides that when a trial has been conducted in one official language and the appeal is to be conducted in the other official language, the appeal judge can order that any relevant document be translated in whole or in part, and s. 10 prescribes the procedure to be followed in the event of an objection to a translation.

¹¹ On October 11, 1985 Regulation 76-47 was repealed and replaced by two Regulations, 85-165 (Documents Regulation - Official Languages of New Brunswick Act) and 85-166 (Documents Rules - Official Languages Act). Regulation 85-165 deals with provincial offences and Regulation 85-166, with criminal offences.

¹² Section 1.

¹³ Section 6.

Regulation 76-48 deals with the procedure to be followed when requesting that proceedings be conducted in one or other of the official languages and it provides that such requests must be made "to the presiding judge at or before the time the accused enters a plea" or in the case of a preliminary inquiry, "not later than the date on which a date is fixed for the preliminary inquiry." Section 4 provides that an appeal "shall be heard in the language in which the proceedings appealed from were conducted" unless otherwise requested. Finally, section 5 states that the court "may, in special circumstances, waive any of the provisions of this regulation if it appears in the interests of justice to do so." These regulations were an essential complement to the provisions of the Official Languages of New Brunswick Act and their enactment indicates that trials in French were slowly becoming a reality.

By 1977, the government's translation services¹⁴ had developed to the point where the Hatfield government felt that it was appropriate to implement the remaining sections of the Official Languages of new Brunswick Act. These were sections 8, 9 and 10 which provided that the Royal Gazette containing orders, regulations and notices issued by the government would henceforth be published in both official languages (ss. 8 and 9) and that every citizen had the right to receive government services in either official language (s. 10).

¹⁴ The Translation Bureau was established in 1967.

These provisions were, however, subject to regulations which could be enacted pursuant to s. 15 of the same Act.¹⁵ One such regulation, Regulation 77-72,¹⁶ like the 1975 amendment to the provincial official languages legislation,¹⁷ provided that certain documents could remain unilingual which meant, virtually always, that they would be in English only. The regulation reads as follows:

Sections 8 and 9 of the Official Languages of New Brunswick Act do not apply to a regulation

(a) that was made in only one of the official languages prior to the coming into force of this Regulation;

(b) that amends a regulation made in only one of the official languages prior to the coming into force of this Regulation, or

(c) that is made under the authority of an Act enacted in only one of the official languages.

Therefore, because of s.5(3) of the Official Languages of New Brunswick Act and Regulation 77-72, francophones still faced the prospect of dealing with legislation and regulations which were available in English only. The government's motivation in limiting the scope of application of the language legislation may have been no more sinister than budgetary restraint, but the effect was that only completely new regulations and their amendments had to be

¹⁵ Supra, p. 46.

¹⁶ The regulation has no name.

¹⁷ Supra, p. 46.

translated. This fact did not escape the notice of either government departments or the francophone community. In 1978 the Ministry of Social Services decided to change a regulation dealing with social assistance. To avoid having to translate the new regulation, the Ministry produced a very substantially revised version of the old regulation.¹⁸ This created an uproar among a group of francophones who accused the government of deliberately evading the provision of the Official Languages of New Brunswick Act which said that regulations would henceforth be in both official languages.

There was suspicion about the sincerity of a government which failed to deliver on its promises of linguistic equality and which provided no mechanism for enforcing the language legislation. The francophone community felt that because the language legislation itself made no provisions for monitoring implementation and because the government as represented by the Department of Justice had not demonstrated a commitment to implementing bilingualism, the legislation therefore did little to advance their cause. As Gérard Snow said:

L'absence du moindre mécanisme de surveillance dans la loi même est une chose répréhensible et scandaleuse. Elle témoigne, plus que tout le reste, de la nature essentiellement symbolique de la démarche gouvernementale et du manque réel d'engagement politique dans cette affaire.¹⁹

¹⁸ Gérard Snow, 1981: 39. See also Towards Equality, 1982: 317.

¹⁹ Gérard Snow, 1981: 43.

There were still many matters to be attended to if the two official languages were to have equal status in New Brunswick's justice system.

An important step toward equality of the two official languages in the criminal courts was taken in 1979 when the federal government amended the Criminal Code by adding Part XIV.1 entitled, "Language of Accused".²⁰ The amendment expressed the language rights of an accused in stronger language than s.11(3) of the federal Official Languages Act had done, and it ensured that the accused would be informed of his right to choose the language of proceedings. Section 462.1 of Part XIV.1 provided that testimony be recorded in the language in which it is given and that pleadings be drafted in the language of the accused.²¹ Therefore, the official transcript of testimony given in French would be the French transcript just as the official transcript of testimony given in English would be the English transcript. An English-only transcript of French testimony such as that produced in the Kelly case in 1966 would no longer be allowed.

Realizing that these new provisions would be difficult to implement in some parts of the country, the federal government provided that the legislation should come in force in each province

²⁰ Supra, p. 4.

²¹ Michel Bastarache, 1986a: 145-147.

when that province so proclaimed. The willingness of the Hatfield government to guarantee these rights in criminal proceedings is clear from the fact that New Brunswick was one of the first provinces to proclaim the provisions in force in 1979.²²

But although the Hatfield government demonstrated some good faith in promoting bilingualism, it also committed some sins of omission. On September 1, 1979 the provincial Department of Justice divided the province into eight judicial districts for the purposes of the administration of justice without taking their linguistic make-up into account.²³ The districts were established on the basis of existing county boundaries and consisted of from one to three entire counties. The districts and their linguistic make-up are shown on the map on page 54. Two judicial districts, both in the northern part of the province, are essentially francophone: the Judicial District of Edmundston at the northwestern tip of the province near the Quebec border (Madawaska County) is 95% francophone and the Judicial District of Bathurst at the northeastern tip of the province (Gloucester County) consists of the Bathurst area which is 65% francophone and the peninsula (Caraquet, Tracadie, Shippagan) which is 95% francophone. In the southwestern part of the province, there are three judicial districts which are basically

²² To date the provision has been proclaimed in force in New Brunswick, the Northwest Territories, the Yukon Territory, Ontario, Manitoba, and Saskatchewan. For summary conviction offences only, the provision has been proclaimed in force in Nova Scotia and Prince Edward Island.

²³ Final Report, 1981: 15. See Regulation 79-126.

anglophone: the Judicial District of Woodstock (Carleton County and Victoria County) which is 95% anglophone; the Judicial District of Fredericton (York County, Sunbury County and Queens County) which is also 95% anglophone; and the Judicial District of Saint John (Saint John County, Kings County and Charlotte County), which is again 95% anglophone with the exception of Saint John which is 10% francophone. In the three remaining judicial districts the two language groups are more evenly divided. In the Judicial District of Moncton in the southeastern part of the province (Westmorland County, Kent County and Albert County), Albert County is 95% anglophone, Moncton is 65% anglophone and Shediac-Richiboucto is 90% francophone. The Judicial District of Newcastle in the eastern part of the province (Northumberland County) is 75% anglophone but some areas are over 95% francophone. Finally, the Judicial District of Campbellton in the north central part of the province (Restigouche County), ranges from 80% anglophone to 95% francophone with some communities being equally divided between the two language groups.²⁴

The linguistic make-up of the judicial districts created problems for francophone parties to legal proceedings in some areas. An example is the fact that the 80% francophone community of Grand Falls was originally included in the essentially anglophone Judicial District of Woodstock. Not only does Grand Falls have more

²⁴ Final Report, 1981: 42-44. Virtually all bilingual lawyers in the province are located in Moncton, Bathurst, Campbellton and Edmundston. See Guy Richard, 1979: 141.

in common with Edmundston linguistically, but also it is a good deal closer to the city of Edmundston than it is to Woodstock.

Nevertheless, court cases arising in Grand Falls had to be dealt with 200 km away in anglophone Woodstock. This particular anomaly was finally corrected in 1983 when Grand Falls became part of the Judicial District of Edmundston²⁵ but throughout the province the geographical distribution of the two linguistic communities did still present problems for providing services in French.

In addition, because of the lack of bilingual personnel not only in predominantly anglophone districts, but also in bilingual districts, a disproportionate number of cases continued to be conducted in English.²⁶ As Michel Bastarache pointed out, in many districts, Department of Justice representatives were unilingual anglophones who could not provide equal services to the francophones living in their districts:

Même dans les régions bilingues de Moncton, de Newcastle et de Campbellton, même dans la capitale, les greffiers sont unilingues. À la Cour provinciale, aucun juge francophone ou bilingue n'est en poste à Fredericton, Oromocto, Minto, Saint-Jean, Moncton, Sackville, Newcastle . . .²⁷

²⁵ Regulation 83-120.

²⁶ John P. Barry, 1983: 262.

²⁷ Michel Bastarache, 1983: 60.

Therefore, despite the apparent advances toward equality of the two official languages, francophone lawyers continued to be frustrated by the fact that, in practice, things had not changed.²⁸ Even in the early 1980's francophone lawyers faced major obstacles when they attempted to practise law in French:

On avait maintes fois entendu les praticiens francophones du Nouveau-Brunswick faire valoir que le faible nombre de procès en français s'expliquait par le manque d'outils élémentaires pour travailler en français et l'incapacité des praticiens francophones de traduire eux-mêmes les actes de procédure de langue anglaise.²⁹

Although most statutes were available in both official languages after 1974, many of the lawyer's basic tools, such as the Rules of Court, were still in English only.³⁰ This discouraged many francophone lawyers from practising in French. In any case, in a province where only 10% of the members of the bar were francophone, French-speaking clients had a limited choice of French-speaking lawyers and, in some regions and in some fields of law, there was no option but to hire an anglophone lawyer. In addition, francophones had little confidence in the quality of court interpretation services and preferred to avoid interpretation

²⁸ Gérard Snow, 1981: 9.

²⁹ Michel Bastarache, 1983: 64.

³⁰ They were finally published in bilingual form in 1982 as Regulation 82-73. *Infra*, p. 92.

altogether. And, even when French services were available, francophone litigants were not always aware of their existence.³¹ Furthermore, some francophones felt that the quality of French language services in the basically anglophone justice system was inferior and that the safest option was to accept proceedings in English.³² In fact, the situation in the courts was such that, although francophones now had the right to request that proceedings be conducted in French,³³ it did not always seem to be prudent to do so. Francophones were reluctant to request French trials not only for fear that such a request would mean delays³⁴ and increased costs but also because court officials sometimes regarded such demands as unreasonable and disruptive, and because requesting a French trial at first instance could make an appeal more difficult.³⁵ They felt that, despite s. 13(1) of the Official Languages of New Brunswick Act, the decision to request that proceedings be conducted in French might place them at a disadvantage. And, when a party did request that proceedings be conducted in French, the

³¹ Final Report, 1981: 59.

³² Final Report, 1981: 21.

³³ Pursuant to s. 13(1) of the Official Languages of New Brunswick Act and s. 11(3) of the federal Official Languages Act for criminal offences.

³⁴ There were delays in scheduling trials in French, particularly civil trial since criminal trials took priority.

³⁵ Anglophone lawyers had been known to refuse to accept documents drawn up in French. See Michel Bastarache, 1983: 61.

request did not necessarily have to be granted since judges still had a great deal of discretion in deciding the language of proceedings.

While the system had certainly changed since the 1960's and now allowed francophones the possibility of expressing themselves in their own language in a court of law, it was clear, as Gérard Snow pointed out, that:

. . . le simple droit de s'exprimer dans l'une ou l'autre langue . . . devant les tribunaux n'a que très peu de valeur en soi, à moins que l'on garantisse du même coup au citoyen qu'il pourra être compris de ses interlocuteurs ou auditeurs et qu'il ne subira aucun préjudice à cause de son choix linguistique.³⁶

Francophones continued to be discriminated against and frustrated by the justice system because the language of the law was still English. The pace at which language reforms in the justice system were being implemented was painfully slow. By the end of the 1970's, the two official languages still did not "possess and enjoy equality of status." The spirit of the Official Languages of New Brunswick Act³⁷ was not being fully applied in the courts of New Brunswick.

³⁶ Gérard Snow, 1981: 14.

³⁷ Section 2 reads as follows:

Subject to this Act, the English and French languages
(a) are the official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extends, and
(b) possess and enjoy equality of status and equal rights and privileges as to their use for such purposes.

CHAPTER THREE

SUGGESTIONS FOR REFORM

Dissatisfaction over the slow rate of progress of French language rights in New Brunswick, including French language rights in the administration of justice, led to the setting up of three different provincial committees during the 1980's to examine the situation and to make suggestions for reform. The first was a Committee of the Barrister's Society. The other two were commissions appointed by the Hatfield government.

In February 1980, the legal profession itself attempted to deal with the problems when the New Brunswick Barristers' Society established the Committee on Integration of the Two Official Languages in the Practice of Law.¹ The Committee's purpose was as follows:

. . . to identify the problems associated with the practice of law in French in New Brunswick and to create the working tools necessary to overcome these problems and without friction or animosity to achieve the integration of both official languages in the practice of law.²

The recommendations made by the Committee were published in a document entitled Final Report which is also known as the Barry-

¹ The Chairman of the Committee was John P. Barry, Q.C. and the Vice-Chairman was Michel Bastarache.

² Final Report, 1981: 11.

Bastarache Report. It is clear from the recommendations that the Committee regarded "equality of status" as having more than symbolic value and felt that many changes would be necessary to make it possible to integrate French into the practice of law in New Brunswick. The recommendations can be classified into four categories: documents, judicial process, translation and interpretation, and the Barristers' Society.

As far as legal documents are concerned, it was recommended that standard forms of all types be available in both official languages and that uniform terminology be used in such documents. It was also recommended that registry offices, banks, financial institutions and other large corporations ensure that standard form documents such as mortgages, sales contracts, leases and insurance contracts be available in both official languages.³

In order to implement the spirit of the official languages legislation in the judicial process, the Committee felt that "the judicial system must not operate in English, providing French services: it must operate in French and English jointly."⁴ The Barry-Bastarache report thus recommended that in both civil and criminal cases proceedings should be conducted in just one official language with interpretation being used only minimally, for example to enable

³ Final Report, 1981: 18-20.

