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THE INTEGRATION OF THE FRENCH AND ENGLISH LANGUAGES INTO THE JUSTICE SYSTEM IN NEW BRUNSWICK

par John P. BARRY, c.r.*

The Province of New Brunswick has been in a unique situation within the Canadian Federation since Confederation concerning the respective percentages of the first language of its citizens. Presently in excess of one-third of the citizens of New Brunswick have French as their first language. The predominant language has always been English and it has been the working language of government and of the courts until a few years ago. It is still fair to say that it is the predominant language.

The francophone community began to assert their rights with respect to equality of language after the election of the government of Premier Louis J. Robichaud in 1960. In 1969 the Provincial Legislature passed the *Official Languages of New Brunswick Act*, Chapter 0-1, R.S.N.B. 1973 and Amendments thereto. The Act stated that both French and English were official languages of New Brunswick for all purposes to which the authority of the Legislature of New Brunswick extended and that they possessed and enjoyed equality of status and equal rights and privileges as to their use.

Following the proclamation of that statute, steady, albeit to the activists in the francophone community, slow progress was made to implement the principles of the law within the life of the citizens of New Brunswick.

Within the judicial processes of New Brunswick, Section 13 of the *Official Languages Act* stipulated the following:

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Conférence prononcée à la réunion conjointe des conseils des divisions du Québec et de l'Ontario de l'Association du Barreau canadien tenue les 4 et 5 juin 1982 au Mont Ste-Marie, Québec.

- “13(1) Subject to section 15, in any proceeding before a court, any person appearing or giving evidence may be heard in the official language of his choice and such choice is not to place that person at any disadvantage.
- 13(2) Subject to subsection (1), when
- (a) requested by one party, and
 - (b) the court agrees that the proceedings can effectively be so conducted, the court may order that the proceedings be conducted totally or partially in one of the official languages.”

While the legal effect of this section was to give equal status to the French language and English language before the courts, in practice the vast majority of all legal documents continued to be drawn in English and the majority of trials were held in English. There were a number of reasons for this, the most predominant being the fact that the bar was predominantly English and as late as 1980 was over 89% unilingual English with the balance being bilingual French. In addition the bilingual members of the bar had all received their legal education in the English language and felt more comfortable practising their profession in that language. In addition the members of the judiciary, although equally balanced on a percentage of population basis between the English and the French communities, also were more comfortable handling trials and delivering judgments in the English language. There was no marked impetus within the legal community itself for any change in the “status quo”.

The University of Moncton, which is New Brunswick's French language university, however, instituted a lobby to open a faculty of law on their campus and were subsequently successful in obtaining the political support of both the incumbent Progressive Conservative Government and the Official Liberal Opposition in New Brunswick to the formation of a faculty of law in which all courses would be taught in the French language. This was a formidable task in view of the fact it would be a French common-law law school because of the fact that all materials and the texts at that time were English. The law school graduated its first class in the spring of 1981.

The Barristers' Society of New Brunswick recognized, with the advent of unilingual French practitioners coming into the mainstream of the New Brunswick legal system, eventual problems would be anticipated. In order to identify these problems associated with the practice of law in French and English in New Brunswick and to create the working tools necessary to overcome these problems, and without friction or animosity to achieve the integration of both official languages in the practice of law, a committee on the integration of the two official languages in the practice of law was formed. The committee was constituted in February of 1980. John P. Barry, Q.C. of

Saint John was appointed Chairman, while Dean Michel Bastarache of the University of Moncton Law School was appointed Vice-Chairman.

The problems facing the committee were unique and in support of this I quote a passage from the Committee's Final Report delivered in the fall of 1981:

"At present, throughout New Brunswick, the great majority of private documents are prepared in English. This situation results from the history of legal education in this province and the lack of precedents in the French Language; it is also the result of past legislation in this area. However, an increase in the use of French has been noted in the last two years and the possibility has to be faced that, in a very short time, unilingual practitioners will be hampered by the existence of documents in French.

The fact that no judicial district in New Brunswick is totally unilingual, but has to deal with a certain percentage of residents speaking both official languages, precluded the option of unilingual and bilingual districts such as those existing in Belgium and Switzerland. The concept assumes that residents of bilingual districts, or at least the lawyers practising there, are bilingual. This assumption at present is without foundation in New Brunswick."

The report itself is a 109 page document including appendices, and a total of 48 recommendations were submitted to the Council of the Barristers' Society of New Brunswick in September of 1981. The published report was then distributed to all members of the New Brunswick Bar. The members were given the period of 4 months to review the report, and to submit individual comments to the Council of The Barristers' Society.

In addition, each of the 7 local law societies within the province held a series of meetings with their members, reviewing the report, and each of the societies submitted their own comments, criticisms and recommendations on the report.

