ENGLISH AS A SECOND LANGUAGE PROBLEM
IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

by

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Abstract

A research project was designed to identify and analyze the issues which are involved in guaranteeing the equal protection of the law in Canada with respect to the right to be informed of the right to counsel upon detention or arrest and the right to the assistance of an interpreter in legal proceedings in the case of non-native speakers of English.

A comparative, multidisciplinary study design allowed the differences among social science views, practitioners' commonsensical knowledge, and legal viewpoints as expressed in reported judgements to be identified. Each of the three sources of viewpoints on cross-cultural interrogation and courtroom interaction was examined with a view to determining the range of phenomena recognized. The study did not attempt to evaluate the social science studies on their own terms, measure the distribution of commonsense knowledge among practitioners, or determine the state of the law on any particular point. The goal was rather to compare the breadth of the legal system's vision with that of social scientists and practitioners, in order to determine whether there will be a need to supplement the court's view.

The results suggested that court interpreters vary greatly in their overall competence, including language ability, and in their understanding of what their role is. Training and certification of court interpreters appears to be the only solution which will satisfy the constitutional guarantee of equal protection. Informing the suspect of his right to counsel presents substantial linguistic and cultural problems, only some of which are addressed by the
courts. In legal proceedings, the right to the assistance of an interpreter raises fundamental questions concerning the point at which the right to an interpreter arises and how entitlement is to be determined.

Practical solutions implied by the research include establishing a bilingual courtroom observer program to safeguard against inadequate interpretation going unnoticed; cautioning the suspect as to his right to counsel in his native language rather than in English, perhaps through audio tape recordings; and establishing a combination translation and legal advice center which could be contacted by calling a toll-free telephone number such as 800-ESL-HELP.
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CHAPTER ONE

INTRODUCTION AND METHODOLOGY
The Canadian Charter of Rights and Freedoms (Charter), a part of the new Canadian constitution, poses a challenge to civil libertarians and second-language scholars alike. The Charter establishes rights which require that particular linguistic and communicative actions be performed, and stipulates further that every person, regardless of ethnic origin, receive the equal protection and benefit of the law; but it offers no practical guidelines for determining whether those rights have in fact been implemented in any particular case. Thus it is left to advocates and jurists-- and perhaps applied linguists-- to interpret the meaning of the constitutional guarantees.

The research described herein was undertaken in the belief that the special problems faced by non-native speakers of English (ESL-speakers) and, indeed, all who are not native members of the Western anglophone speech community, warrant special attention if they are to receive the protection intended by Parliament. The courts, left to themselves, will do their best, but the law schools which the judges attended taught them about neither second-language and intercultural communication issues, nor ethnicity and translation and social interaction. The broad aim of the research was to find a way wherein social scientists' theoretical and empirical efforts could be brought to bear on the questions that arise in securing for ESL-speakers the rights which the government of Canada has stated they shall enjoy.

Traditionally, there are two ways in which a court can take into account ancillary matters which bear on the fact-patterns with which the court must deal. One very familiar method is through the use of expert witnesses, individuals who have established credentials in their special areas which allow the court to accept and place some weight on their
opinions regarding issues at bar. As is well known, both sides in a
dispute are likely to tender expert opinion evidence, so that the judge
is faced with the task of comparing and choosing between opposing
professional judgments in areas in which he himself usually has no
background at all. In principle, any issue can be the subject of
experts' testimony, and the opinions of any expert can be countered with
those of another expert (and hence the cynical layman's observation,
"There are no experts").

A second way in which the judge can become cognizant of relevant
facts which are not proved directly through eyewitness testimony or
other evidence, is by means of "judicial notice." Very simply, this
means that the court can accept as not requiring proof in the court the
truth of any proposition which is either common knowledge or
ascertainable through reference to established, reliable sources. For
example, when the researcher once sought to have a traffic charge
dismissed on the ground that every element of the offence had not been
proved by the Crown, arguing that no evidence had been led to show that
the alleged speeding had taken place after sunrise—which was one of the
elements of the offense as contained in the statute—the judge had only
to take judicial notice of the fact that at nine in the morning at that
time of year, the sun has in fact already risen.

What does the concept of common knowledge encompass? Does it say
anything about the linguistic and cultural issues which are involved in
ensuring that ESL-speakers suffer no disadvantage relative to others in
receiving the benefits which the rights speak of? Common knowledge can
be approached both in terms of what it includes as its content, and with
regard to how, and how well, that information is organized. The
operational goal of the present research project was to establish and organize what social scientists have said about the issues of interest, and compare that with what the courts have said. As a kind of check, and also as a possible source of additional insights, the views of various types of practitioners working within the legal system were determined through interviews.

As such, the study is essentially conceptual, but there was a clear intention as well to arrive at the type of analysis which would have practical uses in interpreting the Charter. In the nature of the case, it would be advocates of ESL-speakers' rights who would be most concerned with seeing to it that what is constitutionally guaranteed is delivered. The study aims, then, at providing what could be looked at as a blueprint for action. The primary thrust is to show how social science studies can be used to supplement or perhaps counter legal or common-sensical viewpoints when those viewpoints seem inadequate for protecting the Charter rights of interest.

The Legal Issues

Of overriding importance is s. 15 of the Charter, the equality provision. It states, in subsection 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 origin or ethnic origin, colour, religion, sex, age, or mental or physical disability.

This provision took effect in April, 1985, three years after the rest of the constitution. The reason for this delay was to allow time for revision of statutes which might be in conflict with s. 15. Other
sections of the Charter, as part of the "the law", must of course conform to s. 15 and be applied in accordance with it.

A regrettable shortcoming in s. 15 is that discrimination on the basis of language is not specifically forbidden. Such discrimination is covered by the general provisions of s. 15, but the overall effect is always strengthened when the law is more specific, as in the International Covenant on Civil and Political Rights (International Covenant) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention). On the other hand, one advantage of s. 15 is that it contains in subsection 2 a provision allowing for "affirmative action" where needed:

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.

This subsection is not apparently aimed at allowing for differential interpretation or application of the law in order to achieve the goals contemplated in the statute itself, but it would not be impossible to argue for such use if it could be shown that achieving the overall goal of equality required it. The critical point, however, in linking s. 15 with ESL-speakers is that ethnic origin—it will be argued--does include language.

Two other sections of the Charter pose special problems for ESL-speakers, and the study was designed to describe those problems so that s. 15 can be brought to bear more effectively on them. Both sections deal expressly with interpersonal legal communication. The first one is s. 10, which sets out certain rights which all suspects must be given:
Everyone has the right on arrest or detention
(a) to be informed promptly of the reason
therefore;
(b) to retain and instruct counsel without
delay and to be informed of that right;
... [emphasis added]

It is s. 10(b) which is of prime importance to all suspects, since
having a lawyer's assistance at the time of interrogation is often as
important as having representation in court. Section 11 is also of
interest because it can be compared with the other two statutes named
above. It states, in part:

Any person charged with an offence has
the right
(a) to be informed without unreasonable
delay of the specific offence; ...

The International Covenant has a similar provision, but addresses the
language issue:

In the determination of any criminal charge against
him, everyone shall be entitled to the following minimum
guarantees, in full equality:
(a) To be informed promptly and in detail in a language
which he understands, of the nature and cause of the charge
against him; ... [Part III, Article 14, section 3; emphasis
added]

The same phraseology is found in the European Convention:

Everyone who is arrested shall be informed promptly,
in a language which he understands, of the reasons for
his arrest and of any charge against him [Section I,
Article 5, section 2; emphasis added].

In contrast to these two statutes, we may compare the older Canadian
Bill of Rights, which refers only to "the right to be informed promptly
of the reason for [one's] arrest or detention", and the sixth amendment
of the American constitution, which gives the accused the right "to be
informed of the nature and cause of the accusation." It is
understandable perhaps that the older American and Canadian statutes did
not deal specifically with the language comprehension issue, in contrast to the European and international statutes, but the omission of the language factor in a contemporary statute such as the Charter—in a country which has an official policy of French and English bilingualism—is puzzling, and regrettable. However, what Parliament has failed to provide, the courts may supply. In so doing, they will have to confront this factual question in cases that come before them: How can we know whether a particular suspect was in fact "informed" of this right to hire a lawyer? The present research project is aimed at elucidating the issues which are implied in that question.

The second of the Charter provisions which deals with communication and which must be applied in the light of s. 15, is s. 14:

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

Essentially the same right is found in the International Covenant and the European Convention, the difference being that those two statutes provide that the assistance shall be "free." The Charter does not require that the party or witness be informed of his right, which could pose problems for an ESL-speaker (not to mention someone who speaks no English whatsoever, though in that case, obviously, the Crown or the judge will take steps to ensure that the individual can perform the role which he is destined to play in the proceedings). Of equal or greater importance is the fact that s. 14 says nothing regarding how to determine whether or not the individual does understand or speak the language of the proceedings; what "assistance" may refer to; and who, in law and in fact, is an interpreter. Questions such as these must, therefore, be handled on a case-by-case basis, with the court's rulings
being guided by legal precedent, when available; judicial notice, perhaps; expert opinion evidence, when tendered; and, in the absence of any of the foregoing and possibly also in combination there with, "common sense."

A number of legal questions can be identified. Does the language capacity referred to in s. 14 have two ways of being measured (i.e., either through production or through comprehension); or are there actually two separate though related abilities? If it is the latter, then perhaps the right to the assistance of an interpreter will be lost if it can be shown that the person does either understand or speak the language of the proceedings. Such an interpretation would be difficult to justify since it would amount to reading the section as meaning "neither speaks nor understands," when in fact it refers to understanding or speaking the language.

Another legal question which could be raised is whether speaking and understanding are to be assessed with reference to native-speaker standards. The judge himself, for example, may be satisfied with the individual's ability to function in the courtroom--with the person's (apparent) ability to say what he means and understand what others are saying, with the judge's own ability to make sense of what the individual says; and the party or witness himself may be satisfied with his ability to communicate in English. Is this enough? Is this what was intended by Parliament? Similar legal questions arise in the case of s. 10(b), e.g., who determines whether the suspect has been informed of his right to counsel, and how? Here too the Charter contains no guidelines at all. Is the investigating officer responsible for ascertaining that the suspect understood what he was just told? If so,
how is this to be done? Is it enough that the suspect says—in English—that he understands? How is his understanding later to be proved in court?

Design of the Study

The purpose of the study was to compare three approaches to the ESL and intercultural communication factors which are involved in framing the issues which arise when we ask how equality is to be achieved in (a) informing suspects of their right to hire a lawyer immediately, and (b) providing "the assistance of an interpreter." Below, the method through which each of the perspectives was developed in the study is outlined.

To establish a point of view which could fairly be said to be illustrative of social scientific thinking, a focused review of the literature was conducted. Sought were theoretical and empirical studies which treated topics such as the nature of problems in legal and other translation and interpretation, suspects' comprehension of their Miranda rights in the United States, basic principles of intercultural communication, special problems involving the language of the law, and linguistic and cultural factors in courtroom interaction. The resulting composite viewpoint cut across a number of disciplines, viz., linguistics, anthropology, sociology, psychology, law, and communication.

This was not the customary approach to a survey to the literature since the research project itself would not seek to delve further into empirical questions raised in the literature. In addition, the literature survey would be used in a somewhat general fashion. There
was not attempt to construct a statistically representative survey of social science thing, either. Instead, the researcher selected studies whose foci came closest to the specific phenomena of interest in the present study. The sources themselves were not evaluated and no attempt was made to reconcile differences among them. Indeed, the studies' usefulness in the present research project lies in another direction: alerting us to the widest possible range of problems which should be considered in asking how equality for ESL-speakers can be achieved in implementing the two communication-oriented Charter rights (ss. 10(b) and 14). This related to the study's goal in this way: Courts must make findings of fact in every case to be decided; but how do the courts know which factual questions to ask in the first place? Legal questions can emerge from the same way of looking at the rights.