⁴ Final Report, 1981: 21.

the court to understand the testimony of a witness who is unable to speak the language of the proceedings. The aim was to prevent situations where an anglophone judge conducted an entire trial through interpreters when all the principal participants were francophone.⁵ Moreover, the Committee was worried about the effect of s. 19(2) of the proposed Canadian Charter of Rights and Freedoms which gave 'any person' involved in court proceedings in New Brunswick the right to use either official language before the court. It feared that this provision would be interpreted as allowing lawyers a choice of language before the courts of the province and that, since most lawyers in the province are English-speaking or prefer to work in English, English would continue to predominate in the justice system. Francophones would be forced to accept trials conducted in English with some interpretation while anglophones continued to enjoy unilingual English trials. The Committee, which felt that the linguistic rights of lawyers should not take precedence over the linguistic rights of the parties to proceedings, predicted that s. 19(2) would be detrimental to the aim of providing francophones with unilingual French trials. It therefore recommended that:

Immediate action shall be taken by the Barristers' Society of New Brunswick to induce the Government of New Brunswick to suggest changes in the planned Charter of Rights . . .⁶

⁵ Final Report, 1981: 22.

⁶ Final Report, 1981: 35.

In order to establish an infrastructure that would make it possible to provide unilingual French trials, the Barry-Bastarache Report recommended that a far greater proportion of court personnel should be bilingual at the time of their appointment or be willing to take language training. It was also recommended that the judicial districts of Bathurst, Campbellton, Edmundston and Grand Falls should have bilingual judges and that certain other districts should have at least one bilingual judge. The report further recommended that at least three of the five Court of Appeal judges should be bilingual.⁷ Finally, it was suggested that all documents related to legal proceedings be in the language of the proceedings, that testimony be recorded in the language in which it is given and that judgments be delivered in the language of the proceedings.⁸

After examining language services available in the justice system, the Committee discovered that the translators and interpreters working in the courts of the province had no special training and, more specifically, no training in legal terminology. It also felt that translators and interpreters suffered from a lack of cooperation on the part of the legal profession. It was recommended, therefore, that training programmes be established

⁷ Final Report, 1981: 21-25. With three francophones on the Court of Appeal, it would be possible to have a panel of three Court of Appeal judges without resorting to ad hoc judges from the Court of Queen's Bench.

⁸ Final Report, 1981: 25-26.

and that the Barristers' Society prepare guidelines for translators and interpreters to enable them to prepare for their cases properly. The report further recommended that the provincial government provide for the translation of judgments issued by courts of the province.⁹

Finally, the Committee, which felt that all lawyers in the province should eventually be required to be bilingual, proposed that the Barristers' Society itself should become a truly bilingual institution, that it should prepare a bilingual manual for the use of its members containing forms, terminology and commentary, and that it should provide continuing education programmes in both official languages.¹⁰

In April of 1982 the Council of the Barristers' Society met to consider the Committee's recommendations. It agreed to the majority of the suggestions but it ultimately rejected the Committee's recommendation with respect to s. 19(2) of the Charter.¹¹ The Barrister's Society felt that the principle embodied in s. 19(2) - that anyone should be allowed to speak to the court in the official language of his or her choice - was a very important

⁹ Final Report, 1981: 30.

¹⁰ Final Report, 1981: 32-33.

¹¹ John P. Barry, 1983: 253-263.

principle and that, even if there was some risk that it might be abused, the importance of the principle warranted taking the risk.

At the same time as the Barristers' Society was seeking to improve bilingual services in the judicial system, the Hatfield government was considering the possibility of revising and strengthening the province's official languages legislation. In June of 1980 the government asked the Official Languages Branch to set up a Task Force on Official Languages with a view to such a revision.¹² The Report of the Task Force, entitled Towards Equality of the Official Languages in New Brunswick, was published in March 1982 and is commonly known as the Poirier-Bastarache Report. Not surprisingly, that portion of the Task Force's work which dealt with the justice system drew heavily on the Barry-Bastarache Report and the recommendations with respect to justice were similar to those of the earlier report. The Poirier-Bastarache Report again stressed the notion of "equality of status" and it found that bilingualism could not become a reality in the administration of justice so long as the Department of Justice had no coherent language policy and failed to attribute equal status to the two official languages.¹³ The Report found that there were still very few signs of bilingualism in the administration of justice even twelve years after the language legislation was enacted.

¹² The Chairman of the Task Force was Bernard Poirier and the Vice-Chairman, Michel Bastarache.

¹³ Michel Bastarache and Saul Schwartz, 1987: 531.

Essentiellement, il faut souligner toutefois que le ministère de la Justice n'a pas manifesté le désir d'assurer un niveau de services acceptable sur le plan linguistique. Il est donc urgent que celui-ci mette en oeuvre un programme de bilinguisme d'envergure . . .¹⁴

The language legislation proposed by the Poirier-Bastarache Report was entitled the "New Brunswick Language Rights Act". It included the following provisions with respect to language rights in the justice system:

1. bills coming before the legislature and all decrees, notices, regulations and proclamations shall be drafted in both official languages;
2. court proceedings shall be conducted in only one of the official languages;
3. interpretation shall be provided free of charge to any party "for the purpose of understanding the proceedings";
4. in determining the language of proceedings the court shall take into account the language of the accused in a criminal case and the language of the parties, the witnesses and the evidence in a civil case;

¹⁴ Towards Equality, 1982: 330.

5. the judgment shall be given in the language of the proceedings and all steps in the process shall be conducted in the language of the proceedings unless otherwise requested.¹⁵

The Poirier-Bastarache Report also recommended that more bilingual judges be appointed and that the Court of Appeal have three francophone judges at all times. The Task Force hoped that its recommendations and the proposed revision of the language legislation would guarantee "equality of status" for French, in the sense that francophones would be provided with the same services in French as those provided to anglophones in English.

In tabling the Report in the Legislative Assembly, Premier Hatfield's comments were rather cautious. He said that the government would give very careful consideration to the recommendations regarding the justice system, but he pointed out that the province would have to discuss the matter of judicial appointments with the federal government and the only promise he made was a rather vague one: "Les recommandations relatives aux services à la population - les bureaux d'enregistrement et ainsi de suite - seront mises en oeuvre dès qu'un personnel qualifié sera recruté."¹⁶

¹⁵ Towards Equality, 1982: 939-945.

¹⁶ New Brunswick, Journal of Debates (Hansard) of the Legislative Assembly of New Brunswick, 1982, vol. IV, pg. 1617-1618.

The same year as the Poirier-Bastarache Report was submitted, official language rights in New Brunswick were entrenched in the Constitution in the Charter of Right and Freedoms. Section 16(2) of the Charter declared that:

English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Section 19, which refers more specifically to language rights in courts, reads as follows:

- (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.
- (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

These provisions, which guaranteed that any citizen in New Brunswick could use either French or English before any court, or in any judicial process or proceeding did not really add anything to existing language rights in New Brunswick but, by entrenching these rights in the constitution, the provincial government indicated its commitment to bilingualism, a commitment that would, it was hoped, solve the practical problems described in the Poirier-

Bastarache Report and address the complaints that francophones still had about the failure of bilingualism in the justice system.¹⁷

On June 17, 1982 the government took the first step toward implementing the recommendations of the Poirier-Bastarache Report when it amended the Official Languages of New Brunswick Act to make the right of an accused to choose the language of proceedings an absolute right in the case of provincial offences. Michel Bastarache suggests that the amendment may have been prompted by reports that, in Provincial Court, some judges and lawyers regarded a request for a French trial as unreasonable and insulting.¹⁸ Whatever the reasons, the amendment added the following paragraph to subsection 13(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.

The same amendment repealed s. 13(2), thus ensuring that proceedings could be conducted in French whether or not the court felt that it was practicable to do so.

¹⁷ Michel Bastarache, 1983: 62-63.

¹⁸ Michel Bastarache, 1983: 61-62.

Another of the Task Force's recommendations was implemented in 1983 when reported decisions of New Brunswick courts were first published in the New Brunswick Reports in parallel columns in both official languages.¹⁹

The Hatfield government was reluctant, however, to undertake a complete revision of the provincial legislation for it feared the public backlash this might cause. Instead, on March 23, 1984, it established another committee, the Advisory Committee on Official Languages, whose purpose was to seek and report on the reactions of the people of New Brunswick to the Poirier-Bastarache Report and to make recommendations for change.

The Advisory Committee's report, the Guérette-Smith Report, submitted in February 1986, indicated that some progress had been made in implementing the language legislation in the justice system. With respect to the provincial Department of Justice, the Committee found that:

. . . the department has undertaken to guarantee bilingual court services, bilingual prosecutors for criminal matters, bilingual representation of the province in litigation involving the citizen and province and full language services to private parties involved in civil suits before the courts of the province. Such services

¹⁹ (1983), 45 N.B.R. (2d). Responsibility for translation of the judgments was undertaken by the Centre de traduction et de terminologie juridiques at the Université de Moncton in 1986 beginning with volume 64.

include the providing of bilingual court personnel, interpreters, duty counsel, judicial officers and members of boards and tribunals.²⁰

It also found that in the period from 1978 to 1985 the percentage of French-speaking employees in the Department of Justice had increased from 4.6% to 17.4% in the Central Office and from 37.5% to 47% in the regions.²¹

Given the progress made in the implementation of bilingualism in the administration of justice, the recommendations of the Guérette-Smith report were not so far-reaching as those of the other reports. Apart from repeating certain recommendations found in the Poirier-Bastarache Report,²² the Committee's principal proposals were as follows:

1. that the government establish a means of monitoring the implementation of the official languages legislation (recommendations 19 and 22);

²⁰ Advisory Committee, 1986: 121.

²¹ Advisory Committee, 1986: 123.

²² Advisory Committee, 1986: 124. Like the Poirier-Bastarache Report, the Guérette-Smith Report recommended that registry offices provide bilingual services, that tribunals, boards and committees be able to hear people in both official languages, and that judges in certain districts be bilingual.

2. that the Translation Bureau increase its capacity in the areas of translation and in simultaneous and consecutive interpretation and that the government provide legal translators and interpreters with training in legal terminology (recommendations 40 and 48);

The government's reaction to the Guérette-Smith report was discouraging. Premier Hatfield seemed more inclined to focus on New Brunswick's accomplishments of the past than on changes for the future. In commenting on the Report, the Premier said that New Brunswick had made great strides in implementing bilingualism in the field of justice. He cited the increase in the number of bilingual court personnel, the increase in the number of francophone lawyers, and the publication of statutes, regulations and judgments in both official languages. He went on to say as follows:

In addition, the Department of Justice itself has made significant efforts to bring about the equality of status of French and English within its operations. Three years ago, the department launched an enhanced official languages program. The results have been substantial. Two years ago, it became the first department to make public a policy on official languages. It developed and implemented a strategic plan to ensure capabilities in both official languages in all regions, all offices, and at all levels of the department.²³

The only assurance of continued improvement that he appeared to give was as follows:

²³ Journal of Debates, 1986, vol. X, 4314.

The Department of Justice will ensure in the next few years that the quality of service it delivers in all its operations will be of equal quality in English and French in all regions and offices throughout the province.²⁴

This reaction disappointed many who felt that the work of the government-appointed committees would prove completely meaningless if the government was not serious about implementing the recommendations. As Michel Bastarache said:

Libéraux et conservateurs adoptent des déclarations de principe et refusent d'envisager tout mécanisme de mise en oeuvre qui présente un caractère coercitif.²⁵

Nevertheless, while the Committee was still at work, the government had taken several steps to implement bilingualism in the judicial system. In the summer of 1984 the provincial Department of Justice had, in fact, announced a new language policy which included language training and the translation of internal documents so that the Department could serve the public in both official languages throughout the province.²⁶

²⁴ Journal of Debates, 1986, vol. X: 4314-4315.

²⁵ Michel Bastarache, "A propos du rapport Guérette-Smith sur les langues officielles au Nouveau-Brunswick," Égalité 18 (1986): 121.

²⁶ Michel Bastarache and Saul Schwartz, 1987: 531.

On June 20, 1984 the Official Languages of New Brunswick Act was again amended to repeal s. 5(3)²⁷ and to change s. 7. Henceforth, all bills and statutes before the Legislative Assembly would have to be in both official languages. The amendment also added subsection 15(3), a provision dealing with translators, which reads as follows:

The Lieutenant-Governor in Council may appoint Official Translators and may make regulations governing their functions and the status and admissibility into evidence of translations prepared by them.

It was not until 1986, however, that the government made any specific pronouncement on interpretation. On January 10 of that year, the provincial legislature enacted Regulation 86-2 entitled Interpreters Regulation - Official Languages of New Brunswick Act which "guarantees every person appearing before a court access without charge to the service of an interpreter."²⁸ Section 3 of the regulation states that in any matter of provincial jurisdiction,

²⁷ This was the provision which had been added in 1975 and which allowed unilingual amendments to statutes which were at that time in only one of the official languages. In practice, this had meant that certain statutes were available in English only. Supra, p. 46.

²⁸ Michel Bastarache, 1986a: 152. The regulation was enacted under s.15(2) of the Official Languages of New Brunswick Act.

A person may request an interpreter in a proceeding to enable him to proceed or to present evidence in the official language of his choice or to enable his solicitor to represent his interests effectively.

And s. 5 provides that the interpreter shall swear to perform the task "impartially", and to the best of my skill, knowledge and ability". However, the regulation does not mention any training or qualifications for interpreters, nor does it indicate whether simultaneous or consecutive interpretation should be used. "Interpreter" is simply defined as "a person who interprets orally in a manner to be heard by every person present".

The francophone community regarded the regulation as a "recul par rapport au bilinguisme judiciaire"²⁹ because it meant that unilingual English lawyers would continue to have an enormous impact on the language of proceedings no matter what the language of the parties to a dispute. The same issue had been brought to light in the Barry-Bastarache Report with respect to the wording of s.19(2) of the Charter. In fact, the enactment of Regulation 86-2 was prompted by a case where an anglophone lawyer representing a francophone client requested the services of an interpreter. The case in question, Cormier v. Fournier,³⁰ was a civil suit in which Ms. Cormier sued Mr Fournier for damages resulting from a traffic

²⁹ Michel Doucet, "L'affaire Tingley: un recul par rapport au bilinguisme judiciaire," Égalité 18 (1986) 107-126.