After receipt of numerous lengthy submissions, the Council of The Barristers' Society, in a special meeting held in April of 1982, dealt with the 48 recommendations within the report. Of those recommendations, 39 were adopted completely by the Society as policy and were subsequently submitted to the Provincial government through the offices of the Premier, the Minister of Justice and the Minister of Education.

With respect to the remaining 9 recommendations, one was rejected completely by the Council, a second was modified and the remaining 7 were referred to a special committee of the Council for further discussion with respect to same.

The recommendation that was rejected completely by the Council was the aspect dealing with the Charter of Rights. At that time the Proposed Charter of Rights with respect to languages in New Brunswick was before

the public but had not been adopted. Those sections of the Charter dealing with the official languages of Canada which effect New Brunswick are as follows:

1. "Section 16(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick."
2. "Section 19(2) Either English or French may be used by any person in, or in any pleading in a process issuing from, any court of New Brunswick."

The committee was concerned about the effect of Section 19(2). The concern of the committee was that the section, as subsequently passed, gave priority to the language rights of the lawyers, not necessarily those of the parties. It was the opinion of the committee that a great number of trials would be conducted bilingually in French speaking areas of New Brunswick although the matter of language would hardly ever arise in other districts. The committee made representations directly to the Premier of New Brunswick in February of 1981 pointing out that the amendments took away from the court the right to decide the language of trial and provided for counsel to address the court through translation. It was the concern of the committee on a practical basis that almost all trials would continue to be in English. It was the view of the committee that until both the courts and the practising bar of New Brunswick were completely bilingual, the practical fact of the amendment to the Charter of Rights would be a detrimental effect with respect to equality of language within New Brunswick.

The committee received a reply in March of 1981 from the Premier of New Brunswick, The Honourable Richard B. Hatfield, basically rejecting their request for change, with the Premier stating in part:

"I do believe, though, that the difficulties that can possibly arise through the removal of a trial judge's discretion with respect to language of trial are in reality only applicable in the case of those who would attempt to take advantage of Section 19(2) of the Charter for mischievous purposes. I cannot believe that that will represent a serious impediment to the workings of the court process generally in this province, nor do I believe that the potential for mischief by a very few should stand in the way of the establishment of an important principle as embodied in the provision."

The Integration Committee subsequently requested that the Barristers' Society of New Brunswick take the leadership to induce the government of the province to suggest changes both in the Charter of Rights and the *Official Languages Act* to avoid what they anticipated would be abuse of the situation in French speaking areas. The Council of the Society rejected this recommendation.

A second recommendation of the committee was recommendation 45 which read:

“45. All students admitted to the Bar as of 1988 shall be required to pass a proficiency test in both official languages. This test will serve to ensure that all new practitioners can read and write both official languages and have a passive understanding of conversation in the other official language.”

This recommendation was the most controversial in the report and drew a great deal of publicity both on a provincial and national basis. The intent of the committee was to create some incentive for the lawyers of New Brunswick if they were to become effectively bilingual in the future.

After a lengthy debate in the provincial council the recommendation was amended to read as follows:

“WHEREAS the Barristers’ Society of New Brunswick foresees that it may become a requirement in the practice of law in New Brunswick to be bilingual,

NOW therefore the Barristers’ Society of New Brunswick considered that it is a desirable objective that as soon as possible all persons admitted to the Society can read and write both official languages and have a passive understanding of conversation in the other official language and urges all institutions involved in the educational system to adopt appropriate measures to achieve that objective.”

The recommendations which were finally adopted by the Barristers’ Society of New Brunswick were as follows:

1. That any Civil Service position that requires a bilingual person shall be subject in future to objective testing, to determine in each case minimum language skills according to a specific standard, the highest level of linguistic ability being that of legal translators and interpreters.
2. The *Standard Form of Conveyances Act* shall be promulgated with regulations prescribing standard forms for residential land transfer, mortgages and leases; these forms shall be printed in both official languages, in two columns, and such forms shall be completed in either language or both, by the party making use of them.
3. The use of the short forms shall be mandatory.
4. Indexes of registry records, filing instructions and notices shall be in both official languages throughout New Brunswick.
5. All registry offices shall include bilingual personnel adequate for the provision of services of equal quality in New Brunswick in the two official languages without recourse to translators or interpreters.