Establishing a representative legal viewpoint—another of the three viewpoints compared in the study—was straightforward, in that a discrete body of available data existed and could be identified. In this case, there was no sampling at all. Instead an attempt was made to include the entire population, which in this instance is all reported Canadian cases in which ESL or intercultural communication issues—including court interpretation—were mentioned. The technique for identifying the population of cases was to begin with a computer-generated list of reported cases obtained from several databases made up of cases reported in the numerous reporting services. Initially, several hundred seemed to come up, but many were rejected later since they did not actually include any discussion of the relevant issues. The final list of cases was made up of recent decisions, primarily, and included a handful from other Commonwealth jurisdictions which had been
cited in the Canadian decisions. There were very few older cases cited in the recent decisions, probably because communication issues received less attention in the past, and perhaps because the pattern of immigration has changed in recent years. Of course, in the case of s. 10(b) and the issues involved therein, it is only with the proclamation of the Charter that informing suspects of the right to counsel became critical. Here, too, the goal of this part of the research was to ascertain the type of viewpoint which is typical of this discipline or enterprise.

Once more, the difference between the approach taken in this study and that which is more commonly taken needs to be mentioned. In legal analysis, such as the "case comment," the state of the law is looked at and then evaluated, i.e., the legal questions are answered on the basis of case-law precedent. In contrast, in the present study, the survey of decided cases was intended to reveal the range of issues which the court recognizes, and the court's typical approach to them.

The third source of data used in the study consists of the practical, results-oriented "working knowledge" of practitioners working within the legal system broadly defined. The interviewees and their occupations were selected on the basis of the accessibility of the researcher (who was himself trained in law and had worked briefly in a legal capacity in the city in which the research was conducted, Vancouver, Canada). The occupations represented are: social service or immigrant services worker (10 respondents); court interpreter (4); lawyer (3); intercultural communication trainers (2); judges (2); probation officers (2); courtworker program administrator (1); case presenting officer (immigration) (1); and adjudicator (immigration) (1).
A sizeable proportion of the interviewees were themselves bilingual and bicultural, including two of the three lawyers and nearly all of the social service and immigrant services workers (some of whom also act as interpreters in various settings).

In the interviews, respondents were asked to consider the two types of communication events implied in the Charter rights, i.e., being questioned by the police and informed of the right to counsel, and using interpreters in court; and then to comment on what the major problems faced by ESL-speakers might be, in their experience. This general approach was modified somewhat according to the interviewee's particular job, of course. No attempt was made to ensure that all interviewees were asked the same exact questions. Instead, often the researcher asked for examples of communication problems which had come to the interviewee's attention, after which the factors involved were discussed at some length. It did not take long for the interviewees to appreciated what it was the the researcher was interested in, and generally researcher and interviewee more or less worked together in exploring the interviewee's particular knowledge in these areas. After a period of time ranging between thirty minutes and about an hour and a half, it had become clear that no more issues or problems were left undiscussed, at which point the interview was terminated by the researcher.

Generally speaking, the interviewees did not find the research topic either unusual or unimportant. Many commented that they had been concerned about some of the issues, and more than once an interviewee stated that the discussion was enlightening. The two bilingual lawyers took an especially keen interest in the interview, as did others from
non-Western backgrounds. It was the researcher's impression that, as a whole, a body of practical knowledge had indeed been tapped in the interviews. This conglomerate of knowledge would play the part in the study of providing a third viewpoint with which the social science and legal viewpoints could be compared. As will be seen later, this goal seems to have been achieved.
CHAPTER TWO

THE SOCIAL ROLE OF THE INTERPRETER
The phenomenon of interpretation itself, as a topic separate from what the court interpreter does, and how, will be discussed first. This relates specifically to the wording of s. 14: What is an interpreter? While it is customary in the law to view interpretation from a strictly linguistic and non-interactional point of view, the review of the social science literature produced a number of observations which bear directly on interpretation as a social phenomenon. To counter the common linguistic emphasis in conceptualizing interpretation, in this report the social role of the interpreter will be discussed first. The short-range goal here, as in the following chapters, is to identify areas where (a) different answers are given to the questions implied; and/or (b) the same questions are not acknowledged within the three perspectives to be compared (social scientific, practical, and legal). In this report, within each area, the social scientific point of view is presented first, then the practical, and finally the legal.

The Social Science Perspective

To clarify some basic terms at the outset, the person who transfers meaning from one language to another in face-to-face interaction is called an interpreter. In the courtroom setting, and elsewhere, the performance of the act is often called translating; however, in the case of conference interpreters, it may be called interpreting. "Oral translation" is a synonym for interpreting according to Harris (1978), though Gold (1984) feels that "simultaneous translation" and "instantaneous translation" are misnomers and should not be used. The actual differences between the skills used in interpreting and translating (written texts) are not clear. What the
conference interpreter provides is customarily called "simultaneous interpretation," i.e., a "voice-over" translation transmitted through headphones. In legal proceedings such as criminal trials, this is done for the accused by an interpreter sitting nearby, who whispers to the accused. It is usual to refer to this interpreter as the party interpreter. Better known perhaps is the interpreter who translates what the witness says after he has said it (the witness interpreter), and translates questions posed by the lawyers or the judge for the witness. This is referred to as consecutive interpretation or consecutive translation. An ESL-speaker who is an accused needs a party interpreter throughout. (In this report, if no distinction is made in the text, the term ESL-speaker refers to both those who speak English as a second language as well as those who, for legal purposes, do not speak it at all.)

The main systematic treatment of the social role of the interpreter has been offered by Anderson (1976), who emphasizes the interpreter's role as a "go-between" who is easily able to affect interactional outcomes by virtue of his key position. He notes that usually the interpreter is a native speaker of one of the communicators' languages but not of the other's, which may affect the communication. He may, for instance, "identify" with the one who speaks his own mother tongue (p. 212). In Anderson's view, the interpreter is an individual with dual loyalties. "he is the 'man in the middle' with some obligations to both clients--and these obligations may not be entirely compatible" (p. 216). Along with this potential role conflict is what Anderson calls role ambiguity, in that "the interpreter's role is always partially undefined--that is, the role prescriptions are objectively
inadequate" (p. 216). Together, the dual obligations and role ambiguity place the interpreter in a relatively powerful position, especially since neither communicator is likely to know how the interpreter is "managing" the interaction. To a sociologist, then, the interpreter is likely to be anything but a "faithful echo."

Others have also commented on the interpreter's social role in one context or another. Cannon (1983) discusses the interpreter's role in intercultural counselling. In general, she feels that the interpreter should not take an active role in structuring the communication (p. 12), yet she acknowledges that on occasion

...the interpreter may be looked on by the client as somewhat of an authority, and the counselor may be expected to speak primarily to the interpreter rather than to the client (p.12).

The interpreter's role may also include assisting the client to behave politely, e.g., "by providing cues to the client as to when to stand, sit, smile, and so on" (p.12). Other divergences from the "translator only" role-set are found when the client needs an interpreter who is also an agent, someone who is held in high esteem by the client and is expected to speak directly to the counselor due to age- or gender-related norms in the client's culture.

Baker (1981), commenting on the use of interpreters in social work, notes that restricting the interpreter's role to translation may cause harm. One example cited is that of an interpreter who dutifully translated the social worker's many questions about a refugee's family's financial status, influence in the community, and so on, without informing the worker that such a line of questioning was offensive to the client. In another case, the interpreter was aware that a refugee had agreed to enter high school only to please the social worker, but
neglected to inform the worker of this. Baker also notes the opposite approach to the interpreter role. In one instance, a young refugee was to be placed either in a foster home or with his uncle. When asked, he said he wanted to live with his uncle, but the interpreter "convinced" the client to choose the foster home (p.393). In another case, an interpreter advised a client not to tell the social worker about her problems because "the social worker 'has had a hard week and does not need any more problems to worry about'" (p.393). The ideal interpreter, for Baker, falls in between these two extremes.

We may look also to others, such as social workers, who occupy roles as mediators and who may on occasion act as interpreters as well (see below). Green (1982) offers a four-part typology of social worker orientations which may be relevant. One approach is advocacy, where the worker represents the interests of the client community. In the second type, the counseling approach, the worker would take a neutral, client-centered view. "Regulation" is a third approach; there, the worker acts as an agent of social control on behalf of the larger society. Interpreters employed by government agencies may well find themselves in this position. Lastly, Green, too, notes the role of "intermediary or broker between the individual and society" (p. 19). Especially when the worker is a member of a minority group which is represented in the community, he may experience conflicts of interest.

A final example of somewhat similar role is that of the foreign student adviser (FSA) working at the university. Athen (1984) notes that the FSA may be "responsible" to nearly a dozen distinct groups, even though this salary is paid only by the school (p. 8). Though it is not a part of the formal FSA role description, FSA's are considered
accountable to the students, their own supervisors, their consciences, the executive officers of the schools, colleagues both within the institution and elsewhere, and perhaps the government of the nation in which they work. Like the interpreter, the FSA must contend with ambiguous duties and numerous responsibilities, and there is considerable variation in role enactment. Here, too, the professional may be held responsible for helping the client behave "decorously," and may be considered "an intermediary or 'cultural interpreter'" (p.62), thus playing an active role in communication. Like the social worker, the FSA can choose between role interpretations which emphasize counseling, protecting society's interests (against the client), or advocacy of the client's interests.

We should also note the observation of the well-known intercultural communication expert Edward C. Stewart regarding the role of cultural (ethnic) differences in conceptions of the interpreter's role:

The American sees the interpreter as a window pane that transmits the message from one language to the other; but in cultures where a third-person role in confrontation is customary, the interpreters role may become a much more active one, to the consternation of the American[,] who is likely to interpret it as inefficiency or perhaps disloyalty (Stewart 1972, p.53).

Practitioners' Views

A number of comments were made by practitioners relating to the social role of the interpreter. The mixture of translation and advocacy engaged in by interpreters working through one immigrant services society was described by its director, who also works as a counselor, as
do the other worker/interpreters. Clients need the assistance of an interpreter in interviews for Unemployment Insurance Commission applications, Workman's Compensation Board appeals, complaints to the Labor Standards Branch, and so on. Sometimes the interpreter provide "straight interpretation," she said, but on other occasions they "advocate on behalf of the client, so that they do receive their entitlement." This may take the form of "cultural interpretation," as when it is necessary to explain to the client what welfare of unemployment insurance is or to deal with the client's suspicion of government agencies in general. She did not know whether these duties might affect an interpreter when acting as a court interpreter, as many of them do from time to time.

Individuals' prior experience with different kinds of legal systems also creates problems which interpreters may attempt to deal with. Clients may not understand the presumption of innocence, for example. A bilingual lawyer explained that, to deal with such problems,

...the interpreter would really have to stop and give a lecture to the person to explain what's going on and doesn't have the opportunity because all they're really supposed to be doing is just exactly translating the questions in English ... [yet sometimes] ... the interpreter just slips one in.

Unfortunately, he added, sometimes the information provided is wrong.

A court interpreter who has been involved in training other court interpreters observed that sometimes the client requests advice from the interpreter because he may be the only person in the courtroom who speaks the client's language and to whom the client can relate. Sometimes "there is a bond" between the two, and the interpreter is someone the accused "will grab for security." He, too, remarked that sometimes the advice given is ill-founded. The client at other times
may tend to confuse the interpreter's role in the courtroom: He may speak directly to the interpreter. The court interpreter trainer explained:

Because the questions come through the interpreter, there is a mistaken identity and you will identify with the interpreter as someone who actually asks the questions. This could be disturbing.

