Northwest Territories Committee on Law Reform

An Act to Amend the Jury Act

eport No. 1

Northwest Territories Canada

Northwest Territories Committee on Law Reform

An Act to Amend the Jury Act

Final Report No. 1

1989

The Honourable Michael A. Ballantyne
Minister of Justice

Dear Sir:

We have the honour of submitting our Final Report on Bill 5-86(1), *An Act to Amend the Jury Act*.

T. David Marshall, J.S.C.,
Chairperson

Geoffrey M. Bickert

Richard Hardy

Laura Nelson

Desmond Brice-Bennett

Richard Spaulding

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INTRODUCTION

In 1986, the Legislative Assembly of the Northwest Territories passed Bill 5-86(1), *An Act to Amend the Jury Act.* This Bill added to the Territorial *Jury Act*[1] the following clause:

> 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]

The Minister of Justice, the Honourable Michael Ballantyne, promised the Assembly that the Amendment would not be declared into force until a thorough analysis had been completed. To this end, the subject of the Amendment was subsequently referred to the Committee on Law Reform as its first project. In June of 1987, the Minister tabled our first Working Paper. In that document, we traced the concept of a jury containing members of two language groups back in history over 600 years. We looked at various methods by which the Amendment could be implemented, at its constitutional validity, and at some of the practical difficulties that must be overcome if implementation is to be a success. We summarized our recommendations as follows:[3]

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.

Our Working Paper was given a wide circulation within the Northwest Territories, and in the rest of Canada. In addition, copies were sent to fellow law reform organizations throughout the Commonwealth. Having considered the responses we received, as well as our own final research, we now present our Final Report.

FOOTNOTES

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

2. The Northwest Territories *Official Languages Act,* S.N.W.T. 1984 (2), c.2., declares the official aboriginal languages of the Territories to be Chipewyan, Cree, Dogrib, Loucheux, North Slavey, South Slavey, and Inuktitut.

3. At p.21 of the Working Paper.

CONSTITUTIONAL ISSUES

In the Working Paper, we expressed the view that the Amendment was validly enacted as being within the legislative competence of the Legislature of the Northwest Territories.[1] None of the comments we have received take issue with this position, and we stand by it. We are, of course, conscious that in implementing the Amendment, care must be taken not to infringe upon the federal power over criminal procedure: this will be dealt with in the section entitled *"Implementation"*.

We do not think that the Amendment conflicts with Bill C-72, the new *Official Languages Act.* Section 14 of that Act declares that

> English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any court.

It has never been suggested that with the implementation of the Amendment, English or French would cease to be used in court. All that is required is the translation of English or French into an aboriginal language. Further, s.83 of that Act provides

> 83.(1) Nothing in this Act abrogates or derogates from any legal or customary right acquired or enjoyed either before or after the coming into force of this Act with respect to any language that is not English or French.
>
> (2) Nothing in this Act shall be interpreted in a manner that is inconsistent with the preservation and enhancement of languages other than English or French.

More specifically, s.97, amending the *Northwest Territories Act,* provides

> 45.2 Nothing in this Part shall be construed as preventing the Commissioner, the Commissioner in Council or the Government of the Territories from granting rights in respect of, or providing services in, English and French or any languages of the aboriginal peoples of Canada, in addition to the rights and services provided for in the ordinance referred to in section 45.1 [The N.W.T. Official Languages Act].

All this indicates that Parliament did not intend to prohibit initiatives such as the Amendment.

We also arrived at the conclusion that the Amendment was not contrary to the provisions of the *Canadian Charter of Rights and Freedoms.*[2] Here, we would like to expand upon our analysis.

To begin, in the Working Paper we noted 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 would be achieved, without giving rise to attack on racial grounds, by making the test purely a linguistic one..."[3] It is now the consensus of the Committee that whether or not the racial qualification offends the Charter, classification on racial grounds should be avoided in Canadian legislation whenever possible. We strongly suggest that the legislation be amended in order to make the test purely linguistic.

In the Working Paper we discussed the validity of the Amendment in light of s.15(1) of the Charter:

> Equality Before and Under Law and Equal Protection and Benefit of Law - Affirmative action programs.
>
> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

We were concerned that the Amendment might be challenged on the grounds that it gives a benefit to aboriginal people of the Northwest Territories not enjoyed by other non-English or French speaking ethnic groups. We now think that there is little chance that the legislation would be struck down *in toto* on this basis, particularly since we continue to believe that trial with a mixed jury should only be with consent of all parties. Surely the way to advance the cause of equality rights is not to attack new benefits. What we think is more likely is that a member of some other ethnic group, or an aboriginal person in another jurisdiction, will claim the same benefits that the Amendment grants to persons in the Northwest Territories speaking an aboriginal language.