6. The *Insurance Act*, *Consumer Product Warranty and Liability Act*, *Conditional Sales Act*, and all other enabling statutes of this kind shall be amended to provide for the mandatory use of standard form contracts issued in both official languages.
7. All court personnel shall have sufficient knowledge of the language of the proceedings.
8. All judges to be appointed for the districts of Bathurst, Campbellton and Edmundston shall be bilingual at the time of their appointment. A sufficient number of bilingual judges shall be available in other judicial districts.
9. The offices of clerk and crown prosecutor in every judicial district shall be able to provide services directly, at all times, in both official languages.
10. In a criminal action, the Crown shall appoint a prosecutor able to act without the services of an interpreter.
11. Bilingual duty counsel shall be available at all times to serve the public in both languages in all districts. Availability signifies a counsel present in the Court or on call. The Crown prosecutor is responsible for advising Legal Aid, N.B., of the need to ensure the presence of a duty counsel capable of representing the accused in his own language.
12. The Court of Appeal shall at all times consist of at least three bilingual judges.
15. Judgment shall be rendered in the language of the proceedings.
16. All appeals shall be made in the language of the proceeding unless otherwise directed by the Court of Appeal.
17. The language of the proceedings shall be the choice of the accused.
18. Responsibility to advise the accused of his right to have a trial in the language of his choice shall be incumbent on persons having first contact with the accused, i.e. the peace officer. This duty shall include the obligation to ensure that necessary authorities (Crown, Court and Legal Aid) be advised of the choice of language.
19. The accused shall select the language of proceedings upon his first appearance before the Court. He may alter his choice, but only prior to the beginning of proceedings and upon reasonable notice to the Crown and the Court.
20. When there are more than one accused and differing choices of language, separate trials, whenever possible, shall be held.
21. When separate trials cannot be held, the rights of the accused shall be respected with a bilingual Court and translation available to all parties. In this case, one language shall be designated for the proceedings and both languages may be used.

22. The plaintiff shall have the initial choice of the language of the proceedings and he shall indicate on the original process the desired language.
23. The parties to the action shall, however, be free to agree on either of the official languages as the language of the proceedings.
24. If the defendant does not agree with the choice of language he may apply to the Court, within 20 days of service of the writ or notice of action, to obtain a change in the language of the proceedings. This application may be made in writing or in person, by the defendant; he shall therein explain why he wishes a change. This application may be in either language and by notice to the plaintiff; it will operate as stay of proceedings. Copy of the notice is to accompany the first defence plea filed.
25. The judge shall decide on the change on the basis of the following criteria:
 - a) language of parties themselves and their knowledge of the other language,
 - b) language of witnesses,
 - c) documentary evidence.Where the equities are equal, the judge shall favour the language of the defendant. His decision on this matter shall be final.
26. When one of the parties involved is a major corporation, i.e. any company that does business throughout the province or in a large part of the province, or in a bilingual region of the province, this party shall be presumed to have facility in both official languages.
27. A witness shall have the right to testify in his own language, when a trial takes place in the other language. When the trial takes place in his language, but the witness wishes to testify in the other language, he may do so with the consent of the presiding judge.
28. Questions may be asked in the language used by the witness but consecutive interpretation shall be employed with each question and then each answer in direct and cross-examination. Cost of such interpreters shall be borne by the Province. If the court and all lawyers are bilingual, the witness is to be examined in his chosen language without translation.
29. All testimonies and depositions shall be recorded in the language in which they were given. A translation may be included but shall not be a part of the official transcript. Any party requesting translation of transcripts shall bear the cost of the translation.
30. Objections to translation may be made by a lawyer and shall be recorded; the judge shall rule on validity of the translation after having assured himself thereof.

31. In all situations where interpretation is allowed, consecutive interpretation shall be used.
32. All documents relating to a criminal or civil process shall be drawn up in the language of the proceedings.
33. All documents submitted to the Court shall be in the language in which they were drawn up. The judge shall decide what documents need to be translated or summarized in the other official language for the purpose of the trial.
34. All boards and tribunals shall have a sufficient number of members fluent in both languages to form a functionally bilingual panel.
35. All boards and tribunals shall offer information and materials in both official languages without the necessity of translation.
36. Language training programs shall be created for government employees in the administration of justice. This training should especially deal with legal terminology.
37. The provincial government shall make a conscious effort to ensure that all offices of the Department of Justice, at the managerial and clerical level, which deal, closely with the public, shall be perfectly bilingual.
38. The provincial government shall provide for translation of judgments, recognizing thereby their importance for legal education and for the development of legal practice in both official languages.
39. All legal interpreters shall be required to take a course of training in legal terminology and submit to an examination certifying their competence.
40. The Barristers' Society of New Brunswick in collaboration with the translation bureau of the Department of Supply and Services shall prepare and implement a series of guidelines to furnish interpreters with the necessary information concerning cases in which their services will be required, thus permitting an adequate preparation on their part.
41. A two-year plan shall be prepared for the achievement of a truly bilingual Society. This plan should deal with the following:
 - a) bilingual competence of the staff of the Society
 - b) in both official languages courses leading to Bar Admission
 - c) availability of written materials from the Society in both official languages
 - d) bilingualism at general meetings of the Society
 - e) a bilingual continuing legal education program
42. The Society shall implement the project of preparing a loose-leaf practitioner's manual embodying forms, terminology and commentary in both official languages.