Sometimes, the credibility of the witness is challenged; he may even be called a liar. If the witness perceives the interpreter as the one asking the questions, the relationship between them can become problematic. We might see the witness "getting worked up, the counsel displaying anger, and now the interpreter may be involved and caught in this," he continued, especially if the interpreter is not an experienced interpreter. On the other hand, the sometimes intense relationship between client and interpreter may lead the client to go as far as asking the interpreter to actually take over the advocacy role. In one instance where the trainer himself had been interpreting,

...the accused ... was charged with a very serious offense, trafficking in heroin. He was asked very unsettling questions, and he was pleading with me, as if he could win anything by convincing me of his innocence, simply because I was the interpreter in the middle of it. So then you try to stay out of the situation as much as possible, but you may still not change the basic fact that the accused will tend to speak to you instead to the counsel who is asking the questions or to the judge.

Respondents' observations concerning interpreter coaching in non-courtroom situations paralleled the discussions of the interpreter's role found in the social science literature. For example, an interpreter-translator who works for an immigrant services agency reported that sometimes social workers ask him during an interview for which he is interpreting, "Is it normal among Japanese to think this
way?", or, "This arrangement would be acceptable for a Japanese?" A probation officer was appreciative of the interpreter's volunteering to provide cultural interpretation, and considered it part of the interpreter's being good at doing his job:

I've come across translators and interpreters who are in fact really good at doing their job. They translate exactly what you say and they translate back from the client to you. A number of them will take the initiative in terms of saying, "Okay, in our culture, that doesn't fit; like, what you've asked just doesn't fit in. Is it alright if I change something?" And they'll tell you what they're going to change it to and present it to the client so that you understand ahead of time what's going on.

She also liked the fact that interpreters might offer opinions about the client's veracity, making observations such as:

"Well, you know, with our culture, this person isn't ... it isn't quite right, the way he's saying these things, so it could be that ... he's not telling the truth or he feels something else about this situation. Maybe you should try looking into that area and questioning him about this."

This respondent would make active use of interpreters in this way, sometimes asking, "Are you picking up anything from the client?" If the interpreter seemed good at doing this, she would then place more faith in the interpreter's opinion in making her assessment of the client's character, which plays a part in the probation officer's work (of course, such "information" could not be used as such--it would have to be corroborated).

The difficulty in later identifying interpreter counseling which occurred in the courtroom is due to the fact that only English-language record is available on appeal; translations made to and from the client in the foreign language are not recorded. Said a bilingual lawyer, the assumption is that the English words are
... absolutely, perfectly correct as to nuance, just as if the person were a proper English-speaking person. So the fact that the interpreter puts words into the witness's mouth or does some coaching or [asks] leading questions or paraphrases a question that's asked by the judge or uses weighted words is just not available to the courts because the assumption is that the interpreter is the voice of the witness, and they are not funneling it in any way.

On occasion, the interpreter may go far beyond what most would consider the bounds of his role. One court reporter who happens to be officially qualified to interpret in numerous languages is thus able to observe the behavior of many different interpreters recalled a case where he had been present in the courtroom as an observer. An untrained interpreter told the accused, in the foreign language, "'Well, look, I have to get out of here, ' you know, 'for my dental appointment, so just plead guilty and get it over with.'" The interviewee observed that, in such case, often

... [t]he person doesn't realize that, of course, he's pleading guilty. He may not actually feel that he's guilty, but for expediency, just to get out of there, sometimes people will plead guilty.

While ideally it does not occur in court interpreting, the practice of actually answering for the client was also noted by some respondents. Several immigration services workers explained that when a client's relative acts as the interpreter, e.g., in applications for government benefits, the relative may answer on behalf of the client, giving the response which he thinks the official may want to hear, but which may in fact be detrimental to the client's case. This is a practice which is related to culture:

[0]ur people define help in a very different way. When you go to seek help from someone, you .. are putting them on that kind of pedestal, that you will tell them what to do and then afterwards take the responsibility. In the same manner, ... a person who
goes with them to interpret, he knows what position he has got, and that he can speak on [their] behalf, and he very comfortably ... goes on speaking on [their] behalf, sometimes without checking with the client.

Particularly when a Punjabi woman is being interviewed, the husband or a son or daughter would automatically assume the responsibility for giving answers. Great confusion can occur when the interpreter oversteps his bounds, as is illustrated by a case where a husband accused of acts of violence against his wife and child had had a restraining order placed on him. The interpreter, described as an older, traditional gentleman who did not approve of a wife taking her husband to court, even for self-protection, told the client, "Think, as far as you're concerned, your family is dead for you. They don't need you, they don't want you."

This type of problem can occur even when the interpreter is supposedly disinterested. A probation officer described a case which involved an interpreter who had "taken a few courses in counseling" and worked for an immigrant services agency as both an interpreter and counselor. In the interview, the interpreter

... jumped in and basically took over the whole conversation .... She felt that because she knew the culture and because she knew the language, she could help the people and take over the counseling role.

In another case reported by the probation officer, the interpreter "got into a fight" with the client, and "[i]t ended up that they both started screaming at each other." The probation officer never learned exactly what had transpired since first one left and then the other, but it seemed that the interpreter had taken the side of the client's wife, against him, in the interview.
The Legal Perspective

In comparison to the social scientists and practitioners, judges do not show much awareness of the reality of the social role of the interpreter. Only a small number of cases decided or relied on in Canada treat this aspect of interpretation at all. Some factors given consideration do, however, offer an interesting complement to the other two perspectives.

In Unterreiner v. The Queen (1980) [citations for cases provided at the end of this report], an Ontario County Court decision, a firearms officer had refused to issue a firearms acquisition certificate to the applicant on the grounds that he had "a history of violence and/or threatened violence, against other persons" (in the language of the regulations). In challenging this denial in Provincial Court, the appellant faced his own father as a Crown witness against him. The father, a native speaker of German, "had difficulty" with English, but it was not discovered until the hearing that an interpreter would be needed. The father suggested that a friend of his present in the courtroom be used as an interpreter. This individual was sworn in as the interpreter without any inquiry into his competence as an interpreter having been made, and without allowing the appellant the chance to make submissions on this point. The appellate court agreed that there had been a denial of natural justice with respect both to the failure to test the interpreter's competence and the failure to inquire into his impartiality. Somewhat to the contrary is the case of R. v. Johny and Billy (1981), where secret tape recordings made of jailhouse conversations between two defendants had been translated by a police
officer. The report makes no mention of the officer's impartiality being an issue.

The social role of the interpreter arises in an oblique fashion with respect to the hearsay issue: When an investigation officer testifies in court as to what the suspect said on the basis of a translation made during the interrogation, is that hearsay? That is, in law, are the interpreter's words those of the suspect? If they are not, then the officer's testimony is hearsay—it is only what someone told him that someone else said, and unacceptable concerning its truth. The interpreter could of course testify as to what the suspect said, but often no notes were taken and/or he is not called as a witness. A very old Supreme Court of Canada case, Shajoo Ram v. The King (1915) shows how far back the view of interpreters as mere translating machines can be traced. In that case, the accused appealed his conviction for perjury on the ground that he had not been legally sworn in as a witness in the first place because the oath had been administered to him by the interpreter rather than by the magistrate. The court was unanimous in holding that this made no difference: "The interpreter was merely the mouthpiece of the judicial officer" (p. 397). The implication seems to be that the interpreter has no social or legal identity or substance of his own (the court took a dim view of such a technical argument in any case).

For an opposing view, there is the Quebec case of R. v. Hatzopolous (1980), where a German-speaking suspect had been questioned by a francophone detective, with the suspect's lawyer acting as an interpreter (German to English, which the detective spoke as a second language). On the voir dire— a separate hearing during the trial in
which the admissibility of inculpatory statements is decided—it was held that this was not a case where the statement could be attributed to the accused. These were "not the accused's words which were taken down but the translations made by his solicitor [lawyer]" (p. 58). Neither Unterreiner nor Hatzopolous offers anything like a satisfying discussion of this issue, however; we must turn to R. v. Kores (1970) for a more involved analysis.

The Kores case was tried first in British Columbia County Court, and then appealed in the Court of Appeal of British Columbia. The accused, a Greek national, had been apprehended by immigration authorities. He was interrogated without the benefit of counsel, and the interpreter made no notes. At trial, he was acquitted due to the investigating officer's testimony having been ruled to be hearsay. His lawyer cited the similar British case of R. v. Attard (1958), and the County Court judge decided to follow that case. In so doing, the court dealt with the leading case on point, Gaio v. Reg. (1960-61), a decision of the High Court of Australia, where the role of the interpreter played an important part in the decision.

In Gaio, which arose in New Guinea, the interpreter had been illiterate (while in Kores, the judge found otherwise, which was why Attard could be followed). Fullagar, J. rejected the hearsay view, as did his brethren, holding that, in law, only a single conversation takes place, even though an interpreter is necessary. The interpreter functions as does a machine:

[S]ome means is necessary by which what A says may be made intelligible to B and what B says may be made intelligible to A. C supplies that means. C is not in any real sense a party to the conversation. He contributes nothing of his own that is material. He
is merely the mouthpiece alternatively of A and of B
(p.430; emphasis added).

This is the clearest statement of the non-hearsay position found in the cases, although the different analogy offered by one of the other judges, Kitto, J., comes close. He said the interpreter had

... acted not as a narrator but strictly as a translator, making the appellant's words intelligible to Smith as they were uttered. This means that the role played by Arthur [the interpreter] between the two persons, the want of a common language preventing them from being understood by one another except through a bilingual transmitter, was not different in principle from that which in another case an electrical instrument fulfill in overcoming the barrier of distance (p. 430; emphasis added).

Menzies, J., too, felt that the interpreter was "like a machine, ... merely a translator" (p.433), and that the hearsay rule would be offended only if the interpreter were "recounting something that had happened" (p. 432).

As stated, at trial in Kores, Attard was followed on the ground that the interpreter there had been "far more than a mere mechanical device at the interview" (p. 101). However, the British Columbia Court of Appeal overturned that ruling by Darling, Co.Ct.J. The court was unanimous in holding the the Gaio case applied to the facts in Kores. Davey, C.J.B.C. explained that, even if the interpreter had not acted merely as a machine, but used his own judgment and skill, that would not affect the admissibility of the evidence: "That only goes to the weight and arises only when the accuracy of the translation made by the interpreter comes in question" (p. 94). In other words, how the interpreter performs his role can be relevant when the trier of fact decides whether to accept the translation as accurate or reliable, but it does not render the translation hearsay. How far this line of
reasoning could be taken is an implied question. The most recent case reported where the issue arose was R. v. Kam Wah Kwok et al. (1984), an Ontario case. There, the Provincial Court judge did apply the hearsay rule, noting that the interpreter was not an agent of the accused.

Comment

What seems more than clear from the preceding is that the court is not aware of many issues where the social or interactional role of the interpreter is concerned. Of course, in general the court is loath to see potential evidence excluded from consideration, without the trier of fact being given a change to "weigh" it. But there is still a great difference in the range of phenomena taken into consideration. The courts can be said to focus on the end-points in the communication process, e.g., what the accused said rather than the circumstances which gave rise to the statement. There is a "bottom line" mentality which, despite its usefulness to the court in reducing the issues to be decided to a manageable few, leads to an artificial distinction between actions and contexts. The meaning of events is sought closest to the end of the action chain, as opposed to the social scientific view, which analyzes meaning within the larger framework of actors, roles, and intentions. Practitioners, too were aware of the human element in interpretation. It appears that the hearsay issue is where the divergence is clearest. The legal perspective approximates that which Stewart (1972) attributed to the Western mind (see above).
CHAPTER THREE

LINGUISTIC ASPECTS OF INTERPRETATION
In this report, the social role of the interpreter is treated prior to linguistic aspects of interpretation since any interrelationship between the two is far more likely to consist of the former influencing the latter rather than vice-versa. In most people's minds, it is the linguistic aspects of interpretation which are uppermost. Here, as in other areas treated in the study, social scientists and practitioners have had more to say about the problems and the variations in the phenomena which make every individual instance unique. Courts take the opposite tack, seeking to find commonalities among instances so that new cases can be classified with reference to their similarities to previously decided cases or, at least, to the statutes or accepted legal principles.