We do not think that an action by a person outside of the Northwest Territories would be successful. As previously mentioned, barring Charter considerations, the Amendment is validly enacted within the powers granted to the Northwest Territories by the Parliament of Canada. It was never intended that the Charter should destroy all differences between the Canadian jurisdictions.[4] If such an action succeeded, it would have the effect of allowing the Legislature of the Northwest Territories to legislate for all of Canada. Put this way, we think that the absurdity becomes obvious.

The other possibility, that within the Northwest Territories a person of another language group might seek the same benefits as the Amendment provides for persons speaking an aboriginal language, is one that we regard as more significant, although we tend to believe that such an action would not succeed.

The Supreme Court of Canada recently delivered its first important decision on the application of s.15(1), *The Law Society of British Columbia* v. *Andrews*.[5] McIntyre J. set out the procedure to be followed when legislation is impugned under s.15(1). First, it must be determined whether the distinction drawn by the legislation constitutes "discrimination" within the meaning of s.15. According to McIntyre J.:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Admittedly, the Amendment might be found to discriminate against members of non-aboriginal ethnic groups on this definition. However, s.15(1) is subject to s.15(2):

> (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.

As we mentioned in the Working Paper,[6] the Amendment might be seen as a law aimed at the amelioration of the condition of aboriginal persons vis-a-vis the justice system. The disadvantages they have encountered in their contacts with that system are well known.

According to McIntyre J., "Where discrimination is found a breach of s.15(1) has occurred - and where s.15(2) is not applicable - any justification, any consideration of the reasonableness of the enactment; indeed, any consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s.1". Section 1 of the Charter, of course provides that

> 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.

In a section 1 analysis it should be relevant that aboriginal people are in the majority of the population in the Northwest Territories, and constitute the majority of the persons appearing before the courts; that many people in the communities, including respected elders who would make fine jurors speak only an aboriginal language; that the government of the Northwest Territories has a special commitment to protecting the culture of the aboriginal peoples; that the justice system of the Northwest Territories has extensive experience in working with the aboriginal languages that it does not have with other languages besides English and French. We think that the Amendment meets the requirements of s.1, notwithstanding the "strict proportionality" test established by the Supreme Court of Canada in *R.* v. *Oakes*.[7]

It is possible that further support in applying the Amendment only to aboriginal languages may be found in s.25 of the *Charter*:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Although subparagraphs (a) and (b) only refer to the Royal Proclamation and land claims, the preceding language is more general, and might be held to apply to newly created "rights or freedoms" such as that found in the Amendment.

Finally, even if we are wrong about all this, we are far from believing that applying the Amendment to other languages would be such a disaster as to justify not declaring it into force.

It should also be noted that an argument can be made that the Amendment furthers compliance with s.11(f) of the *Charter*:

> [Any person charged with an offence has the right] except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.

In the United States, the right to trial by jury is given similar constitutional protection in the Sixth Amendment to the U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defence.

The U.S. Supreme Court has held that the right to trial by a jury means the right to a trial by a jury representing a "fair cross section of the community". The Court takes this requirement seriously. For example, in *Taylor* v. *Louisiana*,[8] Taylor, a man, succeeded in reversing his conviction for a very serious offence, because the jury which convicted him was drawn from a panel on which women were grossly under-represented. In the course of the judgment of the Court, Justice White said these very fine words about the jury system, which we think are worth repeating:[9]

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. ... This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to the public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case ... [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.

We believe that there are many places in the Northwest Territories where a jury that does not include unilingual aboriginal persons will not represent a fair cross section of the community. If the Amendment is not implemented, we think that such a jury might be challenged under s.11(f).

FOOTNOTES

1. At pp.12-13 of the Working Paper.
2. *ibid* pp.13-16.
3. *ibid* p.16.
4. *cf R.* v. *Turpin* (1987), 60 C.R. (3d) 63 (Ont. C.A.), at pp.74-75.
5. February 2, 1989, not yet reported.
6. At pp.15-16.
7. [1986] 1 S.C.R. 103.
8. 42 L. Ed. 2d 690 (1975).
9. *ibid*, p.698, [Citations omitted].

IMPLEMENTATION

In the Working Paper, we expressed the point of view that the Amendment could be put into effect without the necessity of changes in federal legislation, through a combination of practice directives by the Supreme Court, and oral agreement amongst the concerned parties and officials. We invited comments on this issue, and our conclusion was not seriously challenged. We still believe that the practice directive method is practical. Obviously we cannot dictate practice directives to the Supreme Court, but we can offer our advice, and express an opinion.