³⁰ (1986), 29 D.L.R. (4th) 675.

accident. Both parties were francophone and it was agreed that the trial should take place in French. Mr. Fournier, however, was represented by an anglophone lawyer, Mr. Tingley, and at the trial, on October 2, 1985, Mr. Tingley insisted on being provided with simultaneous translation services to enable him to understand the proceedings.³¹ The judge refused Mr. Tingley's request. Mr. Tingley appealed that decision but withdrew his appeal shortly before Regulation 86-2 was passed since s.3 of the regulation provides that a party may request an interpreter "to enable his solicitor to represent his interests effectively". The case was ultimately heard with Mr. Tingley being provided with simultaneous interpretation and with the francophone parties being obliged to communicate with him through the interpreter.³²

This was not the sort of bilingualism intended by those who sought equality of status of the two official languages in the justice system and the Tingley affair was not an isolated incident. Unfortunately, in matters involving insurance claims arising from traffic accidents, francophone defendants were often represented by anglophone lawyers retained by the insurance companies.

³¹ An interpreter was available in the courtroom to provide consecutive interpretation of the testimony of anglophone witnesses for the court. However, Mr. Tingley, who could not function in French, required interpretation of almost the entire proceedings, and thus asked for simultaneous interpretation.

³² Mr. Fournier used a headset to listen to the simultaneous translation of the questions put to him by his lawyer in English.

Therefore, the language rights of the parties to the dispute were often set aside in favour of the language rights of the insurance company's lawyer.

The enactment of Regulation 86-2 was followed by another blow to equality of status when, in May 1986, the Supreme Court of Canada handed down its decision in the case of Société des Acadiens du Nouveau-Brunswick Inc. et al v. Association of Parents for Fairness in Education et al³³. The constitutional issue in the case was expressed as follows by Chief Justice Dickson:

Does s. 19(2) of the Canadian Charter of Rights and Freedoms entitle a party pleading in a court of New Brunswick to be heard by a court, the member or members of which are capable of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official language used by the parties.³⁴

In other words, does s. 19(2) of the Charter of Rights and Freedoms give a francophone party the right to be heard and understood by the court in French (i.e the right to a unilingual French trial) or is the right limited to the right to speak French before the court (i.e. the right to be understood through an interpreter)? The court also considered whether s.13(1) of the Official Languages of New

³³ [1986] 1 S.C.R. 549.

³⁴ Société des Acadiens at 558.

Brunswick Act entitled a party to be understood directly by the court.

The issue which the court was asked to decide in Société des Acadiens du Nouveau-Brunswick Inc. et al v. Association of Parents for Fairness in Education et al arose as the result of an administrative decision by Chief Justice Stuart Stratton of the New Brunswick Court of Appeal in the case of Société des Acadiens du Nouveau-Brunswick et l'Association des conseillers scolaires francophones du Nouveau-Brunswick v. Minority Language School Board No. 50. The latter case, in which the issue was official language education rights, came before Chief Justice Guy Richard of the Court of Queen's Bench in 1983. He agreed with the Société des Acadiens that English language school boards should not allow francophone students to attend French immersion programmes designed for anglophones. The School Board did not appeal the decision but a group of parents whose children were affected by the decision decided to form an association, the Association of Parents for Fairness in Education, for purposes of pursuing the matter. Since the Association had not been involved initially, it required the permission of the Court of Appeal to become a party to the case. The matter came before Chief Justice Stratton who was asked by the appellant to reassign the motion to a bilingual judge since some of the argument was to be in French. Thus, Mr. Justice Jean-Claude Angers was appointed to hear the case. Mr. Justice Angers, however, felt that the matter should be heard by a panel of three Court of Appeal judges. Finally, two bilingual judges, Mr. Justice Angers and

Mr. Justice G. V. LaForest and one anglophone judge, Chief Justice Stratton, heard the motion.³⁵ The Court of Appeal decided that the Association of Parents for Fairness in Education could appeal the Richard decision. The Société des Acadiens du Nouveau-Brunswick then appealed the Court of Appeal's decision to the Supreme Court of Canada arguing that the presence of Chief Justice Stratton on the panel violated both s. 19(2) of the Charter of Rights and Freedoms which allows the use of either official language by any person in the courts of New Brunswick and s. 13(1) of the Official Languages of New Brunswick Act which provides that any person appearing before a court may use the official language of his choice and that the choice shall not place that person at a disadvantage.

The Supreme Court held that section 13(1) did give francophones the right to be understood in French but that the right had not been violated in this case by the presence of Chief Justice Stratton on the panel of three judges. The court found that the appellant was not placed at a disadvantage since, although the English-speaking judge did not make use of simultaneous interpretation, there was no evidence before the court that he did not have sufficient knowledge of French to understand the arguments without the aid of interpretation. The court found that it was "very significant" that at the time of the Court of Appeal hearing no

³⁵ Gérard Snow, "Trois arrêts-clés dans le domaine des droits linguistiques," Égalité 18 (1986): 145-146.

objection was made to Chief Justice Stratton's being a member of the panel.³⁶

In so holding, however, Mr. Justice Beetz, speaking for the majority, said as follows with respect to s. 13(1):

A party pleading in a court of New Brunswick is entitled to be heard by a court, the member or members of which are capable by any reasonable means of understanding the proceedings, the evidence and the arguments, written and oral, regardless of the official languages used by the parties; this entitlement is derived from the principles of natural justice and from s. 13(1) of the Official Languages of New Brunswick Act however, and not from s. 19(2) of the Charter.³⁷

The words "by any reasonable means" used by Mr. Justice Beetz would seem to suggest that equality of status of the official languages before the courts is guaranteed when a party is heard by a court which must use the services of an interpreter to understand. It is not, however, entirely clear what the court meant by the expression "by any reasonable means". Mr. Justice Beetz said at page 581:

I will leave for another day the question as to the reasonable means necessary to ensure that the member or members of a court understand the proceedings, the evidence and the arguments, written or oral, regardless of the official language used by the parties.

³⁶ Société des Acadiens at 553.

³⁷ Société des Acadiens at 581.

With respect to s. 19(2) Mr. Justice Beetz said at page 581:

If the people of New Brunswick were agreeable to have a provision like s. 13(1) of the Official Languages of New Brunswick Act as part of their law, they did not agree to see it entrenched in the Constitution.³⁸

In other words, the majority of the court felt that s. 13(1) of the New Brunswick legislation set a higher standard than s. 19(2) of the Charter and that the Charter provision had deliberately avoided entrenching that standard in the Constitution.

The court held that the right granted by s. 19(2) of the Charter of Rights and Freedoms to use either English or French in any court of New Brunswick was simply the right granted by s. 133 of the Constitution Act, 1867.³⁹ The court said that language rights are not fundamental rights but rather legislated rights based on political compromise. The majority held that such rights should be interpreted conservatively by the judiciary and that courts should leave any extension of such rights to the political process. The court also held that proceedings involving a francophone which are

³⁸ Société des Acadiens at 575.

³⁹ [1986] 1 S.C.R. 549. See also Macdonald v. City of Montreal, [1986] 1 S.C.R. 460 where the Supreme Court of Canada held that the fact that a speeding ticket was issued in only one of the official languages did not violate the guarantee to equality provided for in s. 133.

conducted in English with an anglophone judge do not offend the 'equality of status' provision of s.16 of the Charter. The right to be understood by the court is a matter of due process or natural justice and not an aspect of the equality of the two official languages.⁴⁰ The position of the majority with respect to s. 19(2) is explained by Mr. Justice Beetz as follows at page 580:

. . . if one should hold that the right to be understood in the official language used in court is a language right governed by the equality provision of s. 16, one would have gone a considerable distance towards the adoption of a constitutional requirement which could not be met except by a bilingual judiciary. Such a requirement would have far reaching consequences . . .

While the majority of the Supreme Court held that s. 19(2) of the Charter and s. 133 do not guarantee the right to be understood in either official language but only the right to express oneself in either official language, both Chief Justice Dickson and Madame Justice Wilson, in dissent, felt that s. 19(2) should be interpreted as including the right to be understood in the official language of one's choice. Madame Justice Wilson said as follows at page 643-644:

. . . I think it is clearly established by the pre-eminent position of language rights in the Charter and their sociocultural content that, at the very least, the standard against which the judge's level of comprehension should be measured goes beyond that required by fairness.

⁴⁰ Michel Bastarache, 1986b: 502.

and

I would conclude that the judge's level of comprehension must go beyond mere literal understanding of the language used by counsel. It must be such that the full flavour of the argument can be appreciated.

Madame Justice Wilson also said that translation or interpretation "can only be viewed as inadequate substitutes for true equality".⁴¹

The legislative context of s. 19 also, in my view, requires account to be taken of Canada's fundamental commitment to the "equality of status" of the French and English languages as set out in s. 16.⁴²

As we shall see in the following chapters, Madame Justice Wilson's view of equality of status of the official languages and language comprehension did ultimately win the day in New Brunswick, and many of the recommendations of the Barry-Bastarache Report, the Poirier-Bastarache Report and the Guérette-Smith Report have now been implemented. Even the type of situation which arose in the Cormier case was resolved when the New Brunswick legislature passed an amendment to the Insurance Act in June 1986. The amendment added the following section to the Act:

⁴¹ Société des Acadiens at 645.

⁴² Société des Acadiens at 638.

20.2(1) Nul assureur faisant affaires dans la province ne peut retenir les services d'un avocat pour agir au nom d'un assuré, sauf si l'assuré a indiqué à l'assureur la langue officielle qu'il désire que l'avocat agissant en son nom utilise.⁴³

One indication of the success of the fight for a bilingual justice system is the fact that the Association des juristes d'expression française du Nouveau Brunswick, a pressure group formed in 1987, plays the role of watchdog since it is no longer necessary to lead a crusade for French language rights in the justice system. The Association, whose aims are primarily to "remédier aux faiblesses du régime actuel de protection des droits linguistiques dans l'arène judiciaire et quasi-judiciaire", has expressed confidence in the McKenna government's approach to bilingualism.⁴⁴ And, while there are still some "weaknesses" the government is not blind to them. Indeed, although it rejected as too costly the suggestion that an official languages commissioner be appointed to monitor the implementation of the provincial languages legislation, in September 1988 the government asked the provincial ombudsman to take over from the Official Languages Branch the

⁴³ An Act to Amend the Insurance Act, S.N.B. 1986, c. 48, s. 1.

⁴⁴ Mémoire de l'Association des juristes d'expression française du Nouveau-Brunswick portant sur la capacité bilingue des tribunaux judiciaires et administratifs au Nouveau-Brunswick. Présenté au Premier Ministre du Nouveau-Brunswick, Monsieur Frank McKenna le 9 février 1989. Unpublished. 2.

responsibility for dealing with complaints under the Official Languages of New Brunswick Act.⁴⁵

Complaints about bilingualism in New Brunswick these days come not only from francophones but also from anglophones. Indeed, the new Confederation of the Regions Party consists largely of disgruntled anglophones who oppose the government's bilingualism policies.⁴⁶ Their very vocal opposition to bilingualism in New Brunswick is a measure of the success of official bilingualism which now seems solidly entrenched in the province.

⁴⁵ It was felt that the ombudsman would be seen to be more independent and objective than the Official Languages Branch.

⁴⁶ "N.B. Tory party president wants end to language debate," Ottawa Citizen, September 14, 1989.

CHAPTER FOUR
INSTITUTIONAL SUPPORT FOR BILINGUALISM IN THE
ADMINISTRATION OF JUSTICE

Entrenchment of bilingualism requires more than legislation and regulations. The various measures designed to promote bilingualism which were discussed in chapters two and three would have been fruitless without institutional support to make implementation of the various legislative provisions possible in order to change the status quo and make French a language of the law in New Brunswick. Institutional support has taken various forms: a French language law school, a centre for French terminology for the common law, the translation of standard form documents, statutes, regulations and judgments, the appointment of bilingual judges and court officials, the adoption of a policy of bilingualism by the Department of Justice and by the Law Society of New Brunswick, and the establishment of court interpretation services. Without such support, the justice system in New Brunswick would have remained essentially an English language system.

École de droit, Université de Moncton

Perhaps one of the most important events in the history of bilingualism in the administration of justice in New Brunswick was the creation in 1978 at the Université de Moncton of the École de droit, the first law school in Canada to teach common law in French. In the late 1970's only about 10% of the lawyers in New Brunswick were francophone and, what was worse, even the francophone lawyers were much more comfortable practising law in English

because they had studied law in English. The very limited number of francophone lawyers already made it very difficult to ensure that legal services in French would be available to the francophone population. Without lawyers trained in French in the common law, the province's justice system would never be able to offer equal services in both official languages. But if francophone lawyers could be trained in their own language, they would be accustomed to reading and writing legal documents in French, they would be familiar with French legal terminology and they would be prepared to practise law in French. Hence, the importance of establishing the École de droit.

The purpose of the École was to train lawyers who would one day be able to provide legal services not only to francophones in New Brunswick but to all francophones living in provinces other than Quebec. Pierre Patenaude, the first Dean of the École de droit, believed that the École should play a significant role in implementing the provisions of both the federal and the provincial language legislation:

Dans quelques années, ces provinces recevront donc des juristes ayant reçu une formation spécialisée les destinant à pratiquer le droit en français : jusqu'à aujourd'hui, le droit de recevoir des services juridiques dans la langue de la minorité hors-Québec était resté lettre morte à cause du manque de juristes pouvant oeuvrer en français.¹

¹ Pierre, Patenaude, "Présentation," Revue de l'Université de Moncton 12 (1979): 7.