The Social Science Perspective

Perhaps the most fundamental of issues recognized in social science is that of accuracy or linguistic-equivalence. Rokkan (1980) argues that a truly correct translation is impossible because linguistic equivalence depends on cultural factors, which can never be considered equivalent. On the other had, van Eyken (1981), while acknowledging the impossibility of completely accurate translations from one language to another, argues that meaning nevertheless can still be accessible. Another proponent of that view is Herbert (1968), who holds that...

... the purpose of interpretation is not so much to give an accurate translation as to make the other party understand what the speaker meant (p. 72).

This, the relationship between accuracy and (intended) meaning, is a central issue.
Bilingualism is another central issue. In "natural" translation, such as occurs spontaneously in everyday life, people translate both ways, i.e., from one language into the other and then back again. According to professional standards, however, translators ought to translate only into their native language (Harris 1978, p. 422). Moreover, the untrained bilingual is rarely a successful translator (Delisle 1980). An interpreter, then, is not the same thing as a mere bilingual.

What is a bilingual, for these purposes? This question has direct implications for the right to the assistance of an interpreter, and for the acceptability of translations offered in evidence. A typical definition is that offered by Thiery (1982), for whom true bilingualism is having two mother tongues and enough proficiency in both languages to be accepted as a full-fledged member of both speech communities. Giles (1979) has questioned the reasonableness of setting such a high standard for true bilingualism, in that some degree of interference is to be expected. An important point in this connection is made by Bowen (1980), who observes that the commonsense definition of bilingualism as "knowing" two languages is a quantitative one, while for conference interpreters the term has a qualitative meaning. She cautions:

All too often it is overlooked that the language professions call for a level of performance not found as a matter of course in the population at large. If it were, everyone in the United States colleges would be in honors English; but we know that college students will place at all levels of English, from honors to remedial (p. 201).

This is important in that it implies that laymen and professionals will have significantly different views of what type or level of linguistic ability is implied in the s. 14 right (and, in this area, judges are
laymen). Bowen, too, holds that a "true bilingual" is one who has two native languages. A similar view was expressed by Herbert, who says of the expectations for professional conference interpreters:

> The interpreter is under an obligation to be an authority on the language he speaks. So far as possible, and with few exceptions, he should speak only in his mother tongue (1968, p. 61; emphasis in the original).

This view would create obvious problems for the court interpreter as well as for any other consecutive interpreter, obviously. On the other hand, the simultaneous interpretation whispered into the accused's ear could, in principle, be treated in the same way as conference interpretation as far as expectations for bilingualism are concerned.

The reality of second-language problems in interpretation and translation has been noted often, though in the courtroom or the police station the ability of the parties to continue their communication to their own satisfaction from moment to moment naturally draws attention away from the possibility of problems in translation. Interference or interlanguage problems in translation are unavoidable, according to Toury (1979), given the two irreconcilable requirements of translation: "adequacy," being true to the original text; and "acceptability," meeting the expectations of target-language speakers. Parks (1982), too, notes that first-language interference is a problem in interpretation, and that nonnative interpreters (translating into English) can make phonological, omission, semantic, paraphrasing, and lexical errors. Their speech may also be awkward and more formal. In an empirical study, it was found that simultaneous interpreters do monitor their output as they proceed, but most of their self-corrections were of grammar, rather than content or style (Smeeleer et al. 1980).
Duff (1981) elaborates on the recurrent problems of translation into English. By analogy, the range of difficulties he surveys can be expected to occur in courtroom interpretation as well as that which occurs in the police station, and of course when secretly recorded conversations are transcribed and translated later. (The absence of empirical studies of interpretation problems in court arises partly from the fact that we do not have access to the basic data, i.e., the source-language and target-language utterances.) Of probable but as yet undetermined significance are problems in style. These difficulties would not necessarily render a translation unable to convey the basic facts, but may bear on the credibility attributed to the speaker or his persuasiveness.

Duff stresses that it is not only the literary translator who need be concerned with style:

Whatever discipline he may be working in, the translator [or interpreter] will have to consider, for instance, what public the work is intended for and what degree of specialist knowledge the reader [listener] is expected to have. This means he will have to decide on the register (formal—informal, official—unofficial) and to maintain this register consistently throughout (p. 7; emphasis in the original).

Here is one example he offers of such problems, where the translator has not maintained the same register:

However, we learn from Sorokin and Hart the lesson that a plethora of information is available and can be dug out from our libraries (p. 7; emphasis in the original).

Another stylistic problem is that of mixed metaphors, such as this passage translated (apparently) from Spanish:

This is genuine historical regression, for the process just described undoes a cultural achievement that constitutes one of the richest legacies of capitalism.
and its sequel, the culture of 'dependency' (p. 8; emphasis in the original).

Problems of this sort may create an impression of strangeness which could be attributed to the speaker; they would not necessarily be seen as a reflection of the interpreter's skill.

The fact that languages are built around their own particular sets of mental concepts may also create a sense of alienness:

Language ... has its mental sets: it is through them that we 'picture' reality in words. These mental sets may overlap between one language and another, but they rarely match exactly ... (p. 10).

Since "concepts do not cover exactly the same fields of meaning in different languages" (p. 10), the translator or interpreter is in effect creating a third mental world, a third language. This aspect of translation may not be appreciated by the judge, who has to assume that the (translated) words mean what they would mean had a native speaker of English spoken them.

Ambiguity is a problem even in native-speaker produced texts, as is shown by this extract from a recent sociology textbook:

In all likelihood, you have engaged in actions that have been defined by some groups as deviant. Table 5.2 lists some activities that are illegal in the state of Georgia and likely to be considered deviant by some groups. Few college students can honestly claim to have never committed some of these offenses (Sullivan and Thompson 1984, p. 147; emphasis added).

Does this mean that some of the offenses have been committed by most college students; or that only a few students can claim never to have committed any of the offenses listed? In court interpreting, such ambiguity may be resolved in the wrong direction by the listener, especially if the ambiguity is not noted as such. Duff points out that context is important in resolving ambiguity (pp. 31 and 90). It may be
significant that in cross-examination, the form of the answers is
controlled by the question, and attempts at clarification may be
limited. (The removal of interpretive context also characterizes the
understanding of the meaning of actions in legal proceedings in many
cases.)

Duff cites problems in the source-language text as one of the
contributing factors to translation problems, and observes what could be
relevant in the present discussion:

... there is an important first stage in translation; this is when the writer 'translates' his thoughts into
words. If at this stage the translation is already
imperfect, it is unlikely to improve at the second,
more tangible stage of translation: from one language
to another (p. 3).

This line of thinking can apply equally well to spoken language, as in
the concept of "inner speech." Johnson (1984) treats inner speech as
being the opposite of ordinary speech. In the latter, words reveal
thoughts which the speaker has in his mind, whereas in inner speech,
"words are turned into thoughts" (p. 221). Johnson sees inner speech as
differing from ordinary speech in four ways: It is silent; it is
semantically complex; it is syntactically not very elaborate; and it is
egocentric. This intrapersonal speech is the opposite of interpersonal
speech in these ways. In addition, the characteristics of inner speech
render it rather unsuitable for intercultural communication as well as
for the type of specific question-and-answer communication which
characterizes courtroom examination. In fact, according to Johnson, the
need for syntactic elaboration increases as the extent of shared
symbolization decreases, which is what happens in intercultural
communication. For the ESL-speaker in court, whether using an
interpreter or not, inner speech from one cultural-linguistic background
must be transformed into extrapersonal speech in another. This is not interpretation or translation in the ordinary sense of the term, yet the lack of the assistance of an interpreter can be said to force the ESL-speaker to engage in some type of process different from that which a native speaker of English engages in. He is in effect forced to be his own interpreter.

Translation of legal language is considered to be among the most difficult types of translation. Reiss (1982) has proposed a scale of difficulty for translation based on culture and specialization of text, with general texts less difficult than technical texts, and transcultural texts less challenging than culture-specific texts. She accords greater significance to the first factor than to the second, with general/transcultural being the easiest, and technical/culture-specific the most challenging. Blum-Kulka (1981) takes a similar approach in discussing translation of indirect speech acts. The least difficulty would be faced in translating indirect meaning which is partly conveyed through contextual cues and with the assistance of shared cultural knowledge. Language-specific and culture-specific speech act norms would be the most difficult. Particular problems would be involved, then, in conveying to the court the meaning of events which occurred outside the courtroom, in other cultural contexts.

The only systematic discussion which focuses on the problem of achieving equivalence in legal translation (not interpretation) has been offered by Weston (1983) in a short article. He notes that there are special problems in legal translation because "an unusually large proportion of the text is culture-specific" (p. 207; emphasis in the original). He describes the problem as follows:
[T]he translator has to render concepts into the TL [target language] which differ from those familiar to its speakers not just in minor denotational (referential, cognitive) attributes or in connotation but primarily for cultural and more specifically, institutional reasons (p. 207).

Sometimes the TL culture finds it convenient to use the SL [source language] concept along with the SL term, and may merely borrow it, e.g., "machismo," "chutzpah." In all other cases, says Weston, one of five methods of translating will be utilized.

The ideal technique is that of using a functional equivalent, which Weston calls variously "contextual," "cultural," and semantic equivalence. The contrast is between these functional equivalences and "formal equivalence," in that in functional equivalence the goal is to achieve the most "idiomatic and natural-looking [or natural-sounding] rendering" (p. 208). This Weston calls "non-literal translation" (p. 210). When there is no exact functional equivalent, then the fundamental issue is how close—functionally and in terms of connotation—the TL term must be to the SL term in order for it to be acceptable. This, he notes, is an inherently vague matter:

[T]his must to a large extent be a matter for the individual translator's judgment and discretion in the light of his knowledge of the cultural background and features of the referents concerned (p. 208).

Weston's discussion is exemplary for its recognition of the role of cultural competence in legal translation and the individual variation among translators, by implication, in this regard. He notes as well the absence of criteria of true functional equivalence:

[N]owhere does anyone appear to have enunciated the criterion by which the translator may decide whether a term peculiar to the TL culture is or is not an admissible translation. This omission is the more curious—and serious—as the problem confronts translators quite regularly (p. 208).
Now, the vocabulary involved in translation of legal documents is probably more esoteric than that used in courtroom proceedings, but the problems will still be formidable.

"Word-for-word" translation can sometimes also produce functional equivalence, but is generally considered an alternative approach. Weston states that "literal translation" and "word-for-word" translation mean the same thing—lexical equivalence, with grammatical and syntactic adjustments being made as necessary. He distinguishes four sub-types, the first two of which are extreme. One is the word-for-word translation which is also a functional equivalent (e.g., "court of appeal" for cour d'appel) the other is the meaningless of even ludicrous translation, as in "Keeper of the Seals" for Garde des Sceaux. Faux amis, the third type, are well-known and often mistaken for word-for-word translations. They are either not functionally equivalent, or less functionally equivalent than an alternative, non word-for-word translation. An example is "notary" for notaire, in that the notaire is closer to a lawyer than to a notary public in his functions. The last type of word-for-word translation is that which does not correspond to any particular concept in the TL culture but is sufficiently clear nevertheless. Again, Weston is careful to note that it may be difficult to distinguish between acceptable and unacceptable translations:

[There will be many borderline cases, as each translator must decide for himself whether or not the meaning of a literal translation is either close enough to the unfamiliar meaning (p. 209).]

