LEGISLATIVE ASSEMBLY OF THE

NORTHWEST TERRITORIES

10TH ASSEMBLY, 9TH SESSION

TABLED DOCUMENT NO. 76-87(1)

TABLED ON JUNE 9, 1987

Committee on Law Reform

An Act to Amend the Jury Act

Working Paper No. 1

1987

Northwest Territories Canada

Committee on Law Reform

An Act to Amend the Jury Act

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The Honourable Michael A. Ballantyne
Minister of Justice
Government of the Northwest Territories

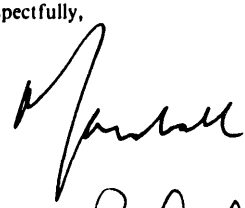
Sir:

We have the honour of presenting this Working Paper on the Amendment to the *Jury Act*, the first publication of our Committee. The Working Paper will be widely circulated in the hope of attracting comments and criticisms. After considering the responses, we shall present to you, Mr. Minister, our final report.

In keeping with our mandate, we have also begun work on other projects aimed at the reform of the law of the Northwest Territories.

As is evident in our report, the aim of the Amendment is indeed salutary. The implementation, however, is not without difficulty. We are entirely aware that there is no universal accord on this question. Difficulties notwithstanding, it is our opinion that the Amendment is meritorious and should be implemented.

Yours respectfully,



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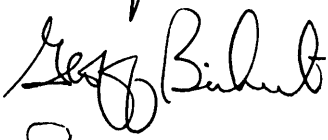

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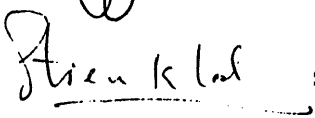

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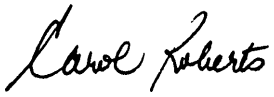

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THE JURY ACT AMENDMENT

Bill 5-86(1)

An Act to Amend the Jury Act

NOTICE

This is a working paper only. It represents the views of the Law Reform Committee at this time. The Committee's views will be presented at a later time to the Minister of Justice, when the Committee has completed its study and taken into account any further suggestions we might receive.

This document will be circulated, both in the Territories and across Canada, and to law reform agencies beyond Canada. We encourage critical comments and suggestions.

The Committee would be grateful, therefore, if all comments could be sent to: The Chairman
Committee on Law Reform of the Northwest Territories
Law Library
Courthouse
4905 - 49th Street
Yellowknife, N.W.T.
Canada X1A 1P2

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I STATEMENT OF PURPOSE

In 1986, the Legislative Assembly of the Northwest Territories passed Bill 5-86(1), *An Act to Amend the Jury Act.*

Section 5 of the *Jury Act* — provided that:

> 5. Subject to this Act, every person who
> (a) is nineteen years of age,
> (b) is a Canadian citizen or permanent resident of Canada, and
> (c) is able to speak and understand either the French language or the English language,
> is qualified to serve as a juror in any action or proceeding that may be tried by a jury in the Territories.

The Amendment provided that:

> 1. The *Jury Act* is amended by adding immediately after section 5.1 the following section:
>
> 5.2 An aboriginal person who does not speak and understand either the french language or the English language, but who speaks and understands an aboriginal language as defined in the *Official Languages Act* and is otherwise qualified under this Act, may serve as a juror in any action or proceeding that may be tried by a jury in the Territories,
>
> 2. This Act shall come into force on a day to be fixed by order of the Commissioner.

The Minister of Justice at that time pointed out the purpose of the legislation, thus: "In the Northwest Territories aboriginal people are in the majority and in the majority of cases aboriginal persons are the accused. If we are to recognize the principle that a person is entitled to be tried by his or her peers, then surely we must do all that we can to make it possible in the Northwest Territories for aboriginal persons to sit on a jury." The Minister promised the Assembly that the amendment would not be proclaimed until a thorough analysis had been completed.[2] Subsequently, the Committee on Law Reform for the Northwest Territories was asked to study the Amendment. Further, the Minister announced in the Legislative Assembly on October 27, 1986: "As a result of that amendment, it will be necessary to put in place appropriate administrative capability to implement the proposed Act and to consider all legal questions arising out of the proposed amendment. The Committee is presently considering the amendment and will be making a full report to me in due course."[3]

This Working Paper represents the first step by the Committee on Law Reform of the Northwest Territories in meeting its mandate. It must be emphasized that this is a working paper only. It is meant to show the direction and scope of the Committee's work up to this point, and to invite comment and criticism.

The Committee on Law Reform has met often concerning this issue. Public meetings have been held in Yellowknife and Iqaluit (formerly Frobisher Bay) concerning the *Jury Act* amendment. We have attempted to make contact with all those familiar with the criminal process to solicit their views. A permanent

office for the Committee on Law Reform has been established adjacent to the Court Library, and the appointment of Mr. Ralph I.E. Armstrong, B.A., LL.B., as Research Officer, has given the Committee full legal research capability.

This Working Paper represents the first report to the Minister of Justice from the Committee on Law Reform. It represents the first of a number of important areas of law reform in the Northwest Territories that the Committee expects to study.

The uniqueness of the Northwest Territories, both geographically and demographically, with its great variations in culture and tradition, mandate, we think — perhaps more than anywhere else in Canada — considerations of law reform.

Law, to be acceptable to people who live under it, must reflect their own culture and tradition. It is our hope that the Committee on Law Reform in the Northwest Territories will be able to make a contribution. We offer this document as a first step in that process.

II LEGISLATIVE BACKGROUND/HISTORY

A. THE ORIGIN OF THE JURY

Although Blackstone, the famous English legal commentator, traces the institution of the jury to Anglo-Saxon times, most legal historians today agree that it was a product of the Norman Conquest.[4] The Normans originally used the jury for administrative purposes. Indeed, the Domesday book was based on the testimony of jurors, swearing as to their knowledge of the facts the Conqueror wished to gather. About the time of Henry II (1154-1189), the jury came to be used in litigation, in addition to its administrative functions. This use of the jury seems to have been given its greatest stimulus by the abolition of trial by ordeal by the Lateran Council of 1215. In search to find a replacement for the ordeal, the English judges turned to the resource closest at hand, the jury. As time went by , the jury lost its administrative functions and become solely a judicial body.

During this time, the nature of a jury trial changed greatly. There can be no doubt that originally juries decided cases upon their own knowledge of the facts, rather than solely considering matters that were introduced in evidence at trial. In a sense, they were as much witnesses as judges of fact. Gradually, over the centuries, the jury lost its witness-like characteristics and became what it is today, the judge of the facts in issue, basing its decisions upon the evidence presented before it at trial, according to the rules of evidence. By 1367, it was decided that the verdict of a jury must be unanimous. By 1670, as a result of the famous decision in *Bushell's Case*,[5] it was determined that, barring corruption, a jury could not be punished for reaching a verdict that the judge disapproved of.

During the course of this history, the English jury, from the *ad hoc* creation it seems to have been originally, became esteemed as one of the glories of the English legal system, and one of the chief protections of the liberty of the subject. Blackstone's words of praise are frequently quoted:

> Upon these accounts the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English Law. And, if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened, when it is applied to Criminal cases! But this we must refer to the ensuing book of these commentaries: only observing for the present, that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either

> in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages. And therefore a celebrated French writer, who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England must perish, should have recollected that Rome, Sparta and Carthage, at the time when their liberties were lost, were strangers to the trial by jury.[6]

At a time and place far from Blackstone's, a noted Canadian lawyer had this to say about the jury:

> [T]he community of attitudes that a jury brings to bear on their verdict renders them far better able to judge their peers than the most reasoned, dispassionate, competent judge regardless of how well intentioned he may be. A jury represents a combination of heart, mind and emotion which the empirical approach of the judge, however capable, can never equal. The jury represents a safeguard and a buffer that we should properly regard as one of our most precious and fundamental freedoms, and I remain staunchly opposed to those who argue for its abolition.[7]

B. MIXED JURIES — THEIR ORIGIN IN ENGLISH LAW

The melding of language groups on juries anticipated by the amendment is far from a novel concept. In the first *Criminal Code of Canada* of 1892[8], we find s.663:

> No alien shall be entitled to be tried by a jury *de medietate linguae* but shall be tried as if he was a natural born subject. R.S.C. c.174, s.161.

Taschereau, in his annotated Criminal Code of 1893, comments on this section:

> Ever since the 28 Ed. III. c.13 [Edward III ascended the throne in 1327, so that the statute would date from *circa* 1355] aliens, under our criminal law, have been entitled to be tried by a jury composed of one half of citizens and one half of aliens or foreigners, if so many of these could be had. It seems to have been thought necessary, in *R. v. Vonhoff,* 10 L.C.J. 292, that these six aliens should be of the country to which the defendent alleged himself to belong, but the better opinion seemed to be that six aliens were required without regard to nationality. S.2 of 28 Ed. III c.13, says "the other half of aliens."
>
> However, this is now of historical interest only, and by the above clause aliens, all through the Dominion, when indicted before a criminal court, are on the same footing as British subjects as to the composition of the jury. In England, also now, an alien is not entitled to a jury *de medietate linguae*; 33 & 34 V. c.14 (Imp.). [1870]

(An approximate translation of *"de medietate linguae"* would be "of the half tongue". The Committee will generally be reserving this term for the jury created by the English statute, and referring to the Canadian jury of English and French speakers, discussed below, simply as "the mixed jury".