Ten years after its establishment, the École de droit is more than an important symbol. It is regarded as a very good law school and has recently doubled its original enrolment with 45 students in the current first year class.² Although approximately half of its students are from out of the province,³ it would seem that the École de droit must be given credit for the fact that the percentage of francophone lawyers in the province has virtually doubled since the early 1980's. Although precise figures are not yet available, the Law Society of New Brunswick estimates that approximately 20% of its 1,150 members are francophone.⁴

Centre de traduction et de terminologie juridiques (CTTJ)

Guy Richard, a champion of francophone rights in New Brunswick, who is now Chief Justice of the Court of Queen's Bench, said in 1979 on the occasion of the opening of the École de droit that he hoped that documents such as mortgages and collective agreements would soon be drafted in French in New Brunswick. He said that there were already wills drafted in French and he predicted that those documents would become important precedents. He indicated, however, that it was virtually unheard of to see pleadings

² The other law school in New Brunswick, the Faculty of Law at the University of New Brunswick in Fredericton, graduates from 65 to 70 students per year. For the past three years it has offered the equivalent of one course in French.

³ Interview with Michel Carrier, Secretary of the Law Society of New Brunswick, November 29, 1989.

⁴ Interview with Michel Carrier.

drafted in French.⁵ This statement reflects the fact that, although English was no longer exclusively the language of the courts, lawyers were still not comfortable practising law in French because of the absence of French terminology for the common law. Even when bilingual forms were available, there was often a reluctance on the part of francophone lawyers to proceed in French. Therefore, a lawyer speaking at the opening of the École de droit in 1979 suggested that, in order to encourage francophone lawyers to practise in French, a documentation centre should be set up to develop "un vocabulaire et des documents qui puissent nous servir de précédents".⁶

A year after the École de droit opened its doors, the Centre de traduction et de terminologie juridiques was established, also at the Université de Moncton. The CTTJ now has a permanent staff consisting of a director and an assistant director, two revisors, six full-time translators and one terminologist as well as two temporary translators and two researchers. The Centre also uses of the services of 22 freelance translators.⁷ It is an essential complement to the École de droit. Its mandate is to promote the practice of law in French in the common law provinces and

⁵ Guy Richard, 1979: 142.

⁶ Roger Savoie, "Comment faciliter la pratique de la common law en français," Revue de l'Université de Moncton 12 (1979): 150.

⁷ Telephone conversation with Charles Zama, Chef de service of the CTTJ, November 27, 1989.

especially in New Brunswick. To this end the Centre has worked on developing a proper technical vocabulary for the common law in French and it has assisted the professors at the École de droit in developing French teaching tools.⁸

Terminology

The problem of French terminology for the common law stems from the fact that virtually all French-speaking lawyers practising law in New Brunswick in the 1970's had received their legal training in English, read cases in English and practised law in English. The few francophones who had studied in French had studied civil law and were not familiar with common law terminology.

In public law fields such as constitutional law, administrative law and criminal law, French terminology for the common law can often be borrowed from the vocabulary used in Quebec and from the vocabulary used by the courts and statutes of federal jurisdiction. The other Canadian source for French terminology is the Quebec civil law system but civil law terms cannot always be used for the common law particularly in fields such as family law, contracts, property law, torts and trusts. The development of a vocabulary for the common law in French, especially in the field of private law,

⁸ Michel Bastarache, "Preface." The Law of Property. Vocabulary of the Common Law, vol. I. (Moncton: Centre de traduction et de terminologie juridiques, 1982) 5.

was thus a necessary step in the implementation of French language services in the administration of justice in New Brunswick.

To date the Centre has published four bilingual legal lexicons⁹ and it is currently working on a Dictionnaire des difficultés et des ressources du français juridique. The Centre makes the results of its terminological research available free of charge to professors, lawyers, judges and translators.¹⁰ It cooperates with term banks such as Termium and BTQ and with other organizations working on terminology for common law in French. It also collaborates with the National Program for the Integration of the Two Official Languages in the Administration of Justice in standardizing French common law terms.

Standard Forms and Precedents

If French common law terminology is essential for French to become a language of the law in New Brunswick, so are standard forms in French. Although discussions of bilingualism in the administration of justice often focus on the right of parties to a lawsuit to speak the official language of their choice in court, most of the work that lawyers do is done with paper and pencil long before the case reaches the courtroom. In fact, even litigation

⁹ Vol. I: The Law of Property, Vol. II: The Law of Trusts, Vol III: Civil Procedure and Evidence and, Vol. IV: The Law of Torts.

¹⁰ Université de Moncton, Centre de traduction et de terminologie juridiques, Rapport Semestriel au 31 octobre 1989. Unpublished: 6.

lawyers do most of their work out of court and prefer to settle disputes before they get to court. It is only in criminal cases that a court appearance is inevitable. All legal procedures involve some written documents, many of which are not unique but appear routinely as standard forms. For example, a lawyer will rely on a standard form for a mortgage, an agreement of purchase and sale, an affidavit, etc. Standard forms make the lawyer's task easier and ensure consistency.

However, when the official languages legislation was adopted, standard legal forms were not available in French in New Brunswick. Francophone lawyers were obliged to use English forms or produce their own French version, a time-consuming and unprofitable task. As a francophone lawyer said: "Pour préparer un testament, acte de vente, une acte d'hypothèque ou un contrat en anglais, on n'a qu'à se servir de "précédents" qui ont subi l'épreuve des années. . ."¹¹

Recognizing this problem, the Barry-Bastarache Committee had recommended that standard court forms be made available in both languages, that large commercial associations such as "banks, financial institutions and other large corporations should be required to issue standard form contracts in both official languages" and that the Law Society prepare a "loose-leaf practitioner's manual embodying forms, terminology and commentary in both official

¹¹ Roger Savoie, 1979: 149.

languages."¹² The Centre has to date published two volumes of a bilingual version of the New Brunswick Court Forms.

Translation of Other Legal Documents in N.B.

Much of the work done in legal translation in New Brunswick has been carried out directly by the CTTJ. It has made a great contribution to the implementation of bilingualism in the justice system in New Brunswick by translating the New Brunswick Rules of Court,¹³ the decisions published in the New Brunswick Reports, the New Brunswick Statute Citator, and materials for the bar admission course and continuing education programmes offered by the Law Society of New Brunswick. The Centre also undertakes the translation of legal documents for the private sector in New Brunswick and it is currently involved in translating the by-laws of the City of Moncton.

Translation for Other Provinces

The CTTJ's commitment to facilitating the practice of common law in French has led it to make its expertise in the field of legal translation available beyond the borders of New Brunswick. For example, it participated in the work of translating the laws and regulations of the Province of Manitoba and the Revised Statutes of the Northwest Territories (completed in November 1989). It has

¹² Final Report, 1981: 19-20.

¹³ Published as Regulation 82-73 on June 1, 1982.

also undertaken the translation of works such as The Law and Business Administration in Canada by Smyth and Soberman (completed in 1985), for the use of francophone lawyers and law students throughout Canada.

Training Activities

In addition to its terminology and translation activities, the CTTJ promotes the use of French in the administration of justice through its training activities. Although these do not constitute a major aspect of its work, the CTTJ provides linguistic training for francophone lawyers and judges in New Brunswick and it offers a practicum to students of legal translation.

Ten years after its inception, the CTTJ, like the École de droit, is a secure and respected institution which has made and continues to make an important contribution to the practice of common law in French in New Brunswick and in the other common law jurisdictions in Canada.

Department of Justice

In the 1970's, it was not only a lack of bilingual lawyers but a lack of bilingual personnel at all levels which made it very difficult for the New Brunswick Department of Justice to operate as a bilingual institution. Figures presented in the Poirier-Bastarache Report show that the Department of Justice had the worst record of

bilingualism of any department in the government.¹⁴ The failure of the Justice Department to reflect the government's policy on bilingualism in the public service was particularly embarrassing since Justice was a very large department providing many services and dealing with the public on a daily basis.

In 1984 the Department published a booklet entitled Official Languages Policy of the Department of Justice in which it admitted that there were "certain weaknesses in its present bilingual capability."¹⁵ The Department undertook to remedy those weaknesses.

Over the next few years and, in a reasonable and progressive manner, the Department of Justice will put into place the bilingual capabilities required to provide services to the public, directly and equally in both official languages, in all program areas, at all Departmental levels and in all geographic locations, in line with the present and foreseen public need for bilingual services and in accordance with this Policy.¹⁶

With respect to the courts, Department policy stated that services in all courts would be available in both official languages. Thus in criminal cases the prosecutor would speak the language of the accused; in civil cases involving the province, the province's lawyer

¹⁴ Michel Bastarache and Saul Schwartz, 1987: 531.

¹⁵ New Brunswick, Department of Justice, Official Languages Policy of the Department of Justice (Fredericton, 1984) Unpublished:1.

¹⁶ Official Languages Policy, 1984: 4.

would speak the language of the other litigant; and witnesses would be able to use either official language. The courts would have bilingual court personnel including court stenographers and duty counsel, and "official court interpreters" would be provided when necessary. Finally, the Department undertook to "ensure that linguistically qualified judges preside . . . in the official language chosen by court participants."¹⁷

Gradually, the Department did begin to reflect the aims of the bilingualism policy. The percentage of bilingual employees in the Department of Justice increased from 25.8% in 1978 to 48.2% in 1989 (see Table I, page 96). The Department managed to change the linguistic make-up of its staff by hiring bilingual individuals, by language training and by transferring or circuiting bilingual personnel.

The success of the Department of Justice's bilingualism policy can also be measured in terms of the percentage of cases conducted in New Brunswick courts in French. Figures show that there has, in fact, been a marked improvement in the situation since the late 1970's. In 1979, only 2.9% of cases in the Court of Appeal and 8.9% of cases in the Provincial Court were conducted in French.¹⁸ That is a very small percentage in a province where over one-third of the population is francophone and where about 12% of the population

¹⁷ Official Languages Policy, 1984: 7-9.

¹⁸ Gordon F. Gregory, 1979: 136.

TABLE I
Percentage of Bilingual Employees in the New Brunswick
Department of Justice¹⁹

	<u>1978</u>	<u>1985</u>	<u>1989</u>
Central Office	4.6%	17.4%	52.0%
Regional Offices	37.5%	47.0%	47.9%
Provincial Total	25.8%	37.2%	48.2%

While the figures for 1978 and 1985 include the Solicitor General's Department, the figures for 1989 do not since the Solicitor General's Department became a separate department in November of 1987.

¹⁹ The figures for 1978 and 1985 are taken from the Guérette-Smith Report, p. 123. The figures for 1989 were provided by Mr. Adrien Fournier of the Department of Justice. I believe that the figures for 1989 reflect a more generous definition of bilingualism than do the figures for 1978 and 1985.

TABLE II
PERCENTAGE OF CASES CONDUCTED IN FRENCH

	<u>1978-79</u>	<u>1988-89</u>
Court of Appeal	2.9%	10.0% ²⁰
Court of Queen's Bench	6.6%	15.0%
Provincial Court	8.9%	17.3%

The figures for 1979 are taken from Gordon Gregory, 1979: 136 and the figures for 1989 were supplied by the New Brunswick Department of Justice.

²⁰ In addition, 3% of the trials in the Court of Appeal were bilingual.

consists of unilingual francophones.²¹ By 1989, 10% of cases in the Court of Appeal, 16% of cases in the Court of Queen's Bench and 17.3% of cases in the Provincial Court were conducted in French. (See Table II, p. 97).

According to an official at the Department of Justice the work remaining to be done in implementing the policy on bilingualism is minimal. All documents are now systematically made available in both official languages although the two versions are not necessarily issued simultaneously. There are delays due to translation since most documents are still drafted in English and then translated into French, but the Department justifies such delays by emphasizing its commitment to providing equal quality of service in both official languages.²²

The Bench

The problem of the lack of French-speaking judges has often been cited as evidence of the government's failure to adhere to the spirit of the language legislation. In the 1970's judicial appointments generally failed to reflect the proportion of francophones in the population. This was of particular concern at the level of the Court of Appeal and in districts where the demand

²¹ Statistics Canada, 1986 census. The figures show that the total population was 709,440, and that 85,055 individuals spoke French only.

²² Interview with Donald Leblanc, Official Languages Advisor, New Brunswick Department of Justice, November 29, 1989.

for trials in French could not be met without the appointment of francophone judges.

Until recently, fewer than 25% of the judges on the Provincial Court and the Court of Queen's Bench were francophone and even bilingual districts did not always have francophone judges. By 1989, however, the proportion of francophone judges had reached over 30% and the government had demonstrated its commitment to providing trials in French by making francophone judges and court personnel available wherever they were needed in the province.²³

The language problem at the level of the Court of Appeal where the judges sit in panels of three could not be solved so easily. Without bilingual capacity on the part of at least three of the six Court of Appeal judges, a francophone panel could be formed only by bringing francophone judges up from the Court of Queen's Bench on an ad hoc basis. This practice was open to criticism since it could be argued that the presence of Queen's Bench judges meant that appeals

²³ This information is based on figures in the Final Report of the Committee on Integration of the Two Official Languages in the Practice of Law and from lists of the names of the judges on the Provincial Court and the Court of Queen's Bench for the years 1979, 1984 and 1989. According to figures for 1988-89 provided by the Department of Justice, the vast majority of trials in French take place in the northern part of the province in Edmundston, Tracadie, Bathurst, Richibucto and Campbellton.

heard in French were not of equal quality.²⁴ In any case, the problem has been solved for the present since there are now three francophone judges on the New Brunswick Court of Appeal - Jean-Claude Angers and Robert C. Rice from Edmundston and Lewis C. Ayles from Campbellton - and one of the anglophone judges, Patrick A. A. Ryan, has a high degree of fluency in French.²⁵ Therefore, it is now possible to compose a panel of three French-speaking Court of Appeal judges to hear appeals in French.

As a result of the increase in the number of francophone judges and the increase in the number of proceedings conducted in French, more and more judgments are being written in French. It is estimated that approximately 20% of the judgments issued by all courts in the province are now written in French.²⁶

²⁴ It should be pointed out that Queen's Bench judges are also occasionally used on an ad hoc basis for appeals conducted in English.