Weston also mentions the tactics of borrowing, and creating or using neologisms, both of which represent last resorts and are not quite the same as translation.
Weston's observations on consistency in translation contribute to this discussion because he distinguishes three goals for consistency; consistency in method or approach to translating; consistency of translation of terms within a given text; and consistency in applying the law itself. Weston holds that it is not possible to translate all the culture-specific terms in a single text with the same technique; in fact, it will rarely be possible to use the same technique for all the items in a set. Intratextual consistency in the translation of specific terms, though, is necessary:

[T]he reader must be able to be sure that repetition of a term refers to the same thing the term did when it was used before, while use of a different term betokens a different referent (p. 210).

On the other hand, different SL context will require the use of a different TL term to translate the same SL term (see p. 211). Again, the primary problem in practice is deciding when the SL context is sufficiently different to warrant using a different TL term.

Given the complexity of legal translation/interpretation and the challenge it poses for court interpreters, it would be expected that high standards for training are the norm. However, Pousada (1979) notes that the courts in the United States have taken a somewhat relaxed attitude concerning both the interpreter's social role and his ability to interpret:

More than once, the courts have utilized less than disinterested parties for interpreting, including the arresting officers, the relatives of crime victims, and members of the opposing party. Often individuals who have no experience as interpreters but who happen to be in the courtroom at the time are recruited (p. 199).

Both problems--role and competence--could be ameliorated through careful training and certification of interpreters. Pousada recommends having a
trained linguist review the translations made "for evidence of incompetence" whenever there is any question raised (see p. 203).

In British Columbia, Canada, the Task Group on Court Reporting (1985) addressed these problems and made some strong recommendations. They rejected the argument that "a poor interpreter is better than no interpreter at all," and stated instead that "an inadequate interpreter amounts to no interpreter at all" (p. 6). They ground their viewpoint in considerations of due process and fairness:

Can it be argued justice has been done if the accused person only partially understands the proceedings, or if the testimony of a witness is partially misinterpreted? (p. 6)

The Task Group noted with dismay the absence of official guidelines for interpreters. They point out that

Interpreters often do not know whether, for example, they are to interpret "word for word" what is said, or are they to summarize and clarify? Are they to interpret everything that is said, or only what appears to [be] relevant? (Appendix IX, n.p.)

Continuing, the Task Group made an observation which was not encountered anywhere else in this study, regarding what laymen mean by the term "word for word" interpreting:

It is important to note the distinction which Interpreters themselves make between "verbatim" interpreting and "accurate" interpreting. The first method gives each word in one language its technical equivalent in the other, while the second method takes account of the idiomatic nature of language and renders what is said in one language in words of the other language that accurately convey their true meaning, tone and style. It is usually, but not always, this notion of "accurate" interpreting which is meant by non-interpreters when they speak of interpreting "verbatim" or "word for word" (Appendix IX, n.p.).

This suggests that the translations which judges receive are not always as literal as they may believe them to be.
The crucial issue, though, is overall competence. The Task Group noted that the observations made in a report by the Canadian Commission on Bilingualism and Biculturalism thirteen years earlier still hold true today. The Task Group states:

It seems difficult to accept the fact that interpreters, on whose competence and fidelity the property or freedom of an individual may depend, are not given any special training and are not required to establish their qualifications by means of an official examination. If court stenographers are tested, why not interpreters? (Appendix IX, n.p.; emphasis added)

Not surprisingly, the Task Group recommended both training and testing for court interpreters.

The Task Group also pointed out something which has direct implications for the equality issue as it applies to s. 14: The renumeration which court interpreters receive varies widely across the country, with Nova Scotia interpreters earning approximately four times as much as their British Columbia counterparts ($29,500 per year versus $7,472—see p. 14). They also noted an anomaly in the Canadian federal government: Simultaneous interpreters employed by the government in Ottawa are paid $280 per day, while the interpreters employed by the immigration authorities in Vancouver receive only $20 per hour of a minimum of two hours of work, after which they receive $12 for each additional hour. If this salary differential reflects the difficulty of the work involved—simultaneous interpretation versus mostly consecutive interpretation—then we must address the issue as it arises in the case of the party interpreter in the courtroom. The Task Group felt that graduation from a recognized school for interpreters, or certification by an appropriate body would be much preferable to an ad hoc assessment of competence by the trial judge just before the trial begins,
especially in that the judge "may not be able to establish the interpreter's level of understanding of the witness's testimony" (p. 7).

The only recent systematic treatise on the training of interpreters is a short work by Weber (1984), who has had twenty years of experience as an interpreter and has taught interpretation on three continents. While he focuses on conference interpreters, he states that as far as training and abilities are concerned, court interpreters should be viewed in the same way (see p. 1, footnote 1). Conference interpreters are considered to be a highly qualified and very professional group, and the question of whether the same standards should be applied to court interpreters is an important issue, and one which may arise in interrelating ss. 14 and 15 of the Charter. For purposes of comparison, we may note that Weber relates that, according to a recent membership survey conducted by the International Association of Conference Interpreters, 95 percent of the respondents between the ages of 30 and 45 had been trained in a university program. The greater proportion of university-trained interpreters, compared to translators, may be due to the fact that poor interpretation is immediately noticeable, Weber says, whereas "one can be a poor translator for a long time before complaints arise" (p. 2). Whether detection of incompetence in court interpreting is as reliable as detection of incompetence in conference interpreting is a question which bears on the certification issue.

During his career, Weber says, he has met only one or two people ("exceptionally gifted") who were capable of being good translators or interpreters without having had the benefit of formal training. The implication for court interpreting is clear: If training is important
for interpretation in international meetings, it is even more important where one's liberty may be at stake. Both translators and interpreters, Weber feels, should complete courses in sight translation, precis writing, and conference terminology and parliamentary procedure. (There is some problem in applying these requirements holus bolus to court interpreters, who may not need to know anything about either conference or parliamentary procedures.) Like Weston, Weber is sensitive to the problem of distinguishing significant mistakes from insignificant ones. He asks,

Should a wrongly translated word, for instance, be counted as a meaning error if it changes the meaning, or should it just count as an error in terminology? (p. 47)

Such a question implies the similar question concerning the assessment of interpreter adequacy. That is, if the adequacy of the translation itself is difficult to measure, how can we hope to test the adequacy of the interpreter (on the spot, in the courtroom)?

Before moving to the training of interpreters in particular, we must note a limitation in Weber's distinction between translation and interpretation just on the basis of whether the transposed product is meant to be read or heard: In the courtroom, much of what is said is also meant to be read later in the form of the trial transcript, e.g., on appeal. The distinction between interpretation and translation is further blurred by texts such as a confession dictated by a suspect in his native language and translated into English by an interpreter, and a confession written out in English and translated for the suspect prior to his signing it.

The interpreter's skills and abilities are impressive. Because of the demands placed on them in performing simultaneous interpretation at
conferences, interpreters must have, in addition to linguistic fluency in the two languages: intelligence, ability to abstract and paraphrase, quick reaction time, good memory, poise in personal presentation, and a suitable voice. Their training should include sight translation, consecutive interpretation, and simultaneous interpretation. "The most difficult aspect of interpreting is the speed with which it must be accomplished" (p. 27). The practical test of interpretation is whether the listener has to make any special effort besides listening (p. 28). These standards indicate what excellence in interpreting entails, but they do not indicate what the cut-off points are for distinguishing adequate from inadequate interpretation.

One important linguistic aspect of interpretation is "credibility," that is, the interpreter's "aptitude to sound convincing" (p. 49). Herbert (1968), in his earlier handbook for interpreters, put the matter this way:

When, owing to some personal handicap such as shyness, insufficient familiarity with the language used, etc., the speaker has not brought his speech out as he should have done and as he wanted to, the interpreter is not precluded from doing somewhat better than the original (p. 59; emphasis added).

A witness might be forced to communicate in a language other than his strongest language because the interpreter provided speaks only one of the witness's other languages, e.g., an interpreter who speaks only the country's national language (such as Tagalog) but the witness's mother tongue is a regional language (such as Ilocano). The analogy which suggests itself here is that of the ESL-speaker testifying without the aid of an interpreter--there, too, there is insufficient familiarity with the language used. The interpreter, in Herbert's scheme, might improve the speech by translating it from ESL into native-speaker-like
English. (Of course, the issue of 'speaks or understands' English would take precedence.)

Though 99 percent of the professional interpreter's work is in simultaneous interpretation normally, Weber notes that consecutive interpretation is still used when there is a need for "a high degree of accuracy" (p. 34). This suggests that the court interpreter's work in performing consecutive interpretation should not be considered less demanding, but should be seen as implying a higher standard of accuracy. Weber states that in general, interpretation can never be expected to be "absolutely accurate in meaning" and "contain all nuances of the original" (p. 3), but Herbert (1968) takes a different view:

Under normal conditions the consecutive interpreter should deliver a better speech than the original, and that for two reasons. The first is that he should be a professional public speaker, the second that he comes afterwards (p. 60; emphasis in the original).

Weber adds that interpreters should be the intellectual equals of those whom they interpret (p. 4). Additionally, while in translation it is not necessary to always "follow the original sentence structure" (p. 32), says Weber, in consecutive interpretation the rule is that the interpretation must contain

... everything that is necessary to the understanding of the original message that the speaker intended to communicate, including all the nonverbal content (p. 50; emphasis added).

Bringing the speaker's intentions into the picture may complicate the situation from a legal point of view, it should be noted. Another unresolved issue is the role of nonverbal communication in testimony. Does the Charter guarantee the right to have one's nonverbal communication, including paralinguistics, translated adequately? If so,
does this imply native-speaker English fluency on the part of the court interpreter?
Practitioners' Views

In the interviews with practitioners, it seemed that there were considerable differences among respondents with respect to awareness of interpretation problems, with bilinguals who had observed courtroom testimony having the most penetrating insights to offer. The two bilingual lawyers, in particular, were well acquainted with these problems. One estimates that he uses interpreters in 70 to 80 percent of his cases. With his cultural and linguistic background, he feels that he is "able to understand the nuances of the language" his clients use and is better able to interpret than most court interpreters. Having to speak to his clients in the courtroom in English, through an interpreter, is a considerable handicap, and he feels that "a great deal of what they say is usually lost in translation." So far, there have been no arguments made to the effect that s. 15 requires that every accused be accorded the right to be examined in his native language when that is possible (i.e., with others in the courtroom having to make do with the inconvenience of hearing translated speech).

The attorney stated that, as a group, Punjabi-English interpreters "are not really proficient at all in the language." He could think of only one or two that he had encountered in the previous five or six years that he would consider qualified, "and even those are not necessarily the best." He himself had been in Canada for about fifteen years, had studied in England for three or four years prior to that, and had studied language for many years, but acknowledged that even he sometimes had difficulty in interpreting the nuances of Punjabi into English.
The other bilingual lawyer, an anglophone who had lived in South America for most of his early life, raised the problem of interpreting the speech of witnesses who speak rapidly. Some of his clients posed such a problem because they were

... extremely well-spoken in their own language, ... spoke at extreme speed, ... culturally were used to dealing with an official speaking in bureaucratese, almost, and using ten-syllable words very quickly, to the point that I could hardly understand them in Spanish, and that the interpreter would then answer in a far more simplified fashion, being unable to cope; and that the importance of what the person was saying and the flavor of what they were saying was lost (emphasis added).

What is lost in translation might not include important factual material, but here would be a loss of thing which "would certainly have helped the credibility of the witness."

He pointed out the existence of differences in interpreting the judge's questions compared to the witness's answers. The judges ask standard questions, and explain at the beginning what the critical words mean.

The interpreter has translated those words a dozen or a hundred times before, has found words to say that word, and the questions that the judges ask are generally simplified.

This is not true of the witness's replies. There, the nuances, "the kind of thing that a decider of fact [e.g., judge] hangs his hat on," can involve fine differences, so that "not getting quite the right word or simplifying a sentence or whatever errors were made when "peripheral" things were being discussed, when the accused was not the focus. He had observed that interpreters

... do struggle more to translate correctly or to ... make sure that the fellow understands when the question's being directed at him, whereas when they're just sort of saying what it is that the policeman's
saying [i.e., simultaneous interpretation], they may say, "Well, he found you with the goods," and what really happened was twenty words went by, you know. **They don't think it's that important to provide details** (emphasis added).