The jury *de medietate linguae* was, however, a mixed jury, and a number of the older sources refer to the Canadian version by the Latin appellation.)

In *Veuillette v. The King* [9], Idington J. remarks that "[t]he right to a jury *de medietate linguae* is entirely of English origin, tracing back to Edward I, and so clearly formed part and parcel of English law that I imagine it was by reason thereof that it became law in so many of the United States, until abolished in all save Kentucky."

Blackstone makes numerous references to juries *de medietate linguae*. He boasts that this is "[a] privilege indulged to strangers in no other country in the world; but which is as antient [sic] with us as the time of King Ethelred. . ."[10]

None of the authorities consulted to date supply much technical detail about how these juries functioned. It is not mentioned whether interpreters were used, or whether the "aliens" on the jury understood enough English to get by. What is remarkable is that this institution should have existed at all, given the disabilities that aliens were under at law during this time period. For example, Blackstone notes that if an alien attempted to purchase land for his own use, it would be forfeit to the Crown, and that even an alien who was naturalized by Act of Parliament was incapable of being a member of the Privy Council, or Parliament, or of holding offices from the Crown.[11]

The jury *de medietate linguae* could not have been wholly satisfactory, or it would not have suffered such widespread abolition. It will be noted, however, that it endured for over 500 years, indicating that it was not entirely unsatisfactory, either. It is also apparent that this privilege was granted mostly with the accused in mind, the better to protect his right to trial by his peers, while the amendment to our *Jury Act* is also aimed at increasing the participation of citizens in the administration of justice. The point being made is that the jury system, as it currently exists, has not remained unchanged throughout history. Over the centuries, our legal system has been flexible enough to make modifications to the jury system when it seemed necessary in the interest of justice, even when administrative inconvenience would result, or when deep-rooted prejudices were involved. There would seem to be no reason why similar flexibility should not be possible today. Certainly the jury must remain flexible if it is to survive.

C. MIXED JURIES IN QUEBEC AND MANITOBA

Although the jury *de medietate linguae* of 28 Edward III has long been abolished, a similar system may still be found in the *Criminal Code of Canada*.[12], based not upon citizenship, but upon language groups. Section 555 provides:

> Mixed Juries
>
> Mixed juries in Quebec — Motion by accused — Order for panel
>
> 555.(1) In those districts in the Province of Quebec in which the sheriff is required by law to return a panel of jurors composed one-half of persons who speak the English language and one-half of persons who speak the French language, he shall in his return specify in separate lists those jurors whom he returns as speaking the English language and those whom he returns as speaking the French language, and the names of the jurors summoned shall be called alternately from those lists.

(2) In any district referred to in subsection (1) the accused may, upon arraignment, move that he be tried by a jury composed entirely of jurors who speak the language of the accused if that language is English or French.

(3) Where a motion is made under subsection (2), the judge may order the sheriff to summon a sufficient panel of jurors who speak the language of the accused unless, in his discretion, it appears that the ends of justice are better served by empanelling a mixed jury. 1953-54,c.51,s.535. [Repealed, 1977-78, c.36, s.2.]

(The repeal of s.555 shall take place on the day when those provisions of the *Code* guaranteeing an accused the right to be tried in his own official language come into force in the Province of Quebec. A date has not yet been set.)

Until 1982, the *Code* contained a similar provision regarding Manitoba, s.556:

(1) Where an accused who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed at least half of persons who speak the language of the accused, if that language is either English or French, he shall be tried by a jury composed at least one-half of the persons whose names stand first in succession upon the general panel and who, not being lawfully challenged, are found, in the judgement of the court, to speak the language of the accused.

(2) Where, as a result of challenges or any other cause there is, in proceedings to which this section applies, a deficiency of persons who speak the language of the accused, the court shall fix another time for the trial, and the sherriff shall remedy the deficiency by summoning, for the time so fixed, the additional number of jurors who speak the language of the accused that the court orders and whose names appear next in succession on the list of petit jurors.

These were the descendants of two sections of the 1892 *Code* immediately following the section abolishing the jury *de medietate linguae.* They read as follows:

Mixed Juries in Province of Quebec

664. In those districts in the province of Quebec in which the sheriff is required by law to return a panel of petit jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the jurors so summoned shall be called alternately from such lists. R.S.C. c.174, s.166.

Mixed Juries in Manitoba

665. Whenever any person who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed, for the one half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury

composed for the one half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found, in the judgement of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R.S.C. c.174, s.167.

It will be noted that the sections concerning Quebec do not so much establish mixed juries, as take their existence for granted. This is because these juries exist under pre-Confederation statute law. The Quebec Legislature subsequently purported to repeal these provisions, but the courts consistently held that after Confederation, such a repeal was no longer open to the Province, being an infringement on the Criminal law power.[14]

The history of these sections is referred to in the dissenting judgement of Brodeur J. in the case of *Veuillette v. The King*[15]:

> This legislation is not new. It dates from the early days of English domination. In 1764, Governor Murray in his ordinance of September 17, declared that "in all tryals in this Court, all His Majesty's subjects in the Colony to be admitted on juries without distinction".
>
> The English-speaking Canadians were very much displeased to see that this ordinance put the English and French upon the same footing, and, in the memorial dated October 16, 1764, they said that "persons professing the religion of the Church of Rome . . . have been empanelled on Grand and Petty Jurys *ever where two protestants were parties* . . ."
>
> Their complaints were referred to England, where the officers of the Crown decided that catholics might serve as jurymen. And in 1766, July 1, a new ordinance intended to dispose of the complaint of the English who were liable to be tried by juries entirely French, was signed decreeing that in actions "between British-born Subjects and Canadians, the Juries are to be composed of an equal number of each, if it be required by either of the parties".
>
> The subsequent legislation grew from these roots.

Although the religious prejudice revealed in this account is distasteful to the modern reader, one may still appreciate the skill with which the "officers of the Crown" dealt with a delicate problem. On the one hand, the new French Canadian subjects were not to be shut out of their rightful role in the judicial process (and this at a time when Roman Catholics in England were still subject to numerous disqualifications); on the other hand, the English subjects were not to be subjected to juries entirely composed of members of another cultural group. These two motivations may strike a responsive chord in the Northwest Territories today. This, too, is another demonstration that the jury system has always been one admitting of a great deal of flexibility in the interests of justice, and has not been frozen into a rigid form.

The Committee's information concerning the procedure followed with mixed juries has been pieced together from a number of sources. Brodeur J.'s dissenting judgement in *Veuillette* refers to the "practice, continually followed for more than 150 years, that in the case of a mixed jury the evidence of the witnesses is translated into both languages, and the Judge's charge is equally given in or translated into English and French."[16] The majority decision in that case however is authority for the proposition, quoted from the headnote, that:

> . . . where the trial was conducted in English and every French speaking juror claimed to understand both English and French, and there was no request preferred or taken to the Judge's charge in a homicide case being given in English only without being repeated in French, the Appellate Court may properly find that there was no substantial wrong upon which to reverse the verdict against the prisoner or to grant a new trial.[17]

The Committee has been fortunate enough to obtain some first-hand information about the operation of these mixed juries from the Honourable Paul Miquelon, who had experience with them both as a Crown Attorney and a superior court judge. He informs us that no interpreter was ever permitted to enter the jury room; the courts relied upon bilingual jurors to facilitate communication between the unilingual members of the jury. He says that he never encountered any problems with a mixed jury.

The mixed jury seems to have fallen out of favour in Quebec. The Committee speculates that this may be related to the notoriety of the most famous case in which a mixed jury was employed, *R.* v *Coffin.*[18] Coffin had requested an all English-speaking jury; the trial judge refused this request, and ordered a mixed jury. The majority of the Supreme Court of Canada took the view that the trial judge exercised his discretion properly, that it would have been improper to exclude the vast majority of prospective jurors in the area, who were French- speaking. The minority were of the opinion that the trial judge did not exercise his discretion on proper grounds, and would have allowed a new trial on this point. (M. Miquelon, who was one of the Crown counsel in *Coffin,* informs the Committee that in fact 11 of the 12 jurors were perfectly bilingual.)

A further ground of appeal in that case concerned the procedure used to address the mixed jury. Kellock J., writing the majority judgement, had this to say:[19]

> The appellant further calls attention to the fact that the trial took place before a mixed jury, the evidence being translated from one language into the other; that the learned trial judge charged the jury in both languages, and that one counsel for the prosecution as well as one for the defence addressed the jury in one language while his associate in each case addressed the jury in the other. It is contended that because of differences between the addresses in one language and the other and between the charges delivered by the learned judge, the result is that the appellant was really tried by two groups of jurymen composed of six men each. It is also contended that s.944 of the Criminal Code requires that the jury be addressed by one counsel only on each side.
>
> When it is remembered (as we were told by Crown counsel without contradiction) that the practice followed with respect to translation, the charge and the addresses has been the invariable practice in the Province of Quebec since 1892, at least, when the Code was first

enacted, and that during all of that time s.944 has been in its present form, the contention, in so far as it is based on that section, cannot, in my opinion, succeed . . . [There follows a discussion of the *Veuillette* case.]