We expressed the opinion in the Working Paper that implementation of the Amendment in any particular case should proceed, to the extent possible, with the consent of all the parties. We think that the justice of this is practically self-evident, and in fact, none of the submissions we received took issue with it. We gave some examples of cases where a mixed jury would be impractical, such as:

- 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.

We expressed the opinion that one method whereby an accused could exercise the option of being tried by an exclusively English or French speaking jury would be to seek an order under what is now Part XVII of the *Code* (the "Language of Accused" provisions), for a trial to be conducted in the English or French language. This would permit the challenge for cause of jurors who did not speak the language of the proceedings pursuant to s.638(1)(f) of the *Code*. A judge may also make an order under Part XVII on her own motion if she is satisfied that such is in the best interests of justice.

As was pointed out in one of the submissions we received, an accused is only entitled to an order under Part XVII if he speaks English or French, or if he can best give testimony in one of those languages. Presumably then, an accused who is himself unilingual in an aboriginal language would not be entitled to an order. Although there would probably be few cases in which a unilingual accused would object to the presence of a unilingual juror, we think that the right to object should be available. We believe that the best method would be a provision in a practice directive that, when the interests of justice require it, a judge may excuse persons who are unilingual in an aboriginal language from sitting as jurors. The Court has a wide latitude in ensuring that a fair trial is conducted, and we think that an order of this kind falls within that latitude.

However, in saying this, we must consider the implications of a recent decision of the Supreme Court of Canada, *Barrow* v. *The Queen*.[1] The circumstances of this case were somewhat unusual. After the accused was arraigned and had entered a plea, the trial judge invited members of the jury panel who felt that they would suffer exceptional hardship from sitting on the jury to step forward and claim exemption from sitting. More important, in respect of the decision of the Supreme Court, he extended this same invitation to those who felt that they would not be able to be impartial between the Crown and the accused.

Those jurors who stepped forward were examined under oath by the judge, outside the earshot of all counsel and the accused. Counsel for the accused raised a mild objection, but the judge continued with the procedure adopted. Many of the potential jurors were in fact excused by the judge after this process. The Supreme Court held, by a majority, that this procedure vitiated the trial. The accused was entitled, pursuant to what is now s.650(1) of the *Code*, to be present in court during the whole of his trial. It was held that for the purposes of s.650(1), the trial had begun. Because the accused had not been able to hear the examinations conducted by the judge, he had not effectively been "present", even though he was in the same courtroom.

The significance of this case for our purposes lies in the response of the majority to the arguments raised by the Crown that the procedure adopted by the judge was either within the inherent powers of the Court, or was validated by s.4(2) of the Nova Scotia *Juries Act*[2] which reads:

> (2) The judge presiding at a session or the Chief Justice may grant to a person exemption from service as a juror at the whole or part of that session upon application by or on behalf of the person.

The majority of the Supreme Court refused to give effect to either of these arguments. It was not within the inherent power of the court to violate s.577(1) over the objection of one of the parties. It was held that s.4(2) applies only to the exemption of prospective jurors on the grounds of hardship, before the trial begins. It is not open to a province (or territory) to legislate as to criminal procedure after a trial has begun. The *Code* set out a detailed process for the selection of an impartial jury, including the provision that partiality is to be tried by a jury of two, not by the judge.

We do not believe that the *Barrow* decision affects the validity of what we are proposing. The practice directive we have in mind would not conflict with the *Criminal Code*. It is undoubtedly within the power of the Territories to set the qualifications for jurors. We believe that it is within the inherent power of the court to deal with the rare circumstances where these qualifications have the potential to do injustice. The real problem in *Barrow* was the examination by the trial judge of the potential jurors after the plea, out of the hearing of either the Crown or the accused. We certainly do not endorse this. We envisage the decision as to whether there will be a jury including persons who only speak an aboriginal language being made at a pre-trial hearing. If it is decided not to have such a jury, jurors who do not speak English or French would be excused either before trial, or after stepping forward in open court, genuinely in the presence of counsel and the accused. *Barrow*, however, does illustrate the difficulties that can arise when a procedure that is not specifically authorized by the *Criminal Code* is attempted in court. For these reasons, we would think it advisable for accused persons who do not wish to be tried by a jury containing members who only speak an aboriginal language to seek an order under Part XVII whenever such an order is available.

FOOTNOTES

1. (1987), 61 C.R. (3d) 308.