Another variable he identified was that of the type of case. "[T]here's no distinction made between, oh, this person knows enough to handle a shoplifting trial, but not a rape trial or a drug conspiracy trial."

Asked to elaborate, he identified conspiracy and consent as two key concepts which arise in difficult cases and which pose special problems for court interpreters. In complex cases, far more sophisticated legal defenses are likely to be raised, and lawyers get involved in very fine points of law.

One of the specific problems in content which arises is that of subjective states of mind. The immigration adjudicator explained that, in immigration hearings, the damage caused by an inadequate interpreter often depends on the type of case. In refugee application cases, the issues are primarily factual,

...for example, he comes from this particular country, he has come to Canada to stay permanently, he did not apply for or receive a visa, and so on.

The contrast, there are subjective issues involving employment, which depends in law partially upon whether the person reasonably expected to receive compensation. Another issue, mentioned by one of the bilingual lawyers, concerns the intention to remain in Canada (which is a violation of visa regulations), as opposed to the mere desire to remain in Canada. The difference is critical. He stated:

[T]rying to describe the differences between intention and desire to somebody who is not proficient in English, and even [to] a lot of interpreters, is very, very tough, very, very tough.
The interpreter must be fluent in both languages, but often is not fluent in either, according to the court interpreter trainer. Most are immigrants to Canada, and their proficiency in their first language "often is not tested at all in any shape or form by the court officials here." It is relatively easy to detect problems in English, he observed, and yet one still finds "interpreters who have very obviously a language proficiency in English which is only a few notches above the person they interpret for." He said he had seen cases where the witness spoke better English than the interpreter. The immigration case presenting officer mentioned that "it's happened that some of our officers are more fluent in a particular language than the interpreter they're using."

The problem of untrained, lay interpreters' linguistic ability was discussed by another court interpreter with extensive experience. He had had many opportunities to observe the performance of other interpreters over the years.

[I] would listen to court proceedings where someone, a lay person, would have been called as an interpreter to help out an accused ... and quite often of course ... I might happen to understand the language in question, unbeknownst to both the interpreter and the accused, and I would be sitting in the background listening to all this stuff that's going on and of course quite often it was a nightmare, simply because the lay person who may know the language or may know a smattering of the language was trying to act as an interpreter, interpreting very technical legal testimony which would come out sometimes totally backward or totally different (emphasis added).

The Spanish-speaking lawyer added one of his own favorite "horror stories, which concerned someone who had been acting as an immigration hearing interpreter for ten or fifteen years:

I thought he was German. He's from Spain, left there in 1936, has never been back, had essentially
forgotten the language, and then as his other business activities started to decline because he got older, he started doing more and more of this [interpreting]. He can't have a legal conversation with me in English; I don't mean about issues but just using those kind of words. And in Spanish ... he stumbled along and was trying to be helpful and therefore rephrased questions, re-invented the guy's answers, shortened them, lengthened them, explained-- I mean, it was just bizarre. And this guy's obviously fried or helped, I don't know what, a variety of people, since then.

Another example he related illustrates the problems involved with interpreters who speak more than one language but are not certified as court interpreters. The interpreter in the following case was Polish and was translating the Czechoslovakian language:

[His translation] kept slipping from Polish into Czechoslovakian and back and forth. He just wasn't good at it. Probably plenty good for a conversation, or an interview in your office; not good enough in the context of a legal hearing, where there's a transcript being produced and where the only thing that gets on the transcript is what he says .... So if there's any nuance, if there's any specific meanings that my client is attempting to convey ... that's just lost.

Another general area discussed by interviewees was that of the detection of inadequate interpretation when it does happen. The South Asian lawyer observed that an ordinary judge or lawyer could not do this:

It is only when you have a lawyer or another person sitting in with a command of the language that you will know whether or not an interpretation is proceeding properly.

It is not always enough just to detect inadequacies, he explained. In one case, the judge refused to strike an incorrect translation from the record even though the interpreter herself admitted that she had made a mistake and was willing to change her interpretation. The other bilingual lawyer felt that the greatest problems were not those which
were flagrant, but those where the answers are not evidently inappropriate:

The horrible fear is when ... the question was A it comes out in the fellow's language A' ... and he answers, A', and then ... instead of the answer coming back as X, it comes back [in the translation] as X*, and nobody realizes [that].

"Intuition" was the most common description of how inadequacies are detected. An immigrant services worker claimed that some of her clients had complained about inadequate interpretation, and that they had detected it by intuition: "They could feel it." The immigration case presenting officer said that, with experience, "you know almost by sense of feel ... when somebody's getting a little off track because the interpretation isn't accurate." The immigration adjudicator also referred to an intuitive method: "Not empirical, purely. Just observing the situation and being aware that things aren't coming across right. It's not making much sense." The court interpreter trainer said almost the same thing: "You sort of sense there is something wrong."

Intuition, though, may be rendered less effective by what the provincial judge who was interviewed called the working assumption that interpreters are doing their job satisfactorily. The immigration adjudicator explained that, especially if the interpreter is someone who interprets regularly for the Immigration Commission,

[W]e assume they're doing a good job because we haven't had problems with them in the past. You just assume that they're translating accurately.

Still, there is a "test" prior to the commencement of an immigration hearing. The interpreter is asked to instruct the subject of the inquiry ("the person concerned") to tell the adjudicator how many people are in the room, or some similar thing. If the answer is factually
correct, the interpreter has passed the test. Of course, the fact that the interpreter passes such an abbreviated test does not mean that there are no limitations at all, as one lawyer observed:

[It] doesn't necessarily mean that the interpreter is going to be able to deal with the quasi-legal terms, the jargon, from the [Immigration] Act, and things like that, when the adjudicator is trying to make explanations or the CPO [case presenting officer] is reading the report into the record or something like that. The interpreter may still have a problem with those types of things.

Another problem is the interpreter who speaks the foreign language very well but does not know how to interpret, as the adjudicator pointed out: "It's one thing to speak a language; it's quite something else to be an interpreter." However, the adjudicator agreed that if the initial "competencey test" is passed, this would create a presumption that the interpreter is satisfactory and the translation would be taken as adequate unless something indicated otherwise.

A very illuminating perspective on the detection of inadequate interpretation in the courtroom was offered by the court interpreter trainer, who had been in charge of a community college training program for court interpreters and had had considerable experience himself as an interpreter. He, too, indicated that in general there would have to be a major problem in understanding before observers would begin to worry about the quality of interpretation:

[I]t really takes a linguist or someone who has done interpreting in order to be able to evaluate. I don't think that the counsel or the judges for that matter are competent enough to judge the performance of an interpreter.

The working assumption that the interpreter is proficient means that interpreters are not treated as expert witnesses are treated, but, he felt, they should be.
He went on to explain how interpreters seek to create a good impression in court. For instance, admitting mistakes is the mark of a good interpreter; such a person is sufficiently confident of this ability that occasional mistakes will not cast doubt on his basic competence. In contrast, he said, a poor interpreter will conceal mistakes:

[A] poor interpreter is very insecure in [his] own ability to interpret, because it is a difficult job, and unless you are proficient, unless you know the techniques and you have done it for a while, you will have difficulties, constant difficulties .... If that is the normal state of operation for an interpreter, then he will not say anything. He will just keep doing his best, which is not really good enough.

However, a poor interpreter may nevertheless act in a confident manner in many cases, he explained:

They feel that their language proficiency is good enough, and then they would act assertively and would ... appear confident. They may do things which are somewhat unethical, such as, they would talk to the ... witness ... and they will make observations or recommendations.

An interpreter who is unsure of his proficiency in interpretation or in one of the languages might avoid slowing down the speed of his interpretation in order not to be seen as inadequate. He offered an example of this. A mock trial was being conducted by law students; simultaneously, interpreters-in-training were being test. The student lawyers were very pleased with one interpreter's performance: She interpreted quickly, and the students like her "general attitude."

Unfortunately, the trainer pointed out,

... her interpretation was quite inaccurate, and that was seen only by the examiners, who were bilingual. And so it does not mean that every problem in interpretation will manifest itself.
The fact that usually only global assessments of their proficiency are being made allows some marginal interpreters to take maximum advantage of their ability to give off an air of confidence. Experience is an important factor. A beginning interpreter

... may appear shy and timid because [he doesn't] know who is who in the courtroom, who is the judge, who is the clerk, and what are the other people present doing, and so that interpreter will stay in the background ...

Sometimes, in fact, he stated, they have difficulty locating the courtroom. The very experienced marginal interpreter who believes himself to be a good or at least adequate interpreter, in contrast, acts rather differently:

[H]e would walk in very confidently. By now he knows the clerk, he knows many of the lawyers, so he would just joke like an old pro, in a sense, and then he would continue like a professional, you know, he would feel like a pro, and so he'd be confident and would continue projecting this image.

Such interpreters may enjoy a good reputation—no complaints were ever made, and they were always available when called upon. The better interpreters, the respondent pointed out, "are not always available, but for the court administrator it's easiest to deal with someone who is available, who comes when called." Many of the courts use interpreter agencies because of the convenience they offer. All that is necessary is to make one phone call; the agency then has the problem of combing its lists to find an available interpreter in the language needed. "It's very easy to be registered with an agency," the respondent pointed out. "No testing is required, nothing of that kind."

To finish this section, we may note that the provincial court judge was able to recall "the odd instance with a French interpreter where, even with my poor French, I can tell the translation is not
accurate, "but he had never himself been involved in a case where it had been necessary to adjourn the trial in order to get another interpreter, though he did know that that had happened.

The Legal Perspective

The social science and practitioners' views provide a clear picture of court interpreting as a demanding profession, one which calls for formal training in addition to considerable linguistic and intellectual abilities. Even more important, we have seen that adequacy tends to be assumed, but should not be. When problems are detected, the lay person has relied on intuition or "feel." Only the individual who is himself equally skilled in the two languages is able to make a direct assessment of the adequacy of interpretation. In the reported cases, little attention is paid to these issues (though other issues arise, which will be dealt with later, in the section on courtroom interaction). The few cases which do deal with the adequacy of interpretation and translation will be presented below in order to illustrate what might be taken to be the court's attitude toward challenges to the adequacy of interpretation.

In R. v. Berger (1975), a German-speaker was accused of murdering a man who, he said, had sexually molested him. At trial, neither the Crown nor the defense counsel inquired into the interpreter's qualifications or his actual competence. During the course of the trial, there arose concern regarding his adequacy on the part of both defense counsel, who was himself "familiar with" German, and a German-speaking psychiatrist who was present in the courtroom. Audio tapes of the trial were later analyzed by a member of the bar of British Columbia who was "fluent" in German. (The report does not specify that the
foreign-language utterances had been recorded, but they must have been.) He thought he had found 34 errors in translation. An appeal of the conviction was taken to the British Columbia Court of Appeal.

On appeal, defense counsel suggested that it was the trial judge who had been responsible for ensuring that the accused understood all of the proceedings and who ought to have inquired into the interpreter's competence. Though this is a basic issue, the Court of Appeal did not deal with it, focusing instead on the alleged mistakes found by the German-speaking lawyer. They were not really mistakes, the court held. The court could find not "significant differences" between the court interpreter's translations and those made by the lawyer, who had been called as an expert witness (p. 376). The court did not say that there were no differences--only that they did not matter.

Unterreiner v. The Queen (1980), discussed earlier, also involved questions about the adequacy of interpretation. (An untrained bilingual, it will be recalled, had been called to interpret.) Problems arose at the beginning of the accused's cross-examination of the chief Crown witness against him regarding the interpreter's translation of the word "violent." The accused disagreed with the interpreter's rendering of the English word "violent" as "nervous." Eventually, even the judge himself entered the fray to add his own definition of the word. The appeal was not decided on this point, but the appellate court here did agree that there had been a denial of natural justice: Both the competence and the impartiality of the interpreter should have been tested.