43. The Society shall provide, through its CLE program, an opportunity for all its members to obtain some proficiency in both official languages as far as essential terminology is concerned.
44. Special advocacy courses shall be created to provide bilingual instruction in matters of litigation.
45. "WHEREAS the Barristers' Society of New Brunswick foresees that it may become a requirement in the practice of law in New Brunswick to be bilingual,
NOW therefore the Barristers' Society of New Brunswick considered that it is a desirable objective that as soon as possible all persons admitted to the Society can read and write both official languages and have a passive understanding of conversation in the other official language and urges all institutions involved in the educational system to adopt appropriate measures to achieve that objective."
46. The Society shall provide for opportunities for discussion of this matter among its members, so as to ensure that all members may be aware of the possibilities of conflict and the necessity for flexibility on the part of all.
47. The refusal of documents or correspondence because of language shall be considered a breach of professional conduct calling for disciplinary action.

The leadership which the Barristers' Society of New Brunswick took in the matter was emphasized in the spring of 1982 when the official languages branch of the Cabinet Secretariat released a White Paper entitled "Towards Equality of The Official Languages in New Brunswick", a report of the task force on official languages. The report itself consisted of extensive study, in excess of 1 000 pages, dealing with all aspects of the status of the two official languages within the Province of New Brunswick. The report contained specific recommendations with respect to the implementation of a linguistic policy with the aspects of institutional bilingualism within the civil service and within the administrative structure of various departments and agencies. It deals specifically with the Departments of Education and Justice, municipal governments, professional associations and the private sector. Specific recommendations are made with respect to a reorientation of the linguistic policy and a reorientation of the judicial framework. For the purposes of this paper, referring to same, we would point out that within the justice system it specifically provides similar recommendations that were contained in the Integration Committee Report with respect to banks, financial institutions and other large corporations being required to issue standard form contracts in both official languages. It includes insurance contracts, chattel mortgages, conditional sales agreements, automobile leasing agreements and other docu-

ments of a similar nature. It is one of the recommendations which the government has indicated will probably be into place by January of 1984.

The Provincial Government Task Report adopted many of the recommendations contained in the Barristers' Society Integration Report in its summary on justice in New Brunswick, the committee report at page 63 stated:

"In conclusion, we wish simply to say that justice is very slow in comparison with other sectors in applying the principle of equality of the official languages. This sector should be governed much more strictly, it is true, but legislative measures and regulatory provisions should be accompanied by a program of information and support for the various enterprises which promote the practice of law in French."

One may ask why was it necessary that the Barristers' Society of New Brunswick adopt these recommendations within such a small province. The Committee was created because, as earlier indicated, inequality of language services for the francophone community and because of the various discrepancies which the committee unveiled in their studies. These discrepancies would be too numerous to elicit in detail. Among one of the examples was the situation at the Provincial Court in Moncton where the community itself is over 50% francophone yet in 1979, 1 735 informations were preferred in English, 376 in French and 57 were of a bilingual nature.

The situation at the Court of Appeal of New Brunswick was even more marked. Only 2% of the cases over the past number of years before the court were argued in French and had the judgments delivered in the French language.

A number of the committee's recommendations caused some personal concern with lawyers themselves. Among those was the factor of judicial appointment and the factor of right to counsel of your choice. The committee had recommended that all judges to be appointed for the judicial districts of Bathurst, Campbellton, Edmundston and Grand Falls, areas whose population is in excess of 75% French, be bilingual at the time of their appointment. It further stated that all judges to be appointed in the district of Moncton should be bilingual or willing to submit to a mandatory course of language training. If unable to pass a linguistic proficiency test within two years of their appointment, be subject to transfer to another district. It further recommended that at least one judge to be appointed in the courts in the districts of Saint John, Fredericton, and New Castle, which are predominantly English, shall be bilingual at the time of the appointment, or, again, submit to the mandatory course of language training and be subject to transfer.

With respect to the question of right to counsel, it was the committee's recommendation that all proceedings in a court hearing shall be in one lan-

guage only and that the lawyers shall address the court in the language of the proceedings. Obviously, unilingual advocates would find themselves at a distinct disadvantage. However, it was the view of the committee that language proficiency should be a professional qualification and that the fundamental rights to be protected were that of the parties to an action and not of officers of the court. This recommendation was not adopted and, obviously, is in conflict with Section 19(2) of the Charter of Rights and Freedoms.

In summary, the bar of New Brunswick has taken a leadership role as a professional association within the province. It is the only one of the 26 professional associations, 19 of which have a monopoly in the practice of their profession, to take this forward step. Carrying the recommendations to fruition now rests with the Society and its membership.