²⁵ Interview with Michel Carrier. The other francophone appointments to the New Brunswick Court of Appeal since 1969 are John N. Bugold, who was appointed in 1970 and retired in 1981, Guy Richard who was appointed in 1979 and became Chief Justice of the Court of Queen's Bench in 1982, a position which he still holds, and G. V. LaForest, who was appointed to the New Brunswick Court of Appeal in 1981 and to the Supreme Court of Canada in 1985.

²⁶ Telephone conversation with Charles Zama, Chef de service, Centre de traduction et de terminologie juridiques, November 27, 1989.

Court Interpretation Services

No judicial forum in a civilized society, as a matter of practice, can refuse all forms of participation in languages foreign to the forum. Without interpretation, at a minimum, due process is impossible for those whose rights are at stake. Interpretation itself becomes a fundamental right, part of general due process.²⁷

It has long been an accepted principle of our legal system that an accused should understand the proceedings at trial in order that he or she may properly defend himself or herself.²⁸ Therefore, in a criminal case, the services of an interpreter are provided to the accused. However, twenty years ago in New Brunswick, a witness giving evidence in a criminal case or a party to a civil case did not have ready access to proper interpretation services.²⁹ Even after the enactment of the federal Official Languages Act and the Official Languages of New Brunswick Act, the right to the services of an interpreter in the courts of New Brunswick remained a rather ill-defined right since the legislation did not specifically mention interpretation.

Moreover, when interpretation was provided, it was not necessarily of good quality since virtually any bilingual individual was considered qualified to interpret before the courts. This was

²⁷ Stephen A. Scott, 1986: 32.

²⁸ R. v. Lee Kun, [1916] 1 K.B. 337 (C.A.).

²⁹ R. v. Randall and R. v. Kelly.

brought out clearly in the following statement by Wilfred Alliston, the Chief Interpreter for the Government of New Brunswick:

When a French witness was simply unable to make himself understood in English, an employee of the court or of some other office near-by, usually a secretary or a stenographer -- sometimes even the sheriff -- was brought in as an interpreter just long enough to bail the judiciary out, then proceedings resumed their unhampered course in English.³⁰

In the early 1970's, court interpretation was sufficiently unsatisfactory to be brought to the attention of the New Brunswick Branch of the Canadian Bar Association. The Justice Department had for some time called upon the interpreters working at the legislature to provide interpretation services for the courts when required. These were permanent government employees whose first duty was to the legislature but who were kept busy doing both interpretation and translation for other departments when the legislature was not sitting. Not only was court interpreting only of secondary interest to them but it also required them to work in a mode (consecutive) other than the one they normally used (simultaneous).

Moreover, the number of interpreters available to work in the courts was inadequate. Indeed, in the 1970's when the provisions of the Official Languages of New Brunswick Act first came into force,

³⁰ Wilfred Alliston, "Court Interpretation in New Brunswick," unpublished: 2.

it was clear that interpretation services provided by the government's Translation Bureau would not be sufficient to cope with an increased demand in all government departments. As the demand for interpretation grew in the 1970's, it became impractical to send interpreters out from Fredericton to courts in various corners of the province and it became more common to hire local people on a casual basis who were available on short notice. But even as late as 1979, Chief Justice Guy Richard noted:

. . . nous sommes encore très pauvres en services de traduction et d'interprétation et . . . il reste beaucoup à faire avant d'en arriver à une solution satisfaisante.³¹

The francophone legal community did not, however, press the government to increase dramatically the number of interpreters on its payroll because there was a strong desire on its part to avoid the necessity for translation and interpretation and, wherever possible, to obtain unilingual French trials.

Conducting legal proceedings through an interpreter was considered unsatisfactory for several reasons. First, since at that time interpreters were generally used to communicate to the court the testimony of a francophone witness or accused in proceedings which were conducted in English, it meant that a unilingual francophone could not follow the proceedings. Moreover, interpreting increased the costs of the trial. Finally, since the interpretation provided was generally in the consecutive mode, it

³¹ Guy Richard, 1979: 143.

increased the length of trials and reduced the effectiveness of cross-examination.³²

In 1974, the Bar Society had recommended that simultaneous interpretation be used in the courts no doubt to avoid the problems caused by consecutive interpretation, and in 1978 the New Brunswick Department of Justice did introduce a system of simultaneous interpretation into the Court of Appeal. The system provided, at the request of the Court or a lawyer, a service similar to that provided in the provincial legislature or in the Supreme Court of Canada.³³ But the system was seldom used and was not a success. In 1981, the Barry-Bastarache Report recommended that only consecutive interpretation be used in the trial courts since simultaneous interpretation is not effective in a trial situation due to problems with equipment and the difficulty of translating rapid exchanges between two or more persons.³⁴ In an article published in 1983, Bastarache went even further, stating that simultaneous interpretation had been a complete failure in New Brunswick and that in all cases, whether at trial or on appeal, translation should be consecutive rather than simultaneous. The feeling against simultaneous interpretation was no doubt due to two main factors. First, it is not only difficult but, in fact, impossible to render 100% of the content of the original in simultaneous interpretation due to

³² Guy Richard, 1979: 141.

³³ Gordon F. Gregory, 1979: 133.

³⁴ Final Report, 1981: 26-27.

the fact that the original speaker does not pause regularly for interpretation. Therefore the interpretation provided is, to some extent at least, a summary interpretation which is inadequate for the purposes of a courtroom. Second, simultaneous interpretation is difficult to monitor even by a bilingual lawyer. Hence, it is unsuitable for use in a milieu such as the courtroom where the accuracy of interpretation must be verifiable. In fact, any type of interpretation in the courtroom, whether simultaneous or consecutive, is a hindrance as well as a help. As Mr. Justice Godin said in the decision in Cormier v. Fournier: "La traduction, peu importe la compétence des interprètes, ne rend pas une image exacte de l'original. L'interprète doit faire des choix et doit exercer son jugement personnel."³⁵ The interpreter cannot always present an accurate representation of what the speaker is saying or how he is saying it. Interpretation thus impedes direct access to the speaker. This undoubtedly was what lead Bastarache to claim that translation and interpretation should be avoided wherever possible, and that the presiding judge should be able to understand the lawyers without resorting to interpretation and translation.³⁶

It is easy to understand why there was so much dissatisfaction with court interpretation during the early 80's. Although by 1981 there were eleven permanent interpreters employed by the provincial government to handle conferences and

³⁵ Cormier v. Fournier (1986), 69 N.B.R. (2d) 155 at 166.

³⁶ Michel Bastarache, 1983: 67.

major trials, as well as a list of casual interpreters available throughout the province "for criminal and civil trials, discoveries, hearings before administrative tribunals and appeals to the Court of Appeal,"³⁷ no special training or qualifications were required of those interpreting in the courts.³⁸ Even the interpreters themselves did not consider that they had received proper training as legal interpreters.³⁹

The interpreter is accepted in any courtroom whenever the need arises, and yet nowhere in our statutes is his role defined. The quality of his interpretation can be crucial to the outcome of a trial and yet we have no standards by which to judge the potential interpreter and no formal mechanism for screening the qualified from the incompetent.⁴⁰

The Barry-Bastarache Report mentioned this problem and recommended that all legal interpreters be trained in legal terminology.⁴¹ However, even as late as 1985 there was a shortage of trained court interpreters and most were trained on the job.

³⁷ Final Report, 1981: 58.

³⁸ An example of the type of mistakes made by untrained interpreters is the translation of the expression "principe de légalité" by "legality principle" rather than "rule of law". See Maurice Bourque, "La capacité bilingue des tribunaux judiciaires et administratifs au Nouveau-Brunswick," Solicitor's Journal 5.3 (1989): 7.

³⁹ Roger Savoie, 1979: 147.

⁴⁰ New Brunswick. Translation Bureau. Court Interpreters Manual (Fredericton: Department of Supply and Services, 1986) 2.

⁴¹ Final Report, 1981: 30-31.

It was not until 1986 that the quality of court interpretation in New Brunswick began to improve. In January of that year the Province of New Brunswick passed Regulation 86-2, the first provincial regulation dealing with court interpretation, a regulation which extended the right to the services of an interpreter to "every person appearing before a court".⁴² That same year, court interpretation services were reorganized and a programme for certification of court interpreters was set up. The government had previously required court interpreters to have only a grade twelve education or the equivalent, and the qualifying examination simply consisted of an interview. Since 1986 candidates have been required to have a university degree or the equivalent and are chosen on the basis of a written and an oral examination. They are then given nine two-hour training sessions involving training in legal terminology, the structure of the judicial system, and an introduction to basic legal texts. The training sessions are followed by an examination to achieve level 1 certification. Further training and examination may lead to level 2 certification. There is now a full-time coordinator of court interpretation services, a lawyer by training, who is responsible for training court interpreters and providing them with documentation and background material for each case. Approximately 40% of the government's interpretation services are court interpretation services and the department currently employs

⁴² Supra, pp. 73-74.

one permanent court interpreter and ten casual court interpreters.⁴³ Of the ten, four are at the probationary level and six have been certified as level 1 interpreters.⁴⁴

These numbers seem to be adequate to meet the demand for court interpretation which has not increased in recent years and which is not expected to increase in the near future. There are now apparently no delays due to requests for interpretation. Moreover, despite the fact that there are no level 2 court interpreters as yet, the competence of the interpreters has increased as a result of the reforms in court interpretation undertaken in 1987.⁴⁵ The Interpretation Service anticipates that its main priority in the coming years will be to continue to improve its services rather than to meet a growing demand.

The fact that statistics show that the number of trials and appeals conducted in French has increased while demands for court interpretation have not, seems to indicate that francophones in New

⁴³ Since the establishment of the separate corps of court interpreters, legislative interpreters are no longer called upon to provide interpretation services in court.

⁴⁴ Court interpreters in New Brunswick are paid as follows:
probationary level - \$60 per half day (i.e. 3 hours)
level 1 - \$100 per half day
level 2 - \$125 per half day
Letter dated Nov. 3, 1989 from Wilfred Alliston, Chief Interpreter,
Government of New Brunswick.

⁴⁵ Interview with Wilfred Alliston, Chief Interpreter for the Province of New Brunswick, November 30, 1989.

Brunswick have, to a large extent, realized their right to have proceedings conducted in French without the services of an interpreter. Figures supplied by the Department of Justice show that interpretation is used in only one percent of cases in the Court of Queen's Bench and it is used only slightly more frequently in French trials than in English trials. In the Court of Appeal interpretation is virtually never used. In civil cases the services of court interpreters are most often used in bilingual discoveries and for unilingual witnesses and in criminal cases they are most often used for unilingual peace officers and expert witnesses.⁴⁶

The reason why it is now possible to conduct proceedings in French is that there is institutional support for French language services in New Brunswick. Institutions such as the École de droit and the Centre de traduction et de terminologie juridiques make French a language of the common law and lend support to the serious efforts of the Department of Justice to become a bilingual institution. Moreover, improved court interpretation services make it possible to conduct proceedings in French even if some of the witnesses are anglophones. But in 1986, following the decision in the Société des Acadiens case, francophones still feared that interpretation would be used as a means of circumventing French language trials while ensuring that a francophone could express himself in his native language.

⁴⁶ Letter from Sylvia Mendes-Roux, Coordinator, Court Interpretation, Government of New Brunswick, dated November 29, 1989.

CONCLUSION

The decision in Société des Acadiens where the Supreme Court of Canada held that s.19(2) of the Charter does not grant the right to be understood directly by the presiding judge, was greeted with great disappointment by many francophones in New Brunswick. The ideal of 'equality of status' had been dealt a severe blow. But there was some hope. The Supreme Court had not said that language rights could not be changed. It had simply said that language rights, being based on political compromise, should be advanced by the legislature and not by the judiciary. Mr. Justice Beetz said:

. . . the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation.

. . .

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 s.16(3), which is a codification of the rule in Jones v. Attorney General of New Brunswick, [1975] 1 S.C.R. 192. The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise.¹

¹ Société des Acadiens, at 578-579.

Recent legislative action by the Canadian Parliament has, in fact, advanced language rights. On July 7, 1988, Parliament repealed the old Official Languages Act and enacted a completely revised version of the legislation. Section 16 of the new Act reads as follows:

16 (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;

(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter;

(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.²

The courts have been given five years to comply with the provision,³ which in essence makes interpretation unnecessary in many cases.

² S.C. 1988, c. 38.

³ The Supreme Court of Canada is exempt from this requirement because its judges come from all across Canada and, since it sits in panels of five, seven or nine, it would be impossible to ensure that an entire panel was francophone.

Section 94 of the same statute also extended official languages rights under s.462.1 of the Criminal Code to all provinces providing, among other things, that the preliminary hearing may be conducted in the language of the accused, that the prosecutor and the judge shall speak the language of the accused, that everything said at the trial shall be recorded in the language in which it is spoken and that there shall be a transcript of anything said by an interpreter. Finally, the judgment is to be available in the language of the accused. These provisions will be in force in all provinces as of January 1, 1990.⁴

The Association des juristes d'expression française du Nouveau-Brunswick, which had argued against interpretation as a means of providing services in French, found the provisions of s.16(1) to be a satisfactory solution. In a brief presented to Premier Frank McKenna at a meeting on February 9, 1989, the Association suggested that the provincial legislation be amended to include a provision identical to s. 16(1) which would apply to various judicial and quasi-judicial bodies in New Brunswick including the Court of Appeal, the Court of Queen's Bench and the Provincial Court. The Association pointed out that unilingual trials are less expensive and more efficient because they avoid the necessity of interpretation and translation. The Association also pointed out that, although the

⁴ Warren J. Newman, Language Rights, the Charter and the New Official Languages Act. Paper presented to the First Annual Conference on Human Rights and the Charter (Ottawa: November 21, 1988). Unpublished. 41-43.

courts, commissions and boards of the province now have many more bilingual appointees than they once did, there are still some unacceptable situations which the province has the required human resources to correct.⁵ The Premier was also reminded that the Liberal Party's platform during the 1987 election campaign had included the following statement:

Chaque commission, tribunal et cour de la justice au Nouveau-Brunswick doit avoir la capacité de fonctionner dans les deux langues officielles. Chaque citoyen étant partie à des procédures judiciaires doit avoir le droit d'être entendu et compris dans la langue officielle de son choix.⁶

The Liberals, who won every seat in the legislature in the 1987 election, are clearly committed to increasing bilingual services provided by the provincial government. In August of 1988, McKenna announced a new official languages policy which is based on a broad interpretation of equality of status. It gives high priority to ensuring that residents of New Brunswick will be able to communicate with any government department, agency or institution in the official language of their choice and that services provided by the government will be of equal quality in both languages.⁷ The

⁵ Mémoire de l'Association des juristes d'expression française du Nouveau-Brunswick 1989: 9.