Accuracy of the translation is important at the stage in the legal proceedings where the accused makes his initial plea to the charge. In
R. v. Beaulieu (1981), the accused was allowed to withdraw a guilty plea he had made to a charge of dangerous driving because the interpreter at trial had translated "in a manner dangerous to the public" as "dans un sense dangereux au public," when it should have been, "d'une facon dangereuse pour le public." Stevenson, J. acknowledged that accuracy in translation is "a very important factor" in such circumstances, but opined as well that whether an accused understands what he is pleading guilty to is only one factor to be considered in deciding whether he should be permitted to withdraw his plea. (Often the accused has had legal advice prior to entering a plea, so understanding the charge when it is read out in court may be less important--this seems to be the court's thinking in this type of matter.) The contrast with Berger is interesting. In Berger the importance of accurate translation was recognized, but possessible shortcomings were ruled as having no real significance; whereas in Beaulieu we have a case where a relatively small translation error was the basis for the decision in the appellant's favor.

The other case where the adequacy of translation was dealt with at some length is R. v. Johnny and Billy (1981), another case from British Columbia, and one of only two cases located where linguists were used as expert witnesses. At the murder trial of the two accused, the defense sought to block the introduction in evidence of taped conversations between the two men. The holding cell had been "bugged," and the Crown had over six hours of tapes which included the interrogation of one accused by the other concerning incriminating things he had told the police during a polygraph test and in subsequent conversations. Most of this conversation was in Chilcotin, one of the Athabascan languages
spoken by the native people of British Columbia. The translation of those tapes into English gave rise to a number of challenges in court.

The translation methods were unorthodox. A police officer who was, like both accuseds, a "native Chilcotin Indian" and was, the judge ruled, fluent in both Chilcotin and English, spent several months translating the tapes. Though the constable spoke Chilcotin fluently, he had not learned to write it, which caused some delay in the translation process. In addition, the judge did confess to having "some minor reservations" about the officer's ability to express himself in English, too. To solve this problem, a missionary working in the area was brought in to assist with the translation. He had lived among the Chilcotin people in the Alexis Creek area of British Columbia for 17 years, had had much practical experience with the language, and had even participated in the creation in a written form of the Chilcotin language. It was admitted, however, that he was deficient in spoken Chilcotin. The two translators both worked on the task, helping each other in preparing their respective translations.

Counsel for the accused Robert Johnny called a university linguistics professor as an expert witness to challenge the translations. He made a number of criticisms of both. The conversations between the two accused, Professor St.-Jacques pointed out, showed "zero redundancy," which occurs when the speakers "have a great deal of shared knowledge" and can say more with fewer words, other things being equal. The professor testified that a "'professional translator' would not translate such a conversation" (pp. 40-41), though on cross-examination he modified his position and said that, though a
professional might translate it, he "would qualify it with the words 'it may mean so and so, but I am not sure;'" (p. 41).

The court met this criticism with the observation that judges and juries face the problem of zero redundancy and shared knowledge every day, since they occur even when translation is not involved. The court also responded to the alleged defects in the translations. The missionary's deficiency in fluency in Chilcotin could "be remedied by appreciating that Mr. King relied upon Special Constable Grant Alphonse to supply word meanings" (p. 40, per Toy, J.). The missionary, it was agreed, also had omitted the swear words.

The magnitude or effect of translation inaccuracies was an issue in this case, too. It was admitted that the missionary "made certain assumptions based on prior knowledge or supposition" (p. 40), but the court held that this had not resulted in any "substantial inaccuracies" and, in any event, once the translation was admitted into evidence, the jury could decide for itself whether the translation should be relied on. Professor St.-Jacques pointed out that nowhere in the translation did Mr. King, the missionary, indicate that he was unsure of what the correct translation should be, nor were any alternative translations offered. But these, too, said Toy, J., were matters for the jury to weigh. Just as the court was prepared to consider that the native constable's knowledge of vocabulary could compensate for the missionary's deficiencies in that area, so, too, the constable's limited syntactic knowledge of English was not fatal because of the missionary's superior knowledge of grammar and syntax both English and Chilcotin which had influenced the constable's translation.
A final point was made by Professor St.-Jacques: Strictly speaking, these were not translations at all. In proper translation there would have been three distinct steps. First, the conversations in Chilcotin would be transcribed, either in phonetic symbols or in the new Chilcotin alphabet. Then a literal translation would have been made. Finally, there would be a "full-bodied English translation," as Toy, J. put it (p. 42). As things stood, the professor noted, there was no way at all to check the accuracy of the translations. These criticisms, however, did not sway the court. Verification might be desirable, but the failure to verify did not make the translations useless. In addition, the judge was not ready to say that the joint efforts of the two translators were the work of "incompetents," nor had he been shown that they were inaccurate. The jury could consider these objections, but there was no reason not to admit the translations into evidence.

Comment

The dramatic contrast here is between the range of truly challenging problems acknowledged to exist by both academic experts and experienced practitioners, and the reluctance of the courts--if that is not too strong a term--to question the adequacy of translation or interpretation, either in the courtroom or regarding evidence of inculpatory statements. Several factors were mentioned as affecting the situation (in the view of those who saw problems).

It seems that lay persons, including judges, are not always aware of the difference between being bilingual and being an interpreter or a translator. Identifying inadequacy in court interpretation as it occurs requires being bilingual, at a minimum, the respondents stated, and
certainly few judges are bilingual in any language other than French. What the interviewees refer to as "intuition," "sense," or "feel" is not likely to be a reliable measure, and certainly the judge should be fully occupied with attending to the things being said by the parties. The accused or the witness is not in a very good position to express any doubts he may have regarding the interpretation, and since no record is made, as a rule, of the foreign-language utterances, the chance to object ends when the trial ends, for all practical purposes. The interpreter swears to translate accurately and faithfully, and is assumed to be doing so until something alerts the court to the possibility that perhaps he is not. It appears that translation inadequacy is noticed relatively often by bilingual observers, but not by the court. One simple remedy, to be mentioned later as well, would be to establish a court observation program wherein bilinguals could assist by being translation watch dogs. The other remedy suggested by the data presented here is to make a record of both the English- and foreign-language utterances, so that any inaccuracies can be found later.
CHAPTER FOUR

INTERCULTURAL INTERROGATIONS
When an ESL-speaker is questioned by police, we have intercultural interrogation. Then the right provided in s. 10(b) arises, if the suspect has in fact been arrested or detained. (The jurisprudence on what constitutes "detention" is much too voluminous to be reviewed here.) The research goal, again, was to assemble a social science perspective which could be used along with practitioners' observations to form a baseline with which legal decisions could be compared, and which could perhaps offer guidelines for further efforts in this area. The social science literature seemed to divide itself into two sub-topics, intercultural communication principles, and interrogation. The discussion of interpreters was presented earlier in this report because intercultural interrogation may be performed with the aid of an interpreter. In addition, implementing the s. 10(b) right specifically involves communicating to the suspect that he had the right to hire an attorney immediately, and implies the question of whether the suspect in fact understands that, for without comprehension, how can he be said to have 'been informed'?

The Social Science Perspective

Intercultural communication is a concept which applies at every juncture when we discuss ESL-speakers, by necessary implication. Since the descriptor "intercultural" is far more common than its rival terms, "cross-cultural" and "interethnic," we need to agree that ethnic origin implies culture, since "ethnic origin" is what s. 15 specifically names as one of the bases upon which discrimination must not be based. In addition, we must see that ethnic origin implies language, since it is
linguistic deficit which triggers that s. 14 right, and linguistic communication which is entailed in s. 10(b).

The intercultural communication literature is expanding. The most satisfactory systematic treatment of the field as a whole seems to be Gudykunst and Kim's textbook, *Communicating With Strangers* (1984). In addressing terminological issues, the authors point out that concepts such as race and ethnicity may be confused by people. An ethnic group is "a a group of people who share a common cultural heritage usually based on a common national origin or language" (p. 15; emphasis added). They describe ethnic groups as possessing "distinctive linguistic, religious, cultural or national characteristics" (p. 63; emphasis added). Thus discrimination based on linguistic or cultural differences in how communication takes place would presumably be covered by s. 15 of the Charter. (In contrast, inequality which results from individual differences, environmental differences, and so on, would be covered by the general provisions of s. 15, since they are not specifically named as being relevant.)

Beliefs, norms, and values are the three major components that affect the communication process. Postulates or beliefs refer to the group's "world-view," which includes such commonsense beliefs as those respecting causation in the universe, the nature of human beings, and so on. These beliefs are treated specifically as commonsensical by the authors: "Cultural postulates are the things we take for granted as the "facts of life"" (p. 59). Among these may be beliefs concerning the relationship between speaking and understanding a language, though the authors do not, of course, discuss this particular question.
Values refer to the things that members of the culture or ethnic group consider good and desirable. Some values pertain to communication events, e.g., the value placed on self-disclosure in North American culture, versus the absence of that value in other cultures. Norms, the third major component, refer to rules for conduct, "socially shared guidelines for expected and accepted behaviors, violation of which leads to some form of sanction" (p. 53). The implications for interethnic communication are that problems should be expected:

Since norms and rules tend to vary systematically across cultures, our behavioral expectations tend to be violated with greater frequency when we communicate with strangers than when we communicate with people who are known (p. 59).

More than that, we tend to apply the standards of our own group in our dealings with all others, regardless of cultural differences. Thus some strangers are seen as "suspicious" while others are viewed as "brash," and so on.

Another culturally variable factor which influences communication is the physical environment:

The setting in which the communication occurs ... performs the ... function of defining boundaries about how to interpret messages. The same message transmitted in different settings can have two entirely different meanings (p. 106).

The meaning, then, changes with the setting. The psychological environment is another factor. All cultures have methods for producing and regulating privacy (see p. 113). In some cultures, it is not possible to achieve privacy through closing off physical areas, as North Americans do. Instead, there exists a kind of psychological privacy, which allows individuals to have the benefits of solitude or anonymity without being physically separated from others. Actual physical
isolation during interrogation or confinement could have different effects upon members of cultures where such isolation is rare.

Next we may consider cultural variation in cognitive processes in message decoding. Gudykunst and Kim explain the importance of extra-linguistic cues in communication:

"Contextual cues refer to all the messages implicit in a communication transaction, including the nature of the interpersonal relationship between the communicators, the nonverbal expressions of the communicators, the physical setting, and the social circumstances. Verbal messages are viewed as explicitly coded messages that stand out against the background of various contextual cues (p. 120; emphasis in the original).

The extent to which the communication setting influences the verbal communication that takes place therein will vary because cultures vary in the extent to which contextual factors directly influence interpersonal communication:

" Cultures that tend to place greater emphasis on sensitivity to and the significance of subtle contextual cues can be characterized as high-context cultures. On the other hand, low-context cultures tend to emphasize spoken or written verbal messages that are explicitly coded (p. 121).

Mainstream North Americans, by and large, are low-context communicators, while members of many Asian ethnic groups would attribute more significance to the setting in which communication takes place and the cues found therein.

One more significant communication factor which varies across ethnic groups is "interpersonal orientation, which refers to... the extent to which an individual is dependent on the group and the equilibrium point of optimal balance between dependency and autonomy of individual members of a primary group (p. 125)."
In mainstream North America, of course, individualism prevails, in contrast to the orientation found in many if not most other places, such as the traditional societies of Asia and Africa, where we find a greater degree of "submission of individual identity, individualism, and self-expression to the groups to which one belongs" (p. 126). In such cultures, individual action is always considered in relation to its likely effect on the welfare of the primary group, which may itself be much larger than its Western counterpart. Along with this factor, we may consider cultural differences in seeking help. In North American society, it is common to rely on specialists and experts:

[I]f someone is experiencing a [sic] serious emotional distress, the person is encouraged to see a professional psychologist or counselor in order to deal with the problem more rationally. In contrast, help for many of the social and emotional problems in high-context cultures is sought from members of one's family and close friends (p. 130).