In my opinion, neither the differences to which we were referred as between the address on behalf of the prosecution in the one language and the other, nor the charges, were of a nature to call for the interference of this Court in the grant of a new trial.

[Section 944 was the ancestor of present section 578, dealing with summing up by the prosecution.]

The dissenting judges did not deal with this point.

The technical problems with mixed juries highlighted by the *Coffin* case will be dealt with in another chapter. It is submitted, however, that the notoriety of the *Coffin* case is primarily due to factors other than the mixed jury (eg: the inflammatory address of Crown Counsel) and that *Coffin* by itself is not an insurmountable obstacle to the successful implementation of a mixed jury system.

D. THE NORTHWEST TERRITORIES - SOME HISTORICAL ADAPTIONS

Because of the extraordinary requirements for the administration of justice in the Northwest Territories, the *Criminal Code* makes its provisions subject to the *Northwest Territories Act.*[20] Currently, this is provided for in s.7 of the *Criminal Code*, which reads as follows:

> 7. (1) The provisions of this Act apply throughout Canada except
> (a) in the Northwest Territories, in so far as they are inconsistent with the *Northwest Territories Act* . . .

The *Northwest Territories Act* has always contained some extraordinary provisions regarding criminal procedure. As an example, s.31 of the current Act permits a judge of the Supreme Court of the Northwest Territories to exercise jurisdiction anywhere in Canada with respect to a criminal offence committed in the Territories — a striking exception to the usual jurisdictional rules. The *Northwest Territories Act* of 1875[21] provided for a jury of six, or eight in capital cases. That statute was soon amended to provide for a six-member jury in all cases. It was under the provisions of the *Act* of 1880[22] that Louis Riel was tried in 1885 by a jury of six, presided over by a stipendiary magistrate and a justice of the peace. Riel's counsel argued both before the Manitoba Court of Appeal[23] and the Privy Council[24], that it was not open to the Dominion Government to make such extreme changes in criminal procedure; in both courts, the argument was rejected.

By the time of the 1927 Revision of the Statutes of Canada, the *Northwest Territories Act* had been amended yet again.[25] These changes confirmed the position of the stipendiary magistrates and gave them wide powers to try offences without a jury, and once again provided for a jury of six.[26]

Clearly, rather extreme variations from the criminal practice known in most of Canada have been prescribed in the Northwest Territories. In the past, these variations have been mainly for administrative convenience in an area with a large territory, a small and scattered population, and often with few amenities for the provision of court facilities or judges.

The point we wish to make is that variations in criminal procedure, specific to the Northwest Territories, have been undertaken in the past to account for specific forensic requirements here.

E. THE JURY AND CUSTOMARY ABORIGINAL LAW

There is a paucity of written authority on aboriginal law and specifically on aboriginal criminal justice.[17] Clearly, however, trial by jury, as that term is known to the common law, did not exist in aboriginal societies in the North of Canada. It is commonly agreed, however, that community consensus was a vital aspect of social control among both the Dene and Inuit.[18] To the extent that the jury system succeeds in drawing members of the community into the legal process to judge the activities of a member of the community, it is analogous to those traditional practices in *R.* v. *Fatt*. The Amendment to the *Jury Act* is an attempt to increase this essential community involvement, by allowing unilingual aboriginal speaking jurors to take part in this jury process.

The Committee is deeply sympathetic to a point made by the Inuit Taparisat of Canada in its submission to the Committee, which we consider merits quoting at length:

> According to Inuit customary law, it is our elders who guide us and who regulate community standards and behaviours. It is the elders who traditionally deal with community problems and concerns, and who hand down the Inuit laws. Most Inuit elders in the Eastern Arctic speak Inuktitut. They do not speak English, and for this reason they would not be allowed to sit on a jury to deal with one of their own people in the way that Inuit customary law demands. The elders are the most knowledgeable and have the greatest wisdom to offer in dealing with those who cause problems in the community, and yet this recourse is denied to the court as it attempts to deal with accused offenders because of English language requirements. In this way, the communities also lose the benefits of the advice of the elders, and Inuit culture is weakened.[19]

This sage statement we think applies as well in the context of the Dene.

It is the Committee's view that the Amendment is a significant step, but not a complete answer to this most eloquent appeal.

F. JURY SELECTION PROCESS — CURRENT CRIMINAL LAW

Basic to an appreciation of the full impact of the amendment to the *Jury Act* is an understanding of the existing system of summoning and selecting jurors in criminal trials, and the relationship between territorial law, on the one hand, and federal criminal law on the other. The following is a description of that process.

1. Qualification of Jurors

The *Jury Act* establishes qualification of jurors by way of a general description, followed by certain exceptions, exemptions, excuses and, in respect of individual proceedings, by way of proximity to the place of trial.

Section 5 describes those persons who are qualified to serve as jurors in any action or proceeding to be tried in the Territories. The basic requirement is that a person be 19 years of age, a permanent resident of Canada, and:

. . .

(c) is able to speak and understand either the French language or the English language,

It is this provision which the *Jury Act* amendment contained in Section 5.2 modifies in certain cases.

Section 6 disqualifies, or excepts from the general qualification, persons convicted and sentenced to a term of imprisonment exceeding one year for which no pardon has been granted, and also excepts persons suffering from physical or mental infirmities incompatible with the discharge of the duties of a juror.

Section 7 of the Act exempts from jury service various persons in specified trades, professions and public offices, including judges, lawyers, members elected to the legislative assembly and persons engaged in what may be described as essential services.

For the purposes of criminal proceedings, section 554 of the *Criminal Code* adopts territorial laws with respect to the qualification and summoning of jurors in this way:

554.(1) A person who is qualified as a juror in accordance with the laws of a province is qualified to serve as a juror in criminal proceedings in that province.

(2) Notwithstanding any law of a province referred to in subsection (1) no person may be disqualified, exempted, or excused from serving as a juror in criminal proceedings on grounds of his or her sex.

The effect of this provision upon the *Jury Act* amendment is discussed under "Legal and Constitutional Issues". However, subsection 554(2) does contain one additional proviso with respect to the general adoption for criminal proceedings of territorial laws for the qualification and summoning of jurors. It prohibits any person being disqualified, exempted or excused from jury service in criminal proceedings on the grounds of his or her sex. It does not appear from the *Criminal Code* what method of selecting jurors would then come into play if the provincial or territorial law directed the Sheriff to select or empanel jurors upon the basis of a sexual discrimination.

2. Sheriff's Lists

The *Jury Act* sets out the procedure by which jury lists are to be compiled in the Territories in accordance with the stipulated qualifications, disqualifications, exemptions, excusals and proximity to sittings of the Court. Subsection 9(2) of the Act directs the Sheriff to give addresses and occupations of the named persons

together with a statement indicating whether a prospective juror can speak and understand the English language or the French language or both languages.

Section 10 gives the Sheriff access to voters' lists, assessment rolls and other public documents, for the purpose of compiling once per year a jury list for each place where the court will hold sittings. Pursuant to section 11, the lists so prepared are to be certified by the Sheriff and sent to the Clerk of the Supreme Court.

Section 12 provides for the preparation of Supplementary Lists at the order of a judge of the Supreme Court if for any reason it is considered necessary, including where sittings of the Court are fixed at a place for which no list has been prepared.

Once it appears that a jury will be required for a sitting of the Court at a particular place, section 13 sets out the manner in which a jury panel will be selected. Of particular note here are the specific directions in connection with the method of selecting separate French-speaking and English-speaking panels. By virtue of Part XIV.1 of the *Criminal Code*, the "Language of Accused" provisions, it is necessary that the Sheriff and the Clerk of the Court be in a position to select such distinct panels in order to ensure that the *Code* provisions may be carried out.

It is the Committee's understanding that the Sheriff for the Territories has had some difficulty in obtaining information from voters' lists, assessment rolls or other public documents suitable to determine the linguistic abilities of the prospective jury panellists. Despite the fact that a number of criminal jury trials have been held in the Territories in the French language with French-speaking jurors for the past several years, the Sheriff has had to resort to selecting persons with "French-sounding names" for want of any system of recording linguistic ability in public documents to which he has had access. The Committee's comments elsewhere in this document respecting the possible certification of jury lists upon the basis of aboriginal language speaking ability are mindful of the existing limitations in the system with respect to the French and English languages.

3. Language Guarantees

In the context of juror qualifications and the preparation and selection of jury panels separated by linguistic ability, brief mention should be made of subparagraph 567(1)(f) of the *Criminal Code*. It provides that a juror may be challenged by the prosecutor or the accused on the ground that the juror does not speak the language (either French or English) in which the trial has been ordered conducted pursuant to s.462.1 of the *Code*. The impact upon the *Jury Act* amendment of constitutional and statutory language guarantees in favour of French and English will be discussed in this Working Paper elsewhere, however, it is apt to note that prospective jurors speaking an aboriginal language, otherwise qualified by the *Jury Act* to serve as jurors, may yet be excluded by virtue of s.567(1)(f) in the circumstances contemplated by that provision, for inability to speak English or French.

4. Trial

Once the procedural obligations of the Sheriff and the Clerk of the Court pursuant to the *Jury Act* have been met, the *Criminal Code* provides for the empanelling of a jury (ie: the selection of a jury for a particular case from the jury panel) in criminal proceedings.