⁶ Mémoire de l'Association des juristes d'expression française du Nouveau-Brunswick 1989: 3.

⁷ Official Languages Policy of the Department of Justice, 1984: 8.

policy statement specifically mentions "court services".⁸ On December 1, 1988 Premier McKenna said as follows:

Pour la première fois dans l'histoire de la province du Nouveau-Brunswick, nous avons un programme en vue d'offrir des services équitables aux deux groupes linguistiques de la province du Nouveau-Brunswick.⁹

The McKenna government's commitment to implementing the policy was demonstrated in 1988 when the Department of Justice hired an Official Languages Advisor to conduct an internal review to see how its own official languages policy of 1984 was being implemented, to ensure that the public was being served in both official languages and to improve communication in the official languages between the Department and its employees in the regions.¹⁰ The review and implementation of required changes in conformity with government policy are to be completed by September, 1993.

In keeping with the new official languages policy, on November 3, 1989, Premier McKenna announced that his government would amend provincial legislation so that by the spring of 1990 francophones would have the right to be heard and understood by a

⁸ Official Languages Policy of the Department of Justice, 1984: 5.

⁹ Journal of Debates, 1986, vol. IV, 1715-1716.

¹⁰ New Brunswick, Department of Justice, Annual Report 1988-89 (Fredericton: Department of Supply and Services, 1989) 20.

judge who speaks their language in all courts in New Brunswick.¹¹ Thus, it seems that Canada's only officially bilingual province will soon have a justice system that is bilingual not only in law but also in fact.

There are, however, still some loose ends. In a recent decision by Chief Justice Richard of the New Brunswick Court of Queen's Bench in the case of Gautreau v. The Queen¹² it was held that an individual charged with a traffic violation has the right to be spoken to by a police officer and to receive a ticket completed in the official language of his choice. In his decision, Chief Justice Richard noted that the police officer did not offer Mr. Gautreau a choice of language thereby violating his constitutional right to use either official language in communicating with any government institution in New Brunswick.¹³ Chief Justice Richard said:

La question soumise dans cette affaire est complexe et elle touche précisément la vie, l'âme et les aspirations de tous les habitants du Nouveau-Brunswick.¹⁴

¹¹ Maurice Bourque, "Capacité bilingue des tribunaux," Le Bref 2.1 (1989): 1. The announcement was made at the Université de Moncton on the occasion of the 11th Annual Banquet of the École de droit.

¹² Unreported decision of the New Brunswick Court of Queen's Bench dated November 3, 1989.

¹³ Section 20(2) of the Charter of Rights and Freedoms.

¹⁴ Gautreau v. The Queen, unreported decision of the New Brunswick Court of Queen's Bench dated November 3, 1989, 36.

The Attorney-General of New Brunswick has, however, decided to appeal the Gautreau decision to the New Brunswick Court of Appeal, probably on the grounds that Chief Justice Richard's decision defines 'government employee' too broadly and implies that all government employees, including employees of municipal governments (i.e. police officers working for municipal police forces), must be bilingual.¹⁵ Naturally, the Société des Acadiens du Nouveau-Brunswick has voiced its disapproval of the government's decision to appeal.¹⁶

There is no doubt that French language rights in New Brunswick's justice system have improved immeasurably since 1963. Two decades ago, when the government of Louis J. Robichaud made the first tentative attempt to assert francophone rights in the justice system by amending the Evidence Act, the amendment did not even dare to mention the word "French" and the "official languages" were not yet official. Since then, language rights have become a very important issue both in federal and in New Brunswick politics, and language legislation has become much more specific in its wording as it attempts to guarantee minority language rights. The decision in Société des Acadiens was initially a disappointment for proponents of French language rights in New Brunswick. In the long

¹⁵ The events which lead to the Gautreau case occurred in 1987 when the highways of New Brunswick were patrolled by the New Brunswick Highway Patrol.

¹⁶ John Spears, "Acadians accuse N.B.'s McKenna of rights betrayal," The Toronto Star, December 7, 1989, A13.

run, however, it was a godsend for those who sought true "equality of status" for both official languages in the justice system for it prompted the federal government and, it would seem, the McKenna government to pass legislation which very clearly guarantees the right to be understood in court in either official language without the services of an interpreter.

The right to be understood by a judge who speaks the official language of the parties is crucial to the development of French as a language of the law in New Brunswick. Francophones cannot enjoy 'equality of status' if English is the functioning language of the justice system and French is always subject to interpretation and translation. In such a system, the status of francophones would be similar to that of other non-English speaking individuals. To achieve 'equality of status' in the justice system, francophones must receive the same treatment as anglophones. They must not be in any way disadvantaged by choosing to proceed in French. Similarly, francophone lawyers must feel secure when proceeding in French. Because the common law system is the legal system of most English-speaking countries, a francophone lawyer in a common law jurisdiction will often use English language materials and is almost certain to be capable of practising law in English. Therefore, faced with the prospect of conducting a case through interpretation and translation, the lawyer may prefer the option of proceeding in English so that he has control over what is said and how it is interpreted. But to become a language of the law in New Brunswick, French must be used in all aspects of the justice system and it must

be used by parties, lawyers, judges and court officials. Judgments will not be written in French if cases are not argued in French. Lawyers will not argue in French if cases are not conducted in French. Parties will not insist on proceedings in French if they are not guaranteed the same rights as anglophones, including the right to be understood directly in French without the services of an interpreter. To encourage the use of French, proceedings must be conducted entirely in French. If translation and interpretation are regarded as adequate means of providing French language services, then French will not become a living language of the justice system and French common law terminology will remain hidden in dictionaries and statute books.

McKenna's promised legislation serves as an example of the progress which has been made in the provision of French language services and of changing attitudes toward the rights of francophones to use their language when dealing with the justice system. It is to be hoped that the changes will eventually produce a justice system where bilingualism is based not on translation and interpretation but on two unilingual systems operating harmoniously side by side.

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List of persons consulted

Wilfred Alliston, Chief Interpreter, Government of New Brunswick

Louise R. Guerrette-Cormier, Association de juristes d'expression française du Nouveau-Brunswick

Joseph Bérubé, Ombudsman, Province of New Brunswick

Michel Carrier, Secretary of the Law Society of New Brunswick

Donald Leblanc, Official Languages Advisor, New Brunswick
Department of Justice

Sylvia Mendes-Roux, Coordinator, Court Interpretation, Government of New Brunswick

Charles Zama, Chef de service, Centre de traduction et de terminologie juridiques, Université de Moncton.

APPENDIX A
QUESTIONNAIRES

Questionnaire used for Interview with Mr. Wilfred Alliston,
Chief Interpreter, Government of New Brunswick.

I. Organization of interpretation services in NB

1. How are court interpretation services in NB organized?
2. Do you have statistics indicating the number of interpreters employed by the Translation Bureau since it was set up? What are their qualifications?
3. Do the same interpreters do both consecutive, whispered simultaneous and simultaneous interpretation? How many of each type are employed.
4. How many other employees are there in the section? What are their tasks?
5. Are the numbers of interpreters adequate to meet current demand?
6. Does the province pay the cost of all court interpretation services?
7. Does the Translation Bureau provide for the translation of court documents?

II. Who makes use of interpretation services?

1. Which courts request the services of court interpreters most often? (consecutive and simultaneous)
2. Is interpretation used more often in criminal matters than in civil matters?
3. Who does the interpreter usually interpret for?
4. Are interpreters used more often in certain areas of the province?

III. Working conditions.

1. How long does an interpreter work without a break?
2. Is it ever necessary to have more than one interpreter in a case?
3. How much is the interpreter paid? Are travel expenses included? Is there any guarantee of how often he or she will be used?
4. Do most interpreters have other jobs in addition to interpretation? If so, what type of job?
5. What resources are available to interpreters in a specific case?
6. Is there much turnover amongst court interpreters? If so why?

IV. Training of interpreters.

1. Why did the government of NB decide in 1987 to improve the interpretation services offered in the courts of NB? How?
2. Where are the court interpreters in NB from? Are they anglophone or francophone?
3. Can you predict what sort of person will make a good interpreter? What are the essential qualities or qualifications?
4. What conclusions do you draw from the fact that errors in French proved to be the downfall of the interpreters who failed the second level recently?
5. What sort of training is the most effective?
6. What could be done in the way of training to improve services?
7. What else could be done to improve services?
8. Do you receive complaints about the interpretation services provided? If so, what sort?

V. Legislation

1. Has there been a regulation dealing with translation or interpretation passed since 86-2? Is the regulation interpreted broadly? Is anyone ever denied the services of an interpreter?
2. What was the purpose of the new legislation providing official statutory recognition of conference interpreters, translators and terminologists?
3. Why are court interpreters to be accredited by the Translation Bureau directly?
4. Are the present legislative provisions and regulations regarding interpretation and translation adequate?

VI. Present political attitudes.

1. Has there been any change in the policy on bilingualism since the election of McKenna?
2. Are francophones generally satisfied with the quality of service they receive from the Department of Justice?
3. What is the purpose of the Association de jurists d'expression française du Nouveau-Brunswick?
4. Are you aware of situations where the court (presiding judge) is not happy about the presence of an interpreter?
5. Are you aware of situations where a party to the proceedings is not happy about the presence of an interpreter?
6. Are you aware of situations where a party chose to testify in English rather than use the services of an interpreter?
7. Has there been an increase in the demand for the services of interpreters in the courts of NB over the past 5 years? 10 years? 20 years?
8. If there has been a significant increase or decrease, what can it be attributed to?

VII. Recruitment and accreditation.

1. Could you describe the process of recruitment of court interpreters?
2. What are the requirements for level 1?
 - level 2?
3. How do these levels compare to the level of interpretation services prior to 1987?

**Questionnaire used for Interview with Mr. Michel Carrier,
Secretary, Law Society of New Brunswick**

I. General.

1. How many lawyers in NB are francophone?
(are they from NB?)
2. Have the francophone lawyers attended law school in French?
Where?
3. What is the name of the group of francophone lawyers and where
are they located?
4. Have all the problems facing those who want to practice law in
French been solved? (i.e. terminology, precedents, standard forms,
bilingual court staff?)
5. Are there many judgments written in French? Do francophone
lawyers read the original or the translation?
6. Does the English version of legislation tend to be regarded as
more authoritative?
7. Are the students who graduate from the University of Moncton in
any way at a disadvantage - i.e. because the law school is newer,
because it is difficult to find teaching staff, because most
materials are in English
8. Does the Faculty of Law of the University of New Brunswick offer
any courses in French?

II. Bar admission course.

1. When was the bar admission course first offered in French?
2. Do people from other provinces take the course? Do you attract
francophone lawyers from Ontario or Quebec?
3. Is bilingualism a requirement for admission to the bar of NB? Is
it possible that it would be in future?

III. Continuing Education.

1. When were continuing education programmes first offered in French?
2. Is demand or for these programmes approximately the same for both languages?

**Questionnaire used for Interview with Mr. Donald Leblanc,
Official Languages Advisor, Department of Justice**

I. General.

1. What is the new language policy of the McKenna government?
2. When was the position of Official Languages Advisor established in the Department of Justice?
3. What is your role?
4. Are court clerks and registry office staff able to offer services in both languages throughout the province?
5. What methods has the Department used to ensure that its staff is bilingual? (Hiring of bilingual individuals, replacement of unilingual individuals by bilingual individuals, language training?).
6. What percentage of the French-speaking population of NB is unilingual? Has this figure changed over the past 20 years?
7. Who pays the cost of translating documents related to court cases? (i.e. is it more expensive for a francophone to sue than for an anglophone?).
8. Does the Department of Justice initiate documents in French or are most documents produced in English and then translated into French.
9. Is legislation (including regulations) produced by bilingual drafting?
10. Is the bulk of legal translation from English into French?
11. Is it possible to have proceedings conducted in French anywhere in the province?
12. Are there delays in court cases caused by requests for trials in French or requests for the services of an interpreter?

II. Statistics.

1. How many French-speaking judges are there on the:
 - a) Provincial Court
 - b) Court of Queen's Bench
 - c) Court of Appeal
2. Is it still necessary to use Court of Queen's Bench judges on an ad hoc basis to hear cases in French at the appeal level?
3. How many trials are there in each court where the proceedings were conducted in French?
4. How many crown prosecutors are francophone?
5. In how many trials is it necessary for a francophone party to communicate through an interpreter?
6. In how many trials is it necessary for an anglophone party to communicate through an interpreter?
7. What percentage of Department of Justice employees are bilingual?

APPENDIX B
PERTINENT LEGISLATION

Official Languages Act
R.S.C. 1970, c. O-2, s.11

Hearing of
witnesses in
official language
of choice

11. (1) Every judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada has, in any proceedings brought or taken before it, and every court in Canada has, in exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, 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 he will not be placed at a disadvantage by not being or being unable to be heard in the other official language.

Duty of federal
courts to provide
simultaneous
translation

(2) Every court of record established by or pursuant to an Act of the Parliament of Canada has, in any proceedings conducted before it within the National Capital Region or a federal bilingual district established under this Act, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous translation of the proceedings, including the evidence given and taken, from one official language into the other except where the court, after receiving and considering any such request, is satisfied that the party making it will not, if such facilities cannot conveniently be made available, be placed at a disadvantage by reason of their not being available or the court, after making every reasonable effort to obtain such facilities, is unable then to obtain them.