2. S.N.S. 1969, c.12.

AN INTERPRETER IN THE JURY ROOM?

In the Working Paper, we deliberately refrained from expressing an opinion as to whether in a case with a mixed jury an interpreter should be permitted to enter the jury room to translate between those jurors who only speak an aboriginal language and the others. This is an area of considerable difficulty, and one where we hoped to profit by the submissions of our readers.

Section 647 of the *Criminal Code* does not expressly permit the presence of an interpreter under these circumstances, but it does not expressly forbid it, either. As we pointed out in the Working Paper, many of the cases where trials have been vitiated because of a thirteenth person in the jury room involved capital murder trials under sections of the *Criminal Code* that have now been repealed. Obviously, with a life at stake, the courts could not tolerate busybodies interfering with a jury, or even the appearance of such interference. We commented: "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 offer no comments or other influence." On the other hand, we mentioned that we had found no evidence that interpreters had ever been permitted to enter the jury room in other jurisdictions that had employed a mixed jury system. This suggests that such entrance would be regarded as radical and unprecedented, and would likely be challenged legally.

We received mixed comments on this issue. Perhaps not surprisingly professional interpreters tended to favour allowing the interpreter to enter the jury room. The comments from lawyers were more cautious. Professor Don Stuart, Editor of the Criminal Reports and one of Canada's leading criminal law academics, thought "There doesn't seem to be another workable alternative," and suggested that the interpreter have to "make a most solemn and open declaration in court about not interfering with the jury." However, another lawyer called the presence of interpreters during jury deliberations an "extraordinary measure," and suggested a "cautious approach to any proposed extraordinary procedures ... unless there is a clear case to be made that such action is necessary." Both of the trial judges who responded expressed considerable reservations on this point. One thought that "a translator should not be allowed into the jury room during deliberations except in the most unusual situations." The other referred to "the problem of the need for an interpreter in the jury room to permit the jurors to communicate between themselves ... my immediate reaction was that this is wrong in principle."

Both of these learned gentlemen pointed out that the provisions of the *Criminal Code* forbidding the disclosure of a jury's deliberations apply only to jurors, not to other persons such as interpreters. One raised the possibility that the interpreter could be questioned about the deliberations in an attempt to overturn the verdict. Any statement made by the interpreter would probably be rejected by the courts,[1] but the situation would be embarrassing. He remarked: "Although a translator who divulges what takes place may be in contempt of court I think that this is a cumbersome way of dealing with the issue." The other judge commented: "It may well be that if the interpreter is sworn to secrecy and a separate offence is created to deal with breach of that secrecy the proposal may find favour."

This obvious lack of enthusiasm on the part of the only trial judges to respond to our Working Paper gives us pause. It indicates to us that if the right of an interpreter to enter the jury room is not placed on a firmer foundation than a practice directive or a Rule of Court, it may be struck down by a court.

Although we have premised the consent of all parties as being an essential component of a trial by a mixed jury, it is far from inconceivable that a losing party could have second thoughts about the matter, and raise the issue on appeal. Any legislation on this point regarding a criminal trial would have to be passed by the federal government, not the territorial.

We think that the Amendment can and should be implemented even if the federal government does not see fit to pass such legislation. The mixed juries of the past functioned without the presence of an interpreter during deliberations, and we do not doubt for a moment that the same could be done in the Northwest Territories today. Generally, in any place in the Northwest Territories where a trial with a mixed jury would be held, at least one of the jurors would be bilingual and able to interpret for the others. In fact, it is more likely that all of the members of the jury would be able to speak the aboriginal language, and that no interpretation would be necessary. For all we know, at present many juries may be conducting their deliberations in an aboriginal language, as being the one with which the jurors are most comfortable.

On the other hand, we see certain advantages in permitting the interpreter to enter the jury room. As we noted in the Working Paper, it is arguable that the bilingual jurors, having heard the trial in two languages, will have an advantage over the unilingual jurors, giving their recollections a greater weight or significance than that of the unilingual jurors. One of the interpreters who made a submission raised the points that it is possible that a unilingual juror will be misinformed by a bilingual juror who is acting as interpreter, and that a bilingual juror who is acting as interpreter is doing two things at the same time, and thus may not be taking his or her full part in the deliberations.

Although we are a Law Reform Committee for the Northwest Territories, we have the same right as any other Canadian citizens to recommend a course of action to the federal government. We observed in the Working Paper that any federal changes could be made in the *Northwest Territories Act*, rather than in the *Criminal Code*. We now think, however, that a good case can be made for an amendment to the *Code*, permitting interpreters to enter the jury room anywhere in Canada. We base this upon an interesting discovery that we made during the course of our research.