The work of the Sheriff and Clerk is subject to a limited scrutiny under section 558 of the *Criminal Code* which provides for a challenge (or objection) to the jury panel by the prosecutor or the accused:

> only on the ground of partiality, fraud or wilful misconduct on the part of the Sheriff or other officer by whom the panel was returned.

The trial judge is called upon to determine the validity of the challenge and has authority to direct the selection of a new panel. It is under this

provision that objections have been brought to the makeup of jury panels on the basis of various alleged discriminations.

With respect to such "challenges t the array" as they are called, it is apt to make some brief comments upon the authorities and the effect of the *Jury Act* amendment.

A number of decided cases have outlined what constitutes a prohibited discrimination and what does not. The Committee is of the view that the current method of empanelling jurors in the Territories, excluding as it does persons who do not speak English or French, does not offend existing legal or constitutional requirements.[30]

Nonetheless, because of the special circumstances present in the Territories, including in some places a large percentage of the adult population who do not speak the English or French language and their consequent exclusion from jury service, we are of the view that the *Jury Act* amendment will tend to ensure that the method of empanelling jurors in the Territories will remain secure against legal or constitutional challenge on the basis of a discrimination not demonstrably justified now or in the future.

It is unnecessary for our purposes to here describe how the actual jury is selected from the panel at the commencement of a criminal trial. This procedure is entirely prescribed by the *Criminal Code* and does not affect, nor is it affected by, the *Jury Act* amendment. Procedural implementation of the amendment as it deals with this stage of a criminal proceeding is discussed under "Procedural Matters".

III LEGAL AND CONSTITUTIONAL ISSUES

A. CONSTITUTIONAL "VIRES"

1. Qualification of Jurors

The Parliament of Canada has constitutional responsibility for criminal law and procedure, pursuant to subsection 91(27) of the *Constitution Act*.[31] As part of that responsibility, the composition of juries in criminal cases is a matter of federal responsibility. In carrying out this legislative responsibility through the *Criminal Code*, Parliament has adopted provincial and territorial laws for the summoning and qualification of jurors for purposes of criminal proceedings. Parliament could prescribe its own rules for the qualification of jurors, and has in fact done so in one limited aspect: subsection 554(2) of the *Code* overrides any provincial or territorial law which purports to disqualify, exempt or excuse a juror on the grounds of his or her sex.[32]

The Committee is of the view that the *Jury Act* amendment does not encroach upon or conflict with the federal responsibility for criminal law and procedure, since the amendment deals solely with qualification of jurors, and does so in a manner which does not purport to disqualify, exempt or excuse jurors on a basis prohibited by the *Criminal Code*.

The cases mentioned *supra*, in which the courts rejected the Quebec Legislature's attempts to abolish the mixed jury, are distinguishable. The Quebec legislation in question provided for mixed juries as a part of criminal procedure; the Territorial legislation only provides for the qualification of jurors, as provided for under the *Criminal Code*. Implementation is to be through constitutionally valid channels.

2. Language Guarantees

It is to be noted that the *Jury Act* amendment is not drafted so as to affect the language of proceedings before the courts. Obviously, jurors speaking and understanding only an aboriginal language will require the assistance of an interpreter with respect to evidence, speeches of counsel or instructions from the judge given in English or French. Nonetheless the language of proceedings is unaffected.

Part XIV.1 of the *Criminal Code*, the "Language of Accused" provisions, afford an accused certain language rights in criminal proceedings, consistent with constitutional guarantees and with the provisions of the *Official Languages Act*.[13] In the event an accused falling within the scope of those *Code* provisions obtains an order directing that his trial be conducted in one or other of the official languages of Canada, then the language of the proceedings would of necessity be that language. In such cases, any prospective juror not skilled in the language of the proceedings would be subject to challenge by the prosecutor or the accused pursuant to subparagraph 567(1)(f) of the *Criminal Code*. It is clear that aboriginal language speaking jurors, otherwise qualified to serve by virtue of the *Jury Act* amendment, could be excluded from the jury on the basis that they did not speak the language in which the proceedings were ordered conducted. There is no apparent conflict between the *Criminal Code* and the *Jury Act* amendment in such situations.

It is worth noting that the language rights granted or confirmed by Part XIV.1 of the *Criminal Code* do not purport to affect any territorial law relating to the language in which court proceedings are conducted. Section 462.3 of the *Code* provides:

> 462.3 Nothing in this Part or the *Official Languages Act* derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language or proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act.

The language of superior court proceedings in the Northwest Territories has traditionally been English, except in criminal proceedings in which an order was granted under Part XIV.1 of the *Criminal Code*, in which case the language of proceedings has been French. There is no territorial law which expressly deals with the language of proceedings, and it is not anticipated that the *Jury Act* amendment will affect the *status quo*. It may be noted that criminal proceedings before justices of the peace in the Territories have been conducted in aboriginal languages. In view of s.462.3 and in the absence of any territorial law to the contrary, this practice would appear to be both lawful and consistent with fairness, when all participants in those proceedings are fluent and comfortable in such languages.

B. THE CHARTER OF RIGHTS

Since 1982, the *Canadian Charter of Rights and Freedoms*[14] has been part of the supreme law of Canada. It is the duty of the courts, when considering the validity of legislation, to decide whether it meets the standards set forth in the *Charter*. Legislation that does not meet the standards of the *Charter* may be declared to be of no force or effect. Obviously, then, it is

important to examine the validity of the amendment in light of some objections that may be raised on the basis of the Charter.

First, with regard to language rights under the Charter, it is perhaps useful to make note of the decision of the Supreme Court of Canada in *Societe des Acadiens du Nouveau Brunswick Inc. et al v. Association of Parents for Fairness in Education, Grand Falls District 50 Branch*[11]. This was a case concerning the application of the relatively obscure s.19 of the Charter:

> 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.

A panel of seven took part in this case. All concurred in the result, but there were differences in reasoning on some points. However Estey, Chouinard, Lamer and LeDain JJ. all concurred with Beetz J. on the point of most concern to us. The following quotation from the headnote gives an accurate summary of his reasons:

> A party is entitled by the principles of natural justice and the *Official Languages of New Brunswick Act*, R.S.N.B. 1973, c. O-1, s.13(1), to be heard by a court composed of judges capable of reasonable means of understanding the proceedings. However, no such entitlement can be derived from the Canadian Charter of Rights and Freedoms, s.19(2). Rights guaranteed by s.19(2) are of the same nature and scope as those granted by s.133 of the Constitution Act, 1867 with respect to the courts of Canada and the courts of Quebec. These rights are language rights unrelated to and not to be confused with the requirements of natural justice. They vest in the speaker or writer or issuer of court processes and confer on the speaker or writer a constitutionally protected power to speak or to write in the official language of his choice. There is, however, no language guarantee contained in the Constitution that the speaker will be heard or understood, or that he has the right to be understood, in the language of his choice. The principle of advancement of equality of status of the two official languages contained in s.16 of the Charter is linked with the legislative process which is particularly suited to the advancement of rights founded upon political compromise. The right to be heard or understood is a right belonging to the category of rights designated in the Charter as legal rights which tend to be seminal in nature because they are rooted in principle, rather than being based upon political compromise as in the case of language rights. The essential difference between the two types of rights requires a distinct judicial approach with respect to each and the courts should pause before they decide to act as an instrument of change with respect to language rights. While language rights provisions are not immune from judicial interpretation, the courts should approach them with more restraint than they would in construing legal rights."

This is of some significance. The Supreme Court of the Northwest Territories, established by the federal *Northwest Territories Act*, is a court "established by Parliament" within the meaning of s.19. It appears from the reasoning of the majority that the presence of a person who speaks an aboriginal language on the jury would not, in itself, violate any party's

Charter right to use English or French. The courts will protect the minimum language rights given by the Charter, but will not invade the political realm to expand them. What the courts will concern themselves with will be "natural justice" — whether the jury is "capable by reasonable means of understanding the proceedings". In this respect, the quality of translation that can be provided becomes important.

It is submitted that other grounds of attack on the amendment based on the Charter are largely without substance. For example, if it is suggested that the amendment constitutes unlawful discrimination under s.15(1), in that it favours aboriginal persons over members of other ethnic groups that do not speak English or French, it might be countered that s.15(2) immediately provides:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Case law on s.15(2) is scanty, but the plain words of the section would seem to be on point. The purpose of the amendment to the *Jury Act* is to ameliorate the condition of the aboriginal peoples of the Northwest Territories vis-a-vis the justice system. Their situation, in having an alien legal system imposed upon them, in the area in which they have lived from time immemorial, is not really comparable to that of other ethnic groups in Canada.

Some support for the constitutionality of the amendment may also be found in ss.26 and 27:

> 26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

It would seem acknowledgement of the right of unilingual aboriginal jurors to participate in the jury process is consistent with the multicultural heritage of Canadians.

Sections 25 and 35 (aboriginal rights) are perhaps of less assistance, as they seem to have been intended only to preserve existing rights, and there does not seem to be any valid argument that a unilingual aboriginal person was entitled to sit on a jury at the time that the Charter became law.

With regard to s.7 (fundamental justice), as long as the translation system works properly, no objection would seem to arise. Indeed, it is arguable that the amendment furthers the cause of fundamental justice, by making the right to a jury of one's peers more meaningful to an aboriginal accused.