11. (1) Dans toutes procédures engagées devant des organismes judiciaires ou quasi-judiciaires créés en vertu d'une loi du Parlement du Canada et dans les procédures pénales où les tribunaux au Canada exercent une juridiction pénale qui leur a été conférée en vertu d'une loi du Parlement du Canada, il incombe à ces organismes et tribunaux de veiller à ce que toute personne témoignant devant eux puisse être entendue dans la langue officielle de son choix et que, ce faisant, elle ne soit pas défavorisée du fait qu'elle n'est pas entendue ou qu'elle est incapable de se faire entendre dans l'autre langue officielle.

Audition des
témoins dans la
langue officielle
de leur choix

(2) Il incombe aux cours d'archives créées en vertu d'une loi du Parlement du Canada de veiller à ce que, à la demande d'une partie à des procédures conduites devant elles, dans la région de la Capitale nationale ou dans un district bilingue fédéral établi en vertu de la présente loi, l'on mette à la disposition de cette partie des services d'interprétation des procédures, notamment pour les témoignages recueillis, d'une langue officielle en l'autre langue. Toutefois, la cour n'y sera pas tenue si, après avoir reçu et examiné une telle demande, elle est convaincue que la partie qui l'a faite ne sera pas défavorisée par l'absence de ces services, s'il est difficile de les mettre à la disposition de cette partie, ou si la cour, après avoir fait tout effort pour les obtenir, n'y est pas parvenue.

Les cours
fédérales sont
tenues de
fournir des
services
d'interprétation

Language of
proceedings in
criminal matters

(3) In exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, any court in Canada may in its discretion, at the request of the accused or any of them if there is more than one accused, and if it appears to the court that the proceedings can effectively be conducted and the evidence can effectively be given and taken wholly or mainly in one of the official languages as specified in the request, order that, subject to subsection (1), the proceedings be conducted and the evidence be given and taken in that language.

(3) Lorsqu'il exerce, dans des procédures pénales, une juridiction pénale qui lui a été conférée en vertu d'une loi du Parlement du Canada, tout tribunal au Canada peut, à sa discrétion, sur demande de l'accusé ou, lorsqu'il y a plus d'un accusé, sur demande de l'un ou plusieurs d'entre eux, ordonner que, sous toutes réserves prévues par le paragraphe (1), les procédures soient conduites et les témoignages fournis et recueillis en la langue officielle spécifiée dans la demande s'il lui paraît que les procédures peuvent être correctement conduites et les témoignages correctement fournis et recueillis, en totalité ou en majeure partie, dans cette langue.

Langues
officielles dans
les procédures
pénales

Application to
certain courts

(4) Subsections (1) and (3) do not apply to any court in which, under and by virtue of section 133 of *The British North America Act, 1867*, either of the official languages may be used by any person, and subsection (3) does not apply to the courts of any province until such time as a discretion in those courts or in the judges thereof is provided for by law as to the language in which, for general purposes in that province, proceedings may be conducted in civil causes or matters.

(4) Les paragraphes (1) et (3) ne s'appliquent pas à un tribunal devant lequel, en vertu de l'article 133 de l'*Acte de l'Amérique du Nord britannique, 1867*, quiconque peut utiliser l'une ou l'autre des langues officielles, et le paragraphe (3) ne s'applique pas aux tribunaux d'une province jusqu'à ce que la loi accorde à ces tribunaux ou aux juges de ces tribunaux la liberté de choisir la langue dans laquelle, de façon générale dans cette province, les procédures peuvent être conduites en matière civile.

Application à
certains
tribunaux

Authority to
make
implementing
rules

(5) The Governor in Council, in the case of any judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada, and the lieutenant governor in council of any province, in the case of any other court in that province, may make such rules governing the procedure in proceedings before such body or court, including rules respecting the giving of notice, as the Governor in Council or the lieutenant governor in council, as the case may be, deems necessary to enable such body or court to exercise or carry out any power or duty conferred or imposed upon it by this section. 1968-69, c. 54, s. 11.

(5) Le gouverneur en conseil, dans le cas d'un organisme judiciaire ou quasi-judiciaire créé en vertu d'une loi du Parlement du Canada, et le lieutenant-gouverneur en conseil d'une province, dans le cas de tout autre tribunal dans cette province, peut établir les règles régissant les procédures devant cet organisme ou ce tribunal, y compris les règles relatives aux notifications, que le gouverneur en conseil ou le lieutenant-gouverneur en conseil, selon le cas, estime nécessaires pour permettre à cet organisme ou à ce tribunal d'exercer toute fonction ou pouvoir qui lui est conféré ou imposé par le présent article. 1968-69, c. 54, art. 11.

Pouvoir
d'établir des
règles
d'application

Official Languages of New Brunswick Act
R.S.N.B. 1973, c. O-1

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1 In this Act

“court” includes judicial, quasi-judicial and administrative tribunals;

“official languages” means those languages so established under section 2, 1969, c.14, s.2.

2 Subject to this Act, the English and French languages

(a) are the official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extends, and

(b) possess and enjoy equality of status and equal rights and privileges as to their use for such purposes. 1969, c.14, s.3.

1 Dans la présente loi

«langues officielles» désigne les langues reconnues comme telles à l'article 2;

«tribunal» s'entend d'un tribunal judiciaire, quasi-judiciaire et administratif. 1969, c.14, art.2.

2 Sous toutes réserves prévues par la présente loi, l'anglais et le français

a) sont les langues officielles du Nouveau-Brunswick pour toutes les fins relevant de la compétence de la Législature du Nouveau-Brunswick, et

b) bénéficient d'un statut équivalent de droit et de privilège, lorsqu'ils sont employés aux fins visées à l'alinéa a). 1969, c.14, art.3.

- 3 The official languages may be used in any proceeding of the Legislative Assembly or committee thereof. 1969, c.14, s.4.
- 4 Records and reports of any proceeding of the Legislative Assembly or committee thereof are to be printed in the official languages. 1969, c.14, s.5.
- 5(1) Bills introduced into the Legislative Assembly are to be printed in the official languages.
- 5(2) Motions or other documents introduced into the Legislative Assembly or committee thereof may be printed in either or both official languages. 1969, c.14, s.6.
- 6 The next and succeeding revisions of the Statutes of New Brunswick are to be printed in the official languages. 1969, c.14, s.7.
- 7(1) Subject to subsection (2), statutes passed subsequent to the proclamation of this section are to be printed in the official languages.
- 7(2) Subsection (1) does not apply where the statute is an amendment to a statute printed in only one of the official languages. 1969, c.14, s.8.
- 8 Subject to section 15, notices, documents, instruments or writings required under this or any Act to be published by the Province, any agency thereof or any Crown corporation are to be printed in the official languages. 1969, c.14, s.9.
- 9 Subject to section 15, copies of Official and other notices, advertisements and documents appearing in *The Royal Gazette* are to be printed in the official languages. 1969, c.14, s.10.
- 10 Subject to section 15, where requested to do so by any person, every public officer or employee
- 3 Les langues officielles peuvent être utilisées à toutes séances de l'Assemblée législative ou de l'un de ses comités. 1969, c.14, art.4.
- 4 Les procès-verbaux et rapports de toutes séances de l'Assemblée législative ou de l'un de ses comités doivent être imprimés dans les langues officielles. 1969, c.14, art.5.
- 5(1) Les projets de loi présentés à l'Assemblée législative doivent être imprimés dans les langues officielles.
- 5(2) Les motions ou autres documents présentés à l'Assemblée législative ou à l'un de ses comités peuvent être imprimés dans l'une ou l'autre des langues officielles ou dans les deux. 1969, c.14, art.6.
- 6 Le prochain recueil des lois révisées du Nouveau-Brunswick et ceux qui suivront devront être imprimés dans les langues officielles. 1969, c.14, art.7.
- 7(1) Sous réserve du paragraphe (2), les lois adoptées à la suite de l'entrée en vigueur du présent article doivent être imprimées dans les langues officielles.
- 7(2) Le paragraphe (1) ne s'applique pas à la loi qui en modifie une autre imprimée dans une seule des langues officielles. 1969, c.14, art.8.
- 8 Sous réserve de l'article 15, les avis, pièces, documents officiels ou écrits, dont la présente loi ou toute autre loi exige la publication par la province, l'un de ses organismes ou une société d'État, doivent être imprimés dans les langues officielles. 1969, c.14, art.9.
- 9 Sous réserve de l'article 15, les avis, annonces et pièces de caractère officiel ou non paraissant dans la *Gazette royale* doivent être imprimés dans les langues officielles. 1969, c.14, art.10.
- 10 Sous réserve de l'article 15, lorsque quelqu'un lui en fait la demande, tout fonctionnaire ou

of the Province, any agency thereof or any Crown corporation shall provide or make provision for such person

(a) to obtain the available services for which such public officer or employee is responsible, and

(b) to communicate regarding those services,

in either official language requested. 1969, c.14, s.11.

11 The council of any municipality may declare by resolution that either or both official language may be used with regard to any matter or in any proceeding of such council. 1969, c.14, s.12.

12 In any public, trade or technical school

(a) where the mother tongue of the pupils is English, the chief language of instruction is to be English and the second language is to be French;

(b) where the mother tongue of the pupils is French, the chief language of instruction is to be French and the second language is to be English;

(c) subject to paragraph (d), where the mother tongue of the pupils is in some cases English and in some cases French, classes are to be so arranged that the chief language of instruction is the mother tongue of each group with the other official language the second language for those groups; and

(d) where the Minister of Education decides that it is not feasible by reason of numbers to abide by the terms of paragraph (c), he may make alternative arrangements to carry out the spirit of this Act. 1969, c.14, s.13.

13(1) Subject to section 15, in any proceeding 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.

13(2) Subject to subsection (1), where

(a) requested by any party, and

(b) the court agrees that the proceedings can effectively be thus conducted,

employé public de la province, de l'un de ses organismes ou d'une société d'État doit veiller à ce que cette personne puisse

a) obtenir les services disponibles dont ce fonctionnaire ou employé public a la responsabilité, et

b) communiquer au sujet de ces services,

dans l'une ou l'autre des langues officielles qui est demandée. 1969, c.14, art.11.

11 Tout conseil municipal peut déclarer par résolution que l'une ou l'autre des langues officielles ou les deux peuvent être utilisées dans toute délibération ou à toute réunion de ce conseil. 1969, c.14, art.12.

12 Dans chacune des écoles publiques, écoles de métiers ou écoles techniques,

a) lorsque l'anglais est la langue maternelle des élèves, l'anglais doit être la principale langue d'enseignement et le français doit être la langue seconde;

b) lorsque le français est la langue maternelle des élèves, le français doit être la principale langue d'enseignement et l'anglais doit être la langue seconde;

c) sous réserve de l'alinéa d), lorsque la langue maternelle d'une partie des élèves est l'anglais et celle de l'autre partie est le français, les classes doivent être organisées de sorte que la langue maternelle de chaque groupe soit la principale langue d'enseignement et que l'autre langue officielle soit la langue seconde; et

d) lorsque le ministre de l'Éducation décide que le nombre rend impraticable l'application des dispositions de l'alinéa c), il peut prendre d'autres mesures en vue de répondre à l'esprit de la présente loi. 1969, c.14, art.13.

13(1) Sous réserve de l'article 15, dans toute procédure devant un tribunal, toute personne qui comparait ou témoigne peut être entendue dans la langue officielle de son choix et ne doit être, en fait, nullement défavorisée en raison de ce choix.

13(2) Sous réserve du paragraphe (1),

a) lorsqu'une partie le demande, et

b) que le tribunal convient qu'on peut efficacement procéder ainsi,

the court may order that the proceedings be conducted totally or partially in one of the official languages. 1969, c.14, s.14.

14 In construing any of the instruments, bills, statutes, writings, records, reports, motions, notices, advertisements, documents or other writings mentioned in this Act, both versions in the official languages are equally authentic. 1969, c.14, s.15.

15 Where

- (a) warranted by reason of numbers of persons involved,
- (b) the spirit of this Act so requires, or
- (c) it is deemed necessary to so provide for the orderly implementation of this Act,

the Lieutenant-Governor in Council may make regulations determining the application of sections 8, 9 and 10 and subsection 13(1). 1969, c.14, s.16.

16 Section 4, subsection 5(1), section 7, 8, 9, 10 and 12, or any provision thereof shall come into force on a day to be fixed by proclamation. 1969, c.14, s.17; 1972, c.52, s.1.

le tribunal peut ordonner que les séances se tiennent uniquement ou partiellement dans l'une des langues officielles. 1969, c.14, art.14.

14 Dans l'interprétation des documents officiels, projets de loi, lois, écrits, procès-verbaux, rapports, motions, avis, annonces, pièces ou autres écrits dont fait mention la présente loi, les deux versions des langues officielles font pareillement autorité. 1969, c.14, art.15.

15 Lorsque

- a) le nombre des personnes en cause le justifie,
- b) l'esprit de la présente loi l'exige, ou
- c) si l'on juge qu'il est nécessaire de le faire pour assurer la bonne application de la présente loi,

le lieutenant-gouverneur en conseil peut édicter des règlements précisant l'application des articles 8, 9 et 10 et du paragraphe 13(1). 1969, c.14, art.16.

16 L'article 4, le paragraphe 5(1) et les articles 7, 8, 9, 10 et 12, ou l'une quelconque de leurs dispositions, entreront en vigueur à une date qui sera fixée par proclamation. 1969, c.14, art.17; 1972, c.52, art.1.

1975 Amendment

CHAPTER 42

An Act to Amend the
Official Languages of
New Brunswick Act*Assented to May 9, 1975**Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:*

1 Section 5 of the Official Languages of New Brunswick Act, Chapter 0-1 of the Revised Statutes, 1973, is amended by adding immediately after subsection (2) thereof the following subsection:

5(3) Subsection (1) does not apply where the bill is to amend a statute printed in only one of the official languages.

2 Section 15 of the said Act is repealed and the following substituted therefor:

15(1) Where

(a) warranted by reason of the number of persons involved,

(b) the spirit of this Act so requires, or

(c) it is deemed necessary to so provide for the orderly implementation of this Act,

the Lieutenant-Governor in Council may make regulations determining the application of sections 8, 9 and 10.