Many jurisdictions in the United States have passed legislation permitting deaf persons to sit as jurors.[2] Those jurors are kept apprised of the proceedings through the work of a "sign language interpreter" or a "signer" who joins the jury throughout its deliberations to facilitate communication between the deaf jurors and the others. The materials we have looked at indicate that this procedure has been a success, and there is no evidence that the interpreters have tried to influence the jury, or otherwise abused their office.[3]

This leads us to ask, if the provinces or territories choose to pass legislation permitting Canadians who cannot hear, or who only speak a language of the aboriginal people of this country, to sit as jurors, why should there not be a mechanism in the *Criminal Code* to facilitate the communication of those jurors? We are firmly convinced that the larger the pool of potential jurors, the better for the administration of justice, and we support legislation that reflects this conviction.

Notwithstanding, we reiterate that implementation of the Amendment should not be delayed in order to permit the passage of federal legislation. We think that the best approach would be a practice direction giving the trial judge wide discretion to admit an interpreter or not, depending upon the circumstances. The trial judge is best situated to decide in a particular case whether justice is best served by permitting an interpreter to be in the jury room throughout, by barring an interpreter altogether, or by permitting an interpreter to enter only when the jury indicates that it is experiencing difficulties.

FOOTNOTES

1. *R.* v. *Perras* (1974), 18 C.C.C. (2d) 47 (Sask. C.A.).

2. The National Centre for Law and the Deaf in Washington D.C. kindly provided us with materials on this subject, including "Deaf Jurors" (1979), Centre for Jury Studies Newsletter No. 5; Manson, "Jury Selection, The Courts, The Constitution and the Deaf" (1980), 11 Pacific Law Journal 967; and *The People* v. *Guzman* February 17, 1984 (N.Y.S.C.) (unreported).

3. See, in particular, *Guzman, supra* 2, at p.13.

JURY LISTS AND THE DUTIES OF THE SHERIFF

In the Working Paper, we suggested that:[1]

> 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.

However, we also noted that:[2]

> 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 panelists. 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.

It has been represented to us that it would be difficult to maintain the principle of random selection of jurors while gathering lists which indicate linguistic capacity. This is the same problem as we alluded to above. The public documents do not contain enough information to accurately determine linguistic capacity; lists supplied by private organizations are not sufficiently random. It is apparent that simply amending the *Jury Act* to give aboriginal languages the same status as English and French in the compiling of lists would not be satisfactory. Thought should be given to a thorough reform of the *Jury Act*, a project which is beyond the scope of this Report. In the meantime, however, implementation of the Amendment would alleviate a problem with the current system. Many persons are called for jury duty who do not in fact speak English or French with any degree of proficiency but who are fluent in an aboriginal language. At present, many of these persons arrive in court at the scheduled time, sometimes at considerable personal inconvenience, and are immediately told that they cannot sit as jurors and may go home. Under the Amendment, they would be able to serve.

We strongly recommend, however, that in implementing the Amendment, careful attention be paid to the needs of the Sheriff's Office. The Sheriff has serious responsibilities in dealing with the queries of prospective jurors and in providing for the comfort and security of the jury. Care must be taken that he has adequate resources at his disposal to meet the needs of the jurors who do not speak English or French.

FOOTNOTES

1. p.19.

2. p.11.

LANGUAGE AND TRANSLATION

In the Working Paper, we were strongly of the opinion that implementation of the Amendment should not be delayed in order to permit the upgrading of resources available for courtroom interpreting. We said:[1]

> 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.
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> ...
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> 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.
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> ...
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> 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.

Our opinon has not changed. We are happy to report though, that considerable progress has been made in the area of courtroom interpreting since we wrote the Working Paper. Recently a training program for legal interpreters was held in the Northwest Territories that is believed to be the first of its kind in Canada, and possibly in North America. We think that the progress that has been made is commendable, and urge that the further upgrading of legal interpreting be a priority for the Territorial Government.

Notwithstanding, we reiterate that there is no fundamental difference between interpreting aboriginal languages into a European language for the benefit of lawyers and judges, which has always been accepted in the Northwest Territories, and interpretation of a European language into an aboriginal language for the benefit of jurors, which would take place under the Amendment. The improvements in the quality of interpretation that have been made, and that must continue to be made, are for the benefit of the system as a whole, and not just for the implementation of the Amendment, which is only one small part of the entire administration of justice.

FOOTNOTES

1. At p.20.