Finally, if necessary, the amendment might be supported by reference to s.1 of the *Charter*:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It could be argued that any limitation on rights created by the amendment is justified by the necessity of further involving the aboriginal people of the Northwest Territories in the administration of justice. In a democratic society, the fact that the Northwest Territories is the only provincial/territorial jurisdiction where aboriginal people make up a majority of the population should be of some weight. In *Badger v. Attorney-General of Manitoba*", a case involving prisoners' voting rights, Scollin J. made some comments that may be worth repeating:

> . . . a "margin of appreciation" exists and a course of action may be demonstrably justified in a free and democratic society without being adopted by every political unit within that society. As with citizens, that is the benefit of being free and democratic. The Charter is not a tool to make Canada a monolith, nor is it an assertion of the primacy of the lowest common denominator. The Constitution ensures the minimum without forbidding betterment and experiment.

It should be noted, however, that some members of the Committee dislike placing the new eligibility for jury duty on a racial basis ["An aboriginal person who does not. . ."] and feel that the same result could be achieved, without giving rise to attack on racial grounds, by making the test purely a linguistic one, ie:

> Any person who does not speak and understand either the French language or the English language but who speaks and understands an aboriginal language [etc]

IV IMPLEMENTATION

A. METHODS

The Committee has considered a number of options available for the implementation of the amendment to the *Jury Act.*

One option arising from the preceding discussion, considering the matter as one of criminal procedure and because this is a matter of federal jurisdiction is to seek appropriate changes in the *Northwest Territories Act.* The Committee, however, has viewed the matter as one of local jurisdiction and hence does not recommend this alternative.

Secondly, the *Criminal Code*, under Power to Make Rules, s.438 reads, *inter alia:*

> 438.(1) Every superior court of criminal jurisdiction and every court of appeal, respectively, may, at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose, make rules of court not inconsistent with this Act or any other Act of the Parliament of Canada, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, action of appeal.
>
> (2) Rules under subsection (1) or (1.1) may be made
> (a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;

This section gives the Supreme Court of the Northwest Territories broad powers to make rules of court to govern proceedings in matters not specifically dealt with in legislation.

On a slightly lesser level of formality, the Supreme Court may issue Practice Directions to counsel, the Sheriff, and other officials involved in the administration of justice, setting out the procedures it expects to be observed. On a third level of formality, the system could be implemented on the basis of oral agreement among the concerned officials.

The Committee at this point believes that a combination of practice directives and oral approval could be sufficient to implement the Amendment.

Under this option we foresee the matter being discussed and agreed to by all parties at the pre-trial stage. This would allow for the provision of appropriate translation requirements for the trial itself. It is especially on this question of procedural implementation that the Committee in this Working Paper seeks comments and input.

B. CONSENT OF PARTIES

It is the view of the Committee at this time that implementation of the *Jury Act* amendment should proceed, to the extent possible, with the consent of all the parties. This is consistent with the consensual nature of trial by jury under criminal law: an accused has an election as to whether he will be tried by a court composed of a judge and jury or by a judge sitting without a jury. Further, an accused may elect to be tried by a jury composed entirely of persons who speak one of the Official Languages of Canada, if he obtains an order under Part XIV.1 of the *Criminal Code*. There are a variety of factors which could render impractical a trial by jury involving jurors speaking only an aboriginal language. Some examples might include:

- trial by a jury composed of more than two linguistic groups, requiring translation for three or more languages;
- joint trial of two or more accused, one of whom speaks an aboriginal language and one or others who speak another aboriginal language or English or French;
- trial of an English or French-speaking accused involving extensive or complex evidence of a scientific or technical nature for which suitable equivalent expressions, words or concepts have not been developed in a particular aboriginal language or for which a suitable interpreter is unavailable.

The implementation of the *Jury Act* amendment requires a careful balancing of interests. The amendment serves an important public interest by involving in the administration of justice a large segment of the population heretofore excluded by reason of language. In turn, trial by jury is a fundamental right of a citizen accused of a serious crime, a right which could be impaired, delayed or practically frustrated, if to exercise that right put the accused at risk of errors occurring in translation by virtue of the sheer complexity of the task in some cases. In balancing the rights of the accused in electing who shall be his judges and the rights of the community to participate fully in the administration of justice, the Committee is of the view that a suitable mechanism must be found to allow an accused person the option to elect trial by a jury composed of persons who speak one of the Official Languages of Canada, that is, English or French, or to elect to be tried by a jury composed of or including persons speaking an aboriginal language.

One mechanism for providing to an accused that option or choice, would be for the accused to consider seeking an order of the court under Part XIV.1 of the *Code* for a trial to be conducted in the English or French language. If such an order were obtained, the prosecutor and the accused would then be in a position to challenge or exclude jurors who did not speak the language of the proceedings, pursuant to s.567(1)(f) of the *Code*. On the other hand, if an accused wished to have a jury which included persons speaking an aboriginal language, he would simply choose not to seek an order from the court fixing the language of the proceedings, and jurors speaking aboriginal languages could not be excluded on the basis of language.

V PROCEDURAL MATTERS

A. INTERPRETER IN THE JURY ROOM?

The Committee has given careful consideration to the question of whether implementation of the *Jury Act* amendment will necessitate or make it desirable that a court interpreter be allowed into the jury deliberation room to assist the jurors in communicating amongst themselves, bearing in mind their differing linguistic abilities. We have been encouraged in our consideration of the viability of juries composed of persons speaking differing languages, or "mixed" juries, by the long history of such juries in Canada and in England before that, as discussed elsewhere in this Working Paper.

Traditionally, the Courts have placed strict limitations upon contact between juries and the public during the course of criminal trials. The limitations, with some exceptions, have applied as well to out of court contact by court officers such as counsel, the Clerk and the Sheriff, and even the trial judge. The strictness of the limitations increases once the jury has heard all the evidence, the addresses or speeches of the lawyers, and the instructions or charge of the trial judge and retires to consider its verdict. Communication with jurors in breach of the legal requirements has in some cases resulted in mistrials or the setting aside of the verdicts upon appeals.

Section 576 of the *Criminal Code* deals briefly with the limitations upon communication with jurors under the heading "Separation of Jurors". That section is reproduced as an appendix hereto.

The trial judge has a discretion to allow the jury to separate at any time before they retire to consider their verdict. In the course of a trial extending over several days or weeks, the jurors will generally be allowed to return to their homes and families when the trial is not in session, with a direction from the trial judge that they must neither discuss the case with anyone nor permit anyone to communicate information to them about the case.

Many of the decided cases in which outsiders have communicated with jurors must be read in the context of the former law in capital cases requiring that juries be kept separate throughout the course of the trial and not just during their final deliberations, as is now the case. When the result of a verdict of guilty was the execution of the person convicted, it is not surprising that the rules with respect to jury separation were very strictly enforced in order to afford every protection to the accused and to ensure the appearance of justice as well as the fact.

The thrust of the cases dealing with untoward communications with jurors prior to and in the course of their deliberations makes it clear that the chief concern was and is with the potential for outside influence. In *R. v. Ryan*[11] O'Halloran, J.A. had this to say about the rationale for the rule:

> Removal of the jury from all outside influences lies at the very foundation of the confidence that has been maintained in it. It is of the highest importance therefore not only that no communication with outsiders shall actually in fact occur, but also that nothing shall seem to take place which may weaken respect for the jury in the public mind.[39]

Section 576.1 of the *Criminal Code* prohibits jurors from disclosing "any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court", and makes such disclosure an offence punishable on summary conviction. This prohibition is aimed at protecting jurors from untoward pressures which could flow from a knowledge of how the jurors deliberated and the views they expressed or positions they took. The case of *R. v. Martin*[40], illustrates the need to protect jurors. In that case the brother of the accused, after the conviction of the latter, went to the house of the foreman of the jury in order to challenge him to a duel. The court in that case said[41] "Judges have authority for protecting the proceedings which are essential to the administration of justice; but jurors, with infinitely greater risk, have no protection of their own, and must depend for it upon what the law affords them."

None of the cases offer much assistance upon the subject of placing an interpreter in the jury room, a court officer with a sworn obligation to simply translate the debates of the jurors and to offer no comment or other influence.

It may be said that in all likelihood in the Northwest Territories, some members of the jury will be bilingual, speaking both the language in which the trial is conducted as well as an aboriginal language, and that these jurors will be in a position to translate the deliberations for the unilingual jurors. On the other hand, it may be argued that the bilingual jurors, having heard the evidence, the addresses of counsel and the judge's instructions in both the language of trial and an aboriginal language, will have an advantage over the unilingual jurors, giving to the recollections of the bilingual jurors a greater weight or significance than the recollections of the unilingual jurors. Admittedly, a similar criticism may be made of an ordinary jury, where some members may be shrewder than others, or of more forceful personality.

Challenges to the validity of the verdict of a mixed jury could be forthcoming if clear procedural safeguards are not established. Clearly, the recommendation of the Committee upon this key question must be carefully considered. Elsewhere in this Working Paper the Committee recommends that implementation of the *Jury Act* amendment be premised upon the consent of the accused. That consent, when given with full knowledge of the consequences, in terms of the presence or absence of an interpreter in the jury room, may be one of the procedural safeguards in whatever approach is taken.