15(2) The Lieutenant-Governor in Council may make regulations governing the procedure in proceedings before any court, including regulations respecting the giving of notice as he deems necessary to enable the court to exercise or carry out any power or duty conferred or imposed upon it by section 13.

CHAPITRE 42

Loi modifiant la Loi sur
les langues officielles du
Nouveau-Brunswick*Sanctionnée le 9 mai 1975**Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:*

1 L'article 5 de la Loi sur les langues officielles du Nouveau-Brunswick, chapitre 0-1 des Lois révisées de 1973, est modifiée par l'adjonction, immédiatement après le paragraphe (2), du paragraphe qui suit:

5(3) Le paragraphe (1) ne s'applique pas lorsque le projet de loi tend à modifier une loi imprimée dans une seule des langues officielles.

2 L'article 15 de cette loi est abrogé et remplacé par ce qui suit:

15(1) Le lieutenant-gouverneur en conseil peut,

a) si le nombre de personnes en cause le justifie,

b) si l'esprit de la présente loi l'exige, ou

c) s'il est jugé nécessaire de le faire pour assurer la bonne application de la présente loi,

édicter des règlements précisant l'application des articles 8, 9 et 10.

15(2) Le lieutenant-gouverneur en conseil peut établir des règlements régissant les procédures engagées devant tout tribunal, y compris les règlements relatifs aux notifications qu'il estime nécessaires pour permettre au tribunal d'exercer toute fonction ou pouvoir qui lui est conféré ou imposé par l'article 13.

1982 Amendment

CHAPTER 47

An Act to Amend the
Official Languages of New Brunswick Act*Assented to June 17, 1982*

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1 *Section 13 of the Official Languages of New Brunswick Act, chapter O-1 of the Revised Statutes, 1973, is amended*

(a) *by adding immediately after subsection (1) thereof the following subsection:*

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.

(b) *by repealing subsection (2) thereof.*

2 This Act comes into force on a day to be fixed by proclamation.

CHAPITRE 47

Loi modifiant la Loi sur
les langues officielles du Nouveau-Brunswick*Sanctionnée le 17 juin 1982*

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:

1 *L'article 13 de la Loi sur les langues officielles du Nouveau-Brunswick, chapitre O-1 des Lois révisées de 1973 est modifié*

a) *par l'adjonction après le paragraphe (1) du paragraphe suivant:*

13(1.1) Sous réserve du paragraphe (1), une personne accusée d'une infraction à une loi ou à un règlement de la province, ou à un arrêté municipal, a droit au déroulement des procédures dans la langue officielle de son choix, et elle doit être informée de ce droit par le juge qui préside au procès avant d'enregistrer son plaidoyer.

b) *par l'abrogation du paragraphe (2).*

2 La présente loi entrera en vigueur à la date qui sera fixée par proclamation.

1984 Amendment

CHAPTER 28

An Act to Amend the
Official Languages of New Brunswick Act*Assented to June 20, 1984*

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1 *Subsection 5(3) of the Official Languages of New Brunswick Act, chapter O-1 of the Revised Statutes, 1973, is repealed.*

2 *Section 7 of the said Act is amended*

(a) *by striking out the words "Subject to subsection (2), statutes" where they appear in subsection (1) thereof and substituting therefor the words "Statutes";*

(b) *by repealing subsection (2) thereof.*

3 *The said Act is further amended by adding immediately after subsection 15(2) thereof the following subsection:*

15(3) The Lieutenant-Governor in Council may appoint Official Translators and may make regulations governing their functions and the status and admissibility into evidence of translations prepared by them.

CHAPITRE 28

Loi modifiant la Loi sur
les langues officielles du Nouveau-Brunswick*Sanctionnée le 20 juin 1984*

Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:

1 *Le paragraphe 5(3) de la Loi sur les langues officielles du Nouveau-Brunswick, chapitre O-1 des Lois révisées de 1973, est abrogé.*

2 *L'article 7 de cette loi est modifié*

a) *par la suppression, au paragraphe (1), des mots «Sous réserve du paragraphe (2), les lois» et leur remplacement par les mots «Les lois»;*

b) *par l'abrogation du paragraphe 7(2).*

3 *Cette loi est en outre modifiée par l'adjonction après le paragraphe 15(2) du paragraphe suivant:*

15(3) Le lieutenant-gouverneur en conseil peut nommer des traducteurs officiels et il peut également établir des règlements régissant leurs fonctions ainsi que le statut et l'admissibilité en preuve des traductions qu'ils font.

An Act Recognizing the Equality of the Two Official
Linguistic Communities in New Brunswick
S.N.B. 1981, c. O-1.1

WHEREAS the Legislative Assembly of New Brunswick acknowledges the existence of two official linguistic communities within New Brunswick whose values and heritages emanate from and are expressed through the two official languages of New Brunswick; and

WHEREAS the Legislative Assembly of New Brunswick desires to recognize the equality of these official linguistic communities; and

WHEREAS the Legislative Assembly of New Brunswick seeks to enhance the capacity of each official linguistic community to enjoy and safeguard its heritage for succeeding generations; and

WHEREAS the Legislative Assembly of New Brunswick desires to affirm and protect in its laws the equality of status and the equal rights and privileges of the official linguistic communities; and

WHEREAS the Legislative Assembly of New Brunswick desires to enshrine in its laws a declaration of principles relating to this equality of status and these equal rights and privileges which shall provide a framework for action on the part of public institutions and an example to private institutions;

THEREFORE, Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

CONSIDERANT que l'Assemblée législative du Nouveau-Brunswick reconnaît l'existence de deux communautés linguistiques officielles au Nouveau-Brunswick dont les valeurs et les héritages culturels émanent des deux langues officielles du Nouveau-Brunswick et s'expriment par elles; et

CONSIDERANT que l'Assemblée législative du Nouveau-Brunswick désire reconnaître l'égalité de ces communautés linguistiques officielles; et

CONSIDERANT que l'Assemblée législative du Nouveau-Brunswick cherche à accroître les possibilités de chaque communauté linguistique officielle de profiter de son héritage culturel et de le sauvegarder pour les générations à venir; et

CONSIDERANT que l'Assemblée législative du Nouveau-Brunswick désire affirmer et protéger dans ses lois l'égalité de statut et l'égalité des droits et privilèges des communautés linguistiques officielles;

ET CONSIDERANT que l'Assemblée législative du Nouveau-Brunswick désire enchaîner dans ses lois une déclaration de principes relative à cette égalité de statut et à cette égalité des droits et privilèges qui doit fournir un cadre d'action aux institutions publiques et un exemple aux institutions privées.

A CES CAUSES, Sa Majesté, sur l'avis et du consentement de l'Assemblée législative du Nouveau-Brunswick, décrète:

1 Acknowledging the unique character of New Brunswick, the English linguistic community and the French linguistic community are officially recognized within the context of one province for all purposes to which the authority of the Legislature of New Brunswick extends, and the equality of status and the equal rights and privileges of these two communities are affirmed.

2 The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.

3 The Government of New Brunswick shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities.

1 Reconnaissant le caractère unique du Nouveau-Brunswick, la communauté linguistique française et la communauté linguistique anglaise sont officiellement reconnues dans le contexte d'une seule province à toutes fins auxquelles s'étend l'autorité de la Législature du Nouveau-Brunswick; l'égalité de statut et l'égalité des droits et privilèges de ces deux communautés sont affirmées.

2 Le gouvernement du Nouveau-Brunswick assure la protection de l'égalité de statut et de l'égalité des droits et privilèges des communautés linguistiques officielles et en particulier de leurs droits à des institutions distinctes où peuvent se dérouler des activités culturelles, éducationnelles et sociales.

3 Le gouvernement du Nouveau-Brunswick, dans les mesures législatives qu'il propose, dans la répartition des ressources publiques et dans ses politiques et programmes, encourage, par des mesures positives, le développement culturel, économique, éducationnel et social des communautés linguistiques officielles.

Constitution Act, 1982
Charter of Rights and Freedoms
ss. 14, 16 and 19

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

14. La partie ou le témoin qui ne peuvent suivre les procédures, soit parce qu'ils ne comprennent pas ou ne parlent pas la langue employée, soit parce qu'ils sont atteints de surdit , ont droit   l'assistance d'un interpr te.

Official Languages of Canada

16. (1) 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.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Langues officielles du Canada

16. (1) Le fran ais et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privil ges  gaux quant   leur usage dans les institutions du Parlement et du gouvernement du Canada.

(2) Le fran ais et l'anglais sont les langues officielles du Nouveau-Brunswick; ils ont un statut et des droits et privil ges  gaux quant   leur usage dans les institutions de la L gislation et du gouvernement du Nouveau-Brunswick.

(3) La pr sente charte ne limite pas le pouvoir du Parlement et des l gislatures de favoriser la progression vers l' galit  de statut ou d'usage du fran ais et de l'anglais.

19. (1) Chacun a le droit d'employer le fran ais ou l'anglais dans toutes les affaires dont sont saisis les tribunaux  tablis par le Parlement et dans tous les actes de proc dure qui en d coulent.

(2) Chacun a le droit d'employer le fran ais ou l'anglais dans toutes les affaires dont sont saisis les tribunaux du Nouveau-Brunswick et dans tous les actes de proc dure qui en d coulent.

Official Languages Act

S.C. 1988, c. 38

ss. 16 and 94

Duty to ensure
understanding
without an
interpreter

16. (1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that

(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;

(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and

(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

16. (1) Il incombe aux tribunaux fédéraux autres que la Cour suprême du Canada de veiller à ce que celui qui entend l'affaire :

a) comprenne l'anglais sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en anglais;

b) comprenne le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu en français;

c) comprenne l'anglais et le français sans l'aide d'un interprète lorsque les parties ont opté pour que l'affaire ait lieu dans les deux langues.

Obligation
relative à la
compréhension
des langues
officielles

Adjudicative
functions

(2) For greater certainty, subsection (1) applies to a federal court only in relation to its adjudicative functions.

(2) Il demeure entendu que le paragraphe (1) ne s'applique aux tribunaux fédéraux que dans le cadre de leurs fonctions judiciaires.

Fonctions
judiciaires

Limitation

(3) No federal court, other than the Federal Court of Canada or the Tax Court of Canada, is required to comply with subsection (1) until five years after that subsection comes into force.

(3) Les tribunaux fédéraux autres que la Cour fédérale et la Cour canadienne de l'impôt disposent toutefois, pour se conformer au paragraphe (1), d'un délai de cinq ans après son entrée en vigueur.

Mise en oeuvre
progressive

94. (1) The *Criminal Code* is amended by adding thereto, immediately after section 462.1 thereof, the following section:

Where order
granted under
section 462.1

"462.11 Where an order is granted under section 462.1 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

(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;

(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

94. (1) Le *Code criminel* est modifié par insertion, après l'article 462.1, de ce qui suit :

Précision

"462.11 Lorsqu'il est ordonné, sous le régime de l'article 462.1, qu'un accusé subisse son procès devant un juge de paix, un juge de la Cour provinciale, un juge seul ou un juge et un jury qui parlent la langue officielle qui est celle de l'accusé ou la langue officielle qui permettra à l'accusé de témoigner le plus facilement :

a) l'accusé et son avocat ont le droit d'employer l'une ou l'autre langue officielle au cours de l'enquête préliminaire et du procès;

b) ils peuvent utiliser l'une ou l'autre langue officielle dans les actes de procédure ou autres documents de l'enquête préliminaire et du procès;

c) les témoins ont le droit de témoigner dans l'une ou l'autre langue officielle à l'enquête préliminaire et au procès;

d) l'accusé a droit à ce que le juge présidant l'enquête parle la même langue officielle que lui;

e) l'accusé a droit à ce que le poursuivant — quand il ne s'agit pas d'un poursuivant privé — parle la même langue officielle que lui;

f) le tribunal est tenu d'offrir des services d'interprétation à l'accusé, à son avocat et aux témoins tant à l'enquête préliminaire qu'au procès;

g) le dossier de l'enquête préliminaire et celui du procès doivent comporter la totalité des débats dans la langue officielle originale et la transcription de l'interprétation, ainsi que toute la preuve documentaire dans la langue officielle de sa présentation à l'audience;

h) le tribunal assure la disponibilité, dans la langue officielle qui est celle de l'accusé, du jugement — exposé des

(iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and

(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."

motifs compris — rendu par écrit dans l'une ou l'autre langue officielle.»

Coming into
force

(2) This section shall come into force in a province

(a) in respect of offences punishable on summary conviction,

(i) on the day this Act is assented to, in the case of a province in which sections 1 and 5 of *An Act to amend the Criminal Code*, being chapter 36 of the Statutes of Canada, 1977-78, as amended by section 188 of the *Criminal Law Amendment Act, 1985*, being chapter 19 of the Statutes of Canada, 1985, are in force in the province in respect of offences punishable on summary conviction, or

(ii) on the day on which those sections come into force in respect of offences punishable on summary conviction, in the case of a province in which those sections are not in force in respect of offences punishable on summary conviction on the day this Act is assented to; and

(b) in respect of indictable offences,

(i) on the day this Act is assented to, in the case of a province in which those sections are in force in respect of indictable offences on that day, or

(ii) on the day on which those sections come into force in respect of indictable offences, in the case of a province in which those sections are not in force in respect of indictable offences on the day this Act is assented to.

(2) Le présent article entre en vigueur dans une province :

a) dans le cas d'infractions punissables par procédure sommaire :

(i) à la date de la sanction royale, s'il s'agit d'une province où les articles 1 et 5 de la *Loi modifiant le Code criminel* (chapitre 36 des Statuts du Canada de 1977-78), dans sa version modifiée par l'article 188 de la *Loi de 1985 modifiant le droit pénal* (chapitre 19 des Statuts du Canada de 1985), sont en vigueur à l'égard des infractions punissables par procédure sommaire,

(ii) à la date de leur entrée en vigueur dans le cas contraire;

b) dans le cas d'actes criminels :

(i) à la date de la sanction royale, s'il s'agit d'une province où ces articles sont alors en vigueur à l'égard des actes criminels,

(ii) à la date de leur entrée en vigueur dans le cas contraire.

Entrée en
vigueur