B. JURY LISTS

Consideration should be given to amending the *Jury Act* further to provide for a method by which the Sheriff could prepare lists of prospective jurors on the basis of their linguistic abilities, analogous to the current provisions for separate lists of French and English-speaking jurors. The availability of such lists would materially assist in determining whether a suitable jury could be empanelled in a given community composed totally of persons speaking an aboriginal language, or whether it would be necessary to empanel a mixed jury. This could have an impact in deciding the needs of the court for interpreters. Similarly, if ultimately it is decided that court

interpreters will not be allowed into the jury room to assist in their deliberations, empanelling a jury from one linguistic group could have substantial advantages, and the availability of lists of prospective jurors of known linguistic abilities would assist in such considerations.

VI LANGUAGE AND TRANSLATION

Courts in the Northwest Territories now regularly hear evidence in native languages. This evidence is translated into English or French. Sometimes all the evidence in a case is thus presented. English-speaking jurors must rely on translations, so it should not be unacceptable that the unilingual juror will hear some evidence translated from the English to the native language. This is simply a reversal of the present practice. One could argue that the native-speaking juror will enhance the reality of the trial, in that those jurors will benefit from a non-translated version. They will hear the evidence and decide the case on the evidence the witness actually gives rather than a translated version. Clearly, there are positive and negative aspects to this change. Sequential translation of the entire trial will be necessary, we think. This will take some time but now much of the trial in a non-English-speaking community is translated in any event, and in the view of the Committee the effort will be well rewarded in opening all the trial to the non-English-speaking members of the community. The submission of the Inuit Taparisat quoted elsewhere in the Working Paper puts the position well.

We believe that although there may not be direct translations for some complex legal terms, those terms are explainable in the aboriginal languages as they are in English to a lay jury.

Training of legal specialists in translation and the production of technical language and dictionaries, in the view of the Committee, though desirable, are not a reason for delaying implementation of the amendment. Such means of upgrading the quality of translation services should, however, be pursued with dispatch, to improve the quality of the administration of justice in any event.

It should also be remembered that the jury functions as a corporate entity rather than on an individualistic basis. The strength of the jury, we think, lies in its collective or corporate nature. Our research indicates that mixed juries functioned reasonably well in the past; so here in communities where the primary language is aboriginal, a unilingual juror should have no trouble as part of the matrix of the corporate decision-maker. Even amongst jurors who all speak one of the official languages, there will be differences in intelligence, cognition, education and cultural background. Yet each juror makes a contribution to the corporate decision.

Negative points will be offset by a better understanding of the nuances in testimony given in the native tongue. Also, these unilingual jurors will often be elders of the community, bringing special skills, experience and wisdom into the trial process.

With regard to technical resources, much progress has been made so that simultaneous translation is now being used where it is considered necessary. Still, it is greatly desirable that further progress be made in supplying high quality translation services to the courts.

SUMMARY OF TENTATIVE CONCLUSIONS AND RECOMMENDATIONS

1. The Committee believes that the *Act to Amend the Jury Act* is constitutionally valid and procedurally feasible.

2. The Committee is inclined to believe that it would be possible to implement the Amendment without further changes to federal or territorial legislation, although deletion of the racial criterion in the Amendment itself might be advisable. Consideration should be given to amending the *Jury Act* to enable better identification of the language capabilities of potential jurors. If it should later seem advisable to seek changes in federal legislation, such change can be made through the *Northwest Territories Act*, without amending the *Criminal Code*.

3. The Committee believes that the consent of the parties is an essential prerequisite to the empanelling of a jury containing persons who do not speak English or French, if all sides are to feel that justice is being done. The pre-trial hearing would be the best time to obtain this consent.

4. The Committee prefers to keep an open mind on a number of procedural points until this Working Paper has been circulated and discussed.

5. The Committee believes that every effort should be made to improve the quality of translation available in the courts. We do not, however, believe that it is necessary to delay implementation of the Amendment in order to allow for these improvements.

APPENDIX A: SECTION 576, *CRIMINAL CODE*

576.(1) The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

(2) Where permission to separate cannot be given the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

(3) Failure to comply with subsection (2) does not affect the validity of the proceedings.

(4) Where the fact that there has been a failure to comply with this section or section 576.1 is discovered before the verdict of the jury is returned the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

(a) direct the accused be tried with a new jury during the same session sittings of the court, or

(b) postpone the trial on such terms as justice may require.

(5) The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict. 1972, c.13, s.48.

APPENDIX B: THE *JURY ACT* OF THE NORTHWEST TERRITORIES

(Not including the aboriginal languages Amendment, or forms.)

CHAPTER J-2

AN ACT RESPECTING JURORS AND JURIES
1985(1), c.4, s.9

SHORT TITLE

Short title

1. This Act may be cited as the *Jury Act*. R.O., c.55. s.1; 1985(1), c.4, s.9

INTERPRETATION

Definitions

2. In this Act

"action"

(a) "action" means a civil proceeding as defined in the *Judicature Act;*

"clerk"

(b) "clerk" means the clerk or deputy clerk of the Court;

"Court"

(c) "Court" means the Supreme Court of the Northwest Territories;

"judge"

(d) "judge" means a judge of the Court. R.O., c.55, s.2; 1985(1), c.4, s.9.

RIGHT TO JURY IN CIVIL MATTERS

Right to jury

3. (1) Where, in any action of libel, slander, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, or in any action founded upon a tort or contract in which the amount claimed exceeds one thousand dollars, or in any action for the recovery of real property, either party to the time fixed for the trial of the action before a jury, the action shall, subject to subsection (2) of this section and subject to section 4, be tried before a jury, but in no other case shall an action be tried before a jury.

May dispense with jury

(2) Where, in any action of a class specified in subsection (1), application is made for the trial of that action before a jury and it appears to a judge, either before or after the commencement of the trial, that the trial will involve any prolonged examination of documents or accounts or any scientific investigation that, in the opinion of the judge, cannot conveniently be made by a jury, the judge may direct that the action be tried without a jury or that the jury be dismissed, in which case the action shall be tried or the trial continued, as the case may be, without a jury. R.O., c.55, s.3.

JURY COSTS

Security for jury costs

4. (1) Where, in accordance with subsection 3(1), application is made for the trial of an action before a jury, the party making the application shall deposit with the clerk such sum by way of security for payment of the cost of the jury as to the clerk appears sufficient under the circumstances.

Payment of costs

(2) Upon the conclusion of the sittings at which the action is tried the party making the application shall pay to the clerk any amount by which the cost of the jury exceeds the amount of the security deposited by him in accordance with subsection (1), and is entitled to have returned to him any amount by which the amount of the security so deposited exceeds the cost of the jury.

Taxation of costs

(3) If the party making the application obtains judgement in his favour, he shall, unless the judge otherwise orders, be allowed and may tax against the unsuccessful party to the action the cost of the jury.

"Cost of the jury" defined

(4) In this section "cost of jury" means

(a) the total cost of the jury for the sittings of the Court at which the action is tried, including the cost of summoning the panel, jurors' fees and allowances, and all other lawful expenses in connection therewith, as certified by the clerk; or

(b) in any case where a jury is used for the trial of more than one action or proceeding at the same sittings of the Court, a portion of the total cost specified in paragraph (a), the said portion to be determined at the conclusion of the sittings in accordance with the Rules of Court, or, if there are no such rules applicable, in accordance with an order to be made by the presiding judge. R.O., c.55, s.4.

PERSONS QUALIFIED TO SERVE AS JURORS

Persons qualified

5. Subject to this Act, every person who

(a) is nineteen or more years of age,

(b) is a Canadian citizen or permanent resident of Canada, and

(c) is able to speak and understand either the French language or the English language,

is qualified to serve as a juror in any action or proceeding that may be tried by a jury in the Territories. R.O., c.55, s.5; 1969(3rd), c.5, s.1; 1985(1), c.4, s.9; 1985(3), c.10, s.66.

Saving provision

5.1 A person who is lawfully serving as a juror in an action or proceeding on the coming into force of paragraph 5(b) may continue to serve as a juror in that action or proceeding notwithstanding that he does not meet the requirements of paragraph 5(b). 1985(3), c.10, s.67.

Persons not qualified

6. No person is qualified to serve as a juror who

(a) has been convicted of an offence for which he was sentenced to a term of imprisonment exceeding one year, not having been subsequently granted a free pardon, or

(b) possesses any physical or mental disability that is incompatible with the discharge of the duties of a juror. R.O., c.55, s.6; 1985(3), c.10, s.68.

PERSONS EXEMPT FROM SERVICE

Persons exempt

7. The following persons are exempt from service as jurors:

(a) members of the Queen's Privy Council for Canada or of the Senate or House of Commons of Canada;

(b) The Commissioner and members of the Legislative Assembly of the Northwest Territories;

(c) members of the Royal Canadian Mounted Police;

(d) judges of any court of record, territorial judges, justices of the peace and coroners;

(e) practising barristers and solicitors;

(f) clergymen of any denomination;

(g) salaried firemen and active members of the fire brigade of a municipality;

(h) officers of the Court, including sheriff's officers, constables and bailiffs;

(i) telegraph, telephone and radio operators;

(j) postmasters and postmistresses;

(k) officers and members of the Canadian Armed Forces;

(l) physicians, surgeons, dental surgeons and druggists in active practice;

(m) nurses in active practice; and

(n) persons whose duties relate to the custody and confinement of prisoners. R.O., c.55, s.7; 1968(2nd), c.9, s.1; 1978(2nd), c.2, s.3; 1978(2nd), c.16, Sched. B; 1985(1), c.4, s.11.

PERSONS EXCUSED FROM SERVICE

Persons excused

8. No persons is required to serve as a juror more than once in any two-year period, unless the service of that person as a juror is necessary by reason of there being an insufficient number of persons qualified to serve as jurors within a distance of thirty kilometres from the place of trial. R.O., c.55, s.8; 1977(3rd), c.2, s.10.

COMPILATION OF JURY LIST

Jury list

9. (1) The sheriff shall, prior to the first day of November in each year or as nearly as possible thereafter, compile a list in Form A, of persons who are qualified to serve as jurors and who are not, to his knowledge, exempt from service, for each place fixed for the sittings of the Court in the following year.

Contents of list

(2) The list shall contain, if possible, not less than forty-eight names and shall give the addresses and occupations of the persons whose names are listed together with a statement indicating whether a prospective juror can speak and understand the English language or the French language or both languages.

Persons not to be entered on list

(3) The name of any person whose place of dwelling is more than thirty kilometres from the place fixed for the sittings of the Court shall not be entered upon the list unless the number of persons who live within a distance of thirty kilometres from the place so fixed and who are qualified to serve as jurors is, in the opinion of the sheriff, insufficient, having regard to the provisions of subsection (2). R.O., c.55, s.10; 1969(3rd), c.5, s.2; 1977(3rd), c.2, s.10.

Access to voters' lists

10. For the purpose of compiling the list referred to in section 9, the sheriff shall have access to the voters' lists, assessment rolls and other public documents under the control of any officer of a municipality situated within, or partly within, a distance of thirty kilometres from the place fixed for the sittings, and the said officer shall furnish to the sheriff upon request any available information as to the qualifications and suitability of persons for service as jurors. R.O., c.55, s.11; 1977(3rd), c.2, s.10.

Certification of lists

11. As soon as possible after the first day of November in each year, the sheriff shall certify the lists prepared by him and shall forward them to the clerk. R.O., c.55, s.12.

Supplementary lists

12. (1) If, after the lists hereinbefore referred to have been forwarded to the clerk, a place other than one for which a list has been prepared is fixed for the sittings of the Court, or if for any reason a judge considers it necessary, the judge may order the sheriff to prepare, certify and return to him a supplementary list; the order shall state the time within which the return is to be made, and may contain such other directions as to the judge seems necessary.

Duty of Sheriff

(2) Upon receipt by the sheriff of the order referred to in subsection (1) the sheriff shall proceed according to the tenor thereof.

Form of supplementary lists

(3) Each supplementary list shall be substantially in accordance with Form A, and shall be marked "Supplementary List". R.O., c.55, s.13.

Certificate of clerk

13. (1) Upon receipt of notice that a jury will be required for a sittings of the Court, the clerk shall, within a reasonable time before the day fixed for the commencement of the sittings, certify over his hand the number of jurors that, in his opinion, will be required for the sittings and shall forthwith forward the certificate to a judge and apply to him for an appointment to select the panel.

Appointment to select panel

(2) Upon receipt of the application for appointment, the judge shall appoint a time and place for the selection of the panel, and shall state whether the panel should be French speaking, English speaking or both French and English speaking and if unable to attend at the time and place appointed, he shall appoint some other person to attend in his behalf.

Notice to sheriff

(3) The clerk shall notify the sheriff in writing of the time and place fixed for the selection of the panel, at least twenty-four hours prior to the time so fixed.

Procedure prior to selecting panel

(4) Prior to the time fixed for the selection of the panel, the clerk, pursuant to the judge's appointment mentioned in subsection (2), shall write the name of each person speaking the English language, the French language or both languages, named in the list or supplementary list returned to him by the sheriff, together with the person's address and occupation, upon a card or piece of paper in a separate envelope and seal it, each envelope being of uniform size and shape and without markings of any kind.

Separation of the names of French speaking and English speaking persons

(5) The clerk shall place the envelopes mentioned in subsection (4) containing the names of French speaking persons in one container and shall place the envelopes containing the names of English speaking persons in a separate container and shall ensure that the contents of each container are not mixed with each other.

Selection of panel

(6) At the time appointed for selection of the panel, the judge or the person appointed to act in his behalf and the sheriff shall attend at the place appointed, whereupon the clerk shall cause all the envelopes containing the names of persons on the list who speak the language set out in the judge's direction made pursuant to subsection (2) to be thoroughly shuffled in the presence of the judge or his appointee and in the presence of the sheriff, and the sheriff shall draw from the container a number of envelopes corresponding to the number of jurors required as certified by the clerk; the envelopes so drawn shall be opened by the sheriff and the names contained therein shall be placed on the panel list.

(7) If, at the time the panel is selected or at any time thereafter, the clerk is of the opinion that the number of jurors so selected will not be sufficient

(a) by reason of the selection of names of persons who
(i) are exempt from service as jurors, or
(ii) are entitled to be excused therefrom, or

(b) because the list did not contain sufficient French speaking or English speaking prospective jurors to make up a French speaking or English speaking jury panel,

he shall so certify and shall further certify to the additional number that in his opinion is necessary and shall,

(c) in accordance with the requirements of this section, make a second drawing and add the names contained in the envelopes so drawn to the panel list, or

(d) refer the matter to the judge with a request that the judge vary his direction as to the panel being French speaking or English speaking, as the case may be, at which time the judge may make such order as he deems appropriate.

Third drawing

(8) A third drawing or as many as are required may be made in accordance with the provisions of this section.

Performance of duties of clerk or sheriff in certain cases

(9) Where the same person performs the duties of sheriff and clerk or where the sheriff or clerk is not available by reason of illness or other cause, the judge shall appoint a person employed in the office of the sheriff or clerk, or, if such person is not available, a territorial judge or justice of the peace, to perform the duties of sheriff or clerk as the case may be.

Certification by judge

(10) The judge or his appointee shall certify as to his attendance at the selection of the panel and as to the regularity of the proceedings thereat.

Custody of certificates

(11) All certificates required in accordance with this section shall be retained in the custody of the clerk. R.O., c.55, s.14; 1965(2nd), c.6, s.2; 1969(3rd), c.5, s.3; 1978(2nd), c.16, Sched. B.

Proceedings after selection of panel

14. Upon completion of the panel list, the clerk shall submit the same to the judge, who may remove from the list the names of any persons who, in his opinion, would suffer undue hardship or serious inconvenience were they to be called upon to serve as jurors, and immediately thereafter shall certify the list as revised by him and return the same to the clerk, who shall forthwith issue to the sheriff a precept, in Form B, requiring the sheriff to summon the persons named on the panel list to attend the Court at the time and place fixed for the commencement of the sittings, and shall deliver the same to the sheriff at least ten days prior to the time so fixed. R.O., c.55, s.15.

Summoning of jurors

15. (1) Upon receipt of the precept referred to in section 14, the sheriff shall summon each person named on the panel list by serving upon him or leaving with a responsible member of his household a written summons in Form C.

Hardship

(2) When serving a summons upon any person the sheriff shall ascertain or attempt to ascertain whether that person's service as a juror will inflict upon him undue hardship or serious inconvenience, and if in the opinion of the sheriff such hardship or inconvenience is likely to result he shall report the same to the clerk.

Failure of sheriff to serve summons

(3) The sheriff is not guilty of a breach of duty by reason only that he fails to serve with a summons any person whose name appears on the panel list, if his failure to serve that person is due to a cause over which he has no control. R.O., c.55, s.16.

Return by sheriff

16. The sheriff shall, on or before the commencement of the sittings of the Court, deliver to the clerk the precept referred to in section 14, together with a return showing his action thereon and listing the names of persons requesting to be excused from service. R.O., c.55, s.17.

SELECTION OF JURORS FROM THE PANEL

Procedure prior to trial

17. The sheriff shall write the name, address and occupation of each person who has been summoned by him and who is not excused from serving as a juror on a separate card or piece of paper, each of which shall be of a uniform size, and shall place the cards in a suitable container and deliver it to the clerk. R.O., c.55, s.18.

Selection of individual jurors

18. (1) Immediately prior to the commencement of each trial for which a jury is required, the clerk shall, in open Court, cause the container to be shaken and the cards or pieces of paper therein thoroughly mixed, and shall then draw out the cards or pieces of paper one at a time, shaking the container after each drawing, and shall continue to draw out such cards or pieces of paper so long as it is necessary to do so in order to obtain a complete jury.

Names selected

(2) The cards selected bearing the names of persons subsequently sworn as jurors shall be kept apart until the verdict is given or the jury is dismissed or discharged and shall then be returned to the container, unless no other action or proceeding remains to be tried by a jury at that sittings of the Court. R.O., c.55, s.19; 1965(2nd), c.6, s.3.

CHALLENGES IN CIVIL MATTERS

Challenges for cause

19. (1) A party to a civil action may, at any time before a person whose name has been selected pursuant to section 18 is sworn, challenge that person for cause.

Idem

(2) Where a challenge is exercised pursuant to subsection (1), the judge may, in his direction, allow the challenge or direct that the person so challenged by sworn.

(3) Each side prosecuting or defending an action may exercise not more than three peremptory challenges that, when exercised, may not be withdrawn. R.O., c.55, s.20. Peremptory challenges

SWEARING OF JURORS

20. Where a person whose name is selected pursuant to section 18 is not challenged or is challenged but the challenge is disallowed, as the case may be, the clerk shall swear that person and when sworn that person shall be a juror for the trial of the action. R.O., c.55, s.21. Swearing of jurors

GENERAL

21. The judge may for a good cause, excuse from service as a juror any person who has been summoned but has not been sworn. R.O., c.55, s.22. Judge may excuse

22. Where at the end of a trial of any action the number of jurors in attendance is less than the number required, or is so reduced for any reason that a full jury cannot be sworn, the judge may, upon application by any party to the action, direct the sheriff to summon such other qualified persons as are needed and can be found and to add their names to the panel. R.O., c.55, s.23. "Tales de circumstantibus"

23. If at any time during the sittings of the Court it appears to the judge that the services of any person as a juror will not be needed, he may order that person to be discharged. R.O., c.55, s.24. Jurors not needed

INSPECTION BY JURY

24. Where, during the trial of an action before a jury, it appears to the judge that a view by the jury of any place or any real or personal property in question is necessary or desirable in order that the jury may better understand the evidence, the judge may, at any time before a verdict is returned, order such view by the jury, on such terms as to costs as to him seems just, and the order so made shall contain directions to the sheriff as to the manner in which and the persons by whom the place or property in question shall be shown to the jury, and shall contain any other direction to the sheriff that the judge sees fit to make. R.O., c.55, s.25. Inspection by jury

VERDICT

25. (1) The jury for the trial of an action shall consist of six persons, any five of whom may return a verdict or answer questions submitted to them by the judge. Verdict

(2) Where more than one question is submitted to the jury in any action, it is not necessary for the same five jurors to agree upon each answer. R.O., c.55, s.26. Answer to question

Special verdict

26. Subject to subsection 7(1) of the Defamation Act, in the absence of any direction by the judge the jury may return a general or special verdict, but shall return a special verdict if the judge so directs and shall not return a general verdict if the judge directs them not to do so; the judge may direct the jury to answer any questions of fact submitted by him, in which case the jury shall answer any such questions and the answers thereto shall constitute a special verdict. R.O., c.55, s.27; 1985(1), c.4, s.9.

Impeaching verdict

27. Subject to section 19, failure to observe any direction in this Act respecting the qualification, exemption or excusal of jurors, the compilation and preparation of lists for the purpose of this Act, the form of such lists or any other requirements with respect thereof, the summoning of jurors or the selection or formation of the panel is not a ground for impeaching the verdict or answers given by a jury in any action. R.O., c.55, s.28; 1985(1), c.4, s.9.

ATTENDANCE OF JURORS

Illness of juror

30. If during the trial of an action a member of the jury becomes ill, the judge may, in his discretion, direct that the trial shall proceed without him and the verdict of the remaining five jurors, if unanimous, shall be valid. R.O., c.55, s.29.

Necessities of jury

31. (1) No jury shall be kept without meat, drink or other reasonable comfort while it is considering its verdict.

Food and lodging costs

(2) Where, during the trial of an action, the judge directs that the jury shall not be allowed to separate, the sheriff shall provide such food and lodgings as he considers proper, the cost thereof as certified by him to be included as part of the costs of the jury. R.O., c.55, s.30.

Failure to obey summons

32. Where a person who is summoned to appear for service as a juror, fails to obey the summons or fails to answer to his or her name when called by the clerk, the judge may impose a fine not less than twenty-five dollars and not exceeding two hundred dollars. R.O., c.55, s.31.

Breach of secrecy by juror

33. Every person shall, in respect of the trial of any action or proceeding in which he serves or has served as a juror, well and truly keep secret the Queen's counsel, his own and that of his fellow jurors, and any juror who divulges any such secret is guilty of an offence and is liable on summary conviction to a fine not exceeding five hundred dollars, or to imprisonment for a term not exceeding two months, or to both fine and imprisonment. R.O., c.55, s.32.

Jurors' fees and allowances

34. The Commissioner may make regulations respecting the fees and allowances payable to jurors, and in the absence of such regulations the fees and allowances payable are those specified in the Rules of Court. R.O., c.55, s.33.

FOOTNOTES

1. R.S.N.W.T. 1974, c.J-2

2. *Hansard*, Legislative Assembly of the Northwest Territories, 7th Session, 10th Assembly, pp. 1119; 832.

3. *Hansard*, Legislative Assembly of the Northwest Territories, 8th Session, 10th Assembly, p. 249.

4. Holdsworth, *A History of English Law*, (7th ed.), vol. I, pp. 312-350. See also Salhany, *Criminal Procedure in Canada*, 4th ed., pp. 272-273; *R. v. Fatt*, [1986] N.W.T.R. 388 at 393.

5. (1670), Freem. K.B. 1, 89 E.R. 2.

6. *Blackstone's Commentaries*, (11th ed.), Vol. III, p. 379.

7. Maloney, "The Challenge to the Retention of Civil Juries" (1974), 8 *Gazette* 166 at 171, as quoted in Law Reform Commission of Saskatchewan, *Tentative Proposals for the Reform of the Jury Act* p. 36.

8. 55-56 Vic. c.29.

9. Taschereau, *The Criminal Code of Canada*, 1893, pp. 771-72.

10. (1919), 32 C.C.C. 394 (S.C.C.), at 396.

11. *Supra*, n.6, Vol. III, p. 360.

12. *Ibid.*, Vol. I, pp. 366-375.

13. R.S.C. 1970, c.C-34.

14. See, e.g., *Alexander v. R.* (1930), 49 Que. K.B. 25, *R. v. Yancey* (1899), 2 C.C.C. 320 (Que. Q.B.).

15. *Supra*, n. 10, at 401.

16. *Ibid.*, at 402-403.

17. *Ibid.*, at 394.

18. (1956), 23 C.R. 1 (S.C.C.).

19. *Ibid.*, at 21-22.

20. 31 Vic. c. 49.

21. 43 Vic. c.25; the amendment to the 1875 *Act* was in 40 Vic. c. 7.

22. 2 Man. L.R. 321.

23. X App. Case 675.

24. R.S.C. 1927 c.142.

25. The six-member jury in the Northwest Territories has been provided for in the *Criminal Code*, as well as in the *Northwest Territories Act*. The Supreme Court of the Northwest Territories has ruled that under the *Charter of Rights* an accused in the Territories is entitled to be tried by a jury of 12. See *R. v. Punch*, [1985] N.W.T.R. 373; *R. v. Fatt*, [1986] N.W.T.R. 388.

26. See generally Jenness, *The Indians of Canada* (Queen's Printer, Ottawa, 1967); also Crowe, *A History of the Original Peoples of Northern Canada* (Queen's University Press, Kingston, Ont., 1974); Hoebel, "Law Ways of Primitive Eskimos", p.677; Journal of Criminal Law and Criminology, March - April 1941, vol. 31, pp. 663-83; van den Steenhoven, Legal Concepts Among the Netsilik Eskimos of Pelly Bay, N.W.T., Department of Indian Affairs, 1959; Research Report on "Caribou Eskimo Law" Report to the Department of Northern Affairs and National Resources. Study of Legal Concepts among Eskimos in some parts of the Keewatin district, N.W.T., in the summer of 1955. The Hague, 1956; Balicki, *The Netsilik Eskimo*, Garden City, New York: Natural History Press American Natural History, 1970.

27. See, e.g., Carswell, "Social Contact Among the Native Peoples of the Northwest Territories in the Pre-Contact Period," (1984), XXII Alberta Law Review 303.

28. The role of the elders in the traditional system of justice among the Inuit is discussed in *R. v. J.N.*, [1986] N.W.T.R. 128 (C.A.).

29. See *R. v. Diabo* (1974), 27 C.C.C. (2d) 411 (Que. C.A.); *R. v. LaForte* (1975), 25 C.C.C. (2d) 75 (Man. C.A.); *R. v. Bradley and Martin* (No. 1) (1973), 23 C.R.N.S. (Ont. H.C.J.); *R. v. Kent, Sinclair and Gode* (1986), 40 Man. R. 160 (C.A.).

30. Enacted by the *Canada Act*, (1982) (U.K.) c.11.

31. See *R. v. O'Rourke* (1882), 1 O.R. 464 (C.A.).

32. R.S.C. 1970, c. 0-2.

33. Schedule B to the *Constitution Act*, n. 31, *supra*.

34. (1986), 27 D.L.R. (4th) 406.

35. *Ibid.*, at 407.

36. (1986), 27 C.C.C. (3d) 158 (Man. Q.B.) at 163-64.

37. (1951), 101 C.C.C. 101 (B.C.C.A.) at 105.

38. With respect to communication or the hint or possibility of communication with outsiders, see also the cases of *R. v. Masuda*, (1953), 106 C.C.C. 122 (B.C.C.A.); *R. v. Mercier*, (1973) 12 C.C.C. (2d) 377 (Que. C.A.); *Bertrand v. The Queen*, (1953), 108 C.C.C. 278 (Que. Q.B.); and *Re Papineau; R. v. Varin*, (1980) 16 C.R. (3d) 56 (Que. S.C.).

39. (1848), 5 Cox C.C. 356.

40. *Ibid.*, at 358.