Presumably, members of some ethnic groups would naturally be more prone than others to avail themselves of the opportunity to retain a lawyer (who is not known to them) to assist them in time of trouble; and the reverse would hold true for the desire to contact a relative or friend.

Cultures also differ in how oral communication is viewed. In the Western tradition, the emphasis is on the speaker as an individual:

A primary function of speech in this tradition is to express one's ideas and thoughts as clearly, logically, and persuasively as possible, so the speaker can be fully recognized for his or her individuality in influencing others (p. 140).

We may compare the Eastern tradition:

[R]ather than encouraging the expression of individuality through the articulation of words, the tradition of Eastern cultures stresses the value of adherence to culturally defined social expectations and rules. The primary emphasis is placed not on the technique of construction and delivering verbal
messages for maximum persuasiveness but on conformity to the already established social relationships defined by the position of the individual speaker in the society (p. 141).

The tendency, then, might be for a member of an Eastern culture to defer to the authority and expectations of someone in a clearly constituted position of authority, such as a police officer.

In Asian cultures, less importance is placed on verbal communication in the first place:

Unlike Western cultures, which traditionally have placed great faith in the power of words, the psychocultural orientation of Asian cultures can be characterized as bordering on a "mistrust" of words (p. 141).

One implication is that Asians will attach less significance to the speech of others, for the same reason; this may include the s. 10(b) caution. Along with the above we may note the well-known Asian value placed on having minimal disagreement or confrontation in communication:

In general, Asians tend to be concerned more with the overall emotional quality of the interaction than with the meaning of particular words or sentences. Courtesy often takes precedence over truthfulness, which is consistent with the cultural emphasis on the maintenance of social harmony as the primary function of speech. This leads Asians to give an agreeable and pleasant answer to a question when a literal, factual answer might be unpleasant or embarrassing (p. 142; emphasis added).

A third factor, described as existing in Thai culture, as an example, is that "doubts are rarely verbalized, especially when one is communicating with elders and persons of higher status" (p. 142). These factors, particularly in combination with other cultural differences mentioned earlier, would perhaps lead many Asians to respond affirmatively to the investigator's comprehension check following the reading of the s. 10(b) caution, "Do you understand?" It would be
contrary to virtually everything in their background to say, "Frankly, officer, I don't--would you mind repeating that?" It would be naive to assume that that question "means" the same thing to everybody.

Having reviewed the basic principles of intercultural communication, we can consider the interrogation process itself. To represent this area of social science investigation, the researcher chose a pair of British studies which made use of American data in a review of the literature and supplemented it with empirical data collected in Great Britain. The first study (Irving and Hilgendorf 1980) is a review of the American literature on police interrogation, and the second (Irving 1980) is an attempt to ascertain the extent to which the reality in Great Britain corresponds with that pictured in the American social science literature. How much the studies apply to Canada is not known, of course, but we might assume that they are somewhat relevant. Again, the primary aim is to present a typical example of social science thinking on the matter.

Irving and Hilgendorf conceive of the suspect being interrogated as "subject to physical, psychological and social pressures" (p. 9) that affect the decisions he must make, and bear on the central issue of the voluntariness of suspects' confessions and their reliability (truth). The background for their study involves the British Judges' Rules, which stipulate that confessions cannot be admitted into evidence unless they were voluntary, i.e., not made out of fear of prejudice or hope of advantage, and not brought about by "oppression" (see p.11). This is the situation in Canada, too, though the concept of oppression is a strictly British contribution.
Reviewing many different studies, the authors identified persuasion as a key factor. The literature reveals the following factors as enhancing persuasion: difference in status; high authority; active participation of the subject; isolation of the subject from his peers; and mild stress such as anxiety or lack of important information needed by the subject in order to make certain vital decisions. They next examined a number of police manuals to see whether the recommendations contained therein fit the social science literature review they conducted.

The first set of factors represents the psychological interactional aspect. The interrogator should act as if the suspect's guilt is a foregone conclusion, play down the seriousness of the offense, minimize the consequences of partial confession or admitting guilty knowledge, and refrain from displaying guns or recording equipment (which might make the suspect too nervous). Second, the interrogators can try to manipulate the suspect's understanding of the social consequences of confessing or not, e.g., explaining why committing the crime was normal or reasonable and due to understandable pressures, and explaining that confessing is the honorable and socially acceptable thing while keeping silent or lying indicates guilt (see p. 20). Such attempts might, in line with the intercultural communication perspective, be more effective with members of Eastern cultures, it would seem.

Attention is also paid to the interrogation environment generally, e.g., length of time of questioning, intervals between questioning periods, provision of food and drink, and custody itself; and to the nature of questioning itself (p. 27). To conceptualize the various
factors which, together, might constitute "oppression," the writers group stress studies under three types of cause of stress: physical characteristics of the immediate environment, confinement and isolation, and submission to authority. Again, the ethnic factor seems important, on the basis of the intercultural communication viewpoint.

The physical environment can be stressful when the suspect is uncertain about intrusion by others, how to get food or find a place or rest, or where the toilet facilities are. There is also of course the overall loss of control involved in being in custody. To some, the interrogation situation "may pose a threat of loss of liberty, a threat of punishment, social stigma, or economic threat to family" (p. 32). Confinement and social isolation was shown to cause stress in the social science literature: Many subjects quit the experiments because of the unpleasantness. The third factor, submission to authority, calls to mind the fascinating experiments conducted by Stanley Milgram, the American social psychologist, which demonstrated the lengths to which some people will go when they believe they are being subjected to legitimate authority. The obedience factor

... predisposes the subject to give up the responsibility for making the decision for himself in favour of acquiescing to the demands of his interrogator (p. 43).

Here, in particular, cultural differences might result in greater overall oppression for some individuals. The police manuals' advice to increase authority includes: using props such as fake files and documents; using third-party introductions to emphasize the status of the interrogator; calling high-status subjects by their first names and being more forceful with them; and limiting suspects' attempts at flattery or ingratiation (see p. 48).
Following up empirically, Irving (1980) conducted a participant observation study of police interrogation in Great Britain. Overall, the results were confirmatory. The authority of the police is underscored at every turn:

Everything which happens to a suspect from the moment he enters the cell block reinforces the authority of the police. The removal of his property and items of clothing, body search, the reading of rights, being assigned a cell and locked in, the rules relating to custody, insistence on obedience, all leave the suspect in no doubt as to his status (p. 134).

Irving concluded that the authority factor was more important than confinement and isolation. Threat of harm was a factor, too, though not because suspects were actually harmed by the police (in the cases observed).

Psychological tactics were employed by police. For example, where more than one charge could be laid,

... the suspect can be led to believe, or can simply be allowed to assume, that the lesser charge will ensue if he is cooperative, or that the more serious charge will result if he is not (p. 139).

This points up the importance of linguistic comprehension and the need for interpretation during interrogation. The police were subtle in this regard. They know that

... where the suspect wants to believe that a bargain is being offered, only the slightest indication is needed to make him certain that it has been offered (p. 140).

A tactic which would work particularly well with Asians, it would seem, was to tell the suspect that

... unless matters were cleared up satisfactorily the police would have to request a remand in custody and this would affect the suspect's family and friends (p. 139).
Another tactic, one which could be effective with ESL-speakers, is to tell the suspect that a jury is unlikely to believe the story he has told police—if the suspect speaks English poorly, and particularly if he is unaware of the right to the assistance of an interpreter at trial, this may seem quite realistic.

It may be significant that, of 16 cases out of 60 in the study where no identifiable tactics were used by police, four involved suspects with inadequate English who were interviewed through an interpreter. The interpreter may provide protection against police tactics either because the need to translate reduced the interrogator's ability to manipulate verbal meanings, or because now the suspect is in the company of someone who speaks his language, and often is from his own ethno-cultural background. This, though not a part of the interpreter's official role-set, may amount to a significant, latent function of interpretation. Overall, the tactics work. Of the 60 suspects in the sample, 35 made admissions during the interview, and four others did later. Only one suspect refused to answer any questions (see p. 149). Irving concluded that police practice in Great Britain was in fact similar to the American experience as reported in the social science literature review and the police manuals.

In Canada, recent federal Law Reform Commission dealt with police interrogation. The Commission (1984) took the position that confessions should be admitted in evidence only if they were made with "an enlightened understanding of the consequences that may flow from making them." and that voluntariness implies that the suspect "had been apprised of his legal jeopardy at the time" (p. 2). The Commission concluded that specific statutory rules governing police interrogation
were needed. They point out that, in contrast to the situation at trial, during interrogation the accused does not even enjoy the presumption of innocence. To the contrary, he is the subject of investigation precisely because the police believe he is guilty. The Commission stated tersely: "in fact, then, if not in law, an interrogation is an inquisition in which agents of the state seek the disclosure of evidence" (p. 45). When the police officer questions a suspect, "an adversarial process has commenced" (p. 47). The interrogator "is not seeking mere information," but "seeks evidence, and for practical purposes he is taking 'indirect testimony'" (p. 44; emphasis added).

The Commission recommended requiring investigators to inform the suspect of his right to remain silent before any questioning begins, or, if the suspect made a spontaneous confession, as soon as possible after the confession has been written down. The Commission noted that the Charter does not require this. They argue:

As there is in fact no presumption of innocence where there is a suspicion of guilt, it seems a self-evident proposition that a suspect should be apprised of a right [to silence] that has long been recognized at law. The Commission takes the view that the right to silence of a person suspected or accused of a crime is as great, if not greater, as the right to contact a lawyer (p. 57).

It may be asked, in addition, what good it does to contact a lawyer after you have confessed out of ignorance to your right to remain silent. The Commission offered one suggested wording for the recommended warning:

You have a right to remain silent. Anything you say may be introduced as evidence in court. If you agree to make a statement or answer questions, you are free to exercise your right to remain silent at any time.
Before you make a statement or answer any questions, you may contact a lawyer [see section 6].

Whether this wording would be suitable for ESL-speakers is open to question, as is suggested by several studies of individuals' comprehension of their rights even when they have been informed of them.

Briere's (1978) study of ESL-speakers' comprehension of Miranda rights in the United States seems to be the only one of its type. He became involved in a case where a foreign student was read his rights, waived them, and then incriminated himself. Called as an expert witness by the public defender, Briere indicated his doubt that the Thai student had understood his rights well enough to have waived them. Besides testing the student's English ability, Briere applied readability formulae to the Miranda warnings, and determined the frequency with which the key words in the warnings appeared in everyday language. (Using readability tests with spoken warnings would not overestimate the difficulty of the warnings because difficult reading makes even more difficult listening, Briere says [see pp. 237-238].)

For 50 percent comprehension, the average level of difficulty in the warnings was grade 8; for 100 percent comprehension, grade 11.6 (see p. 241). By way of comparison, a Los Angeles County school district study found that 75 percent of 863 youths between the ages of 14 and 17 surveyed did not understand the Miranda rights when they were read to them by policemen (see p. 242). The rights are as follows:

You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have a right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning.

--Do you understand these rights?
--Do you wish to give up the right to remain silent?
Do you wish to give up the right to an attorney and to have him present during questioning? (quoted at p. 235).

(This familiar litany has been heard by Canadians so often—on American television programs—that many believe the rights to exist in Canada.)

Two of the terms, "attorney" and "questioning," occur only two or three times per million words in written materials, according to Briere (p. 239). Even many native speakers of English, Briere notes, may not know that "attorney" and "lawyer" are synonymous. There can be no doubt that the equivalent Canadian term used in the Charter, "counsel," is even less well known in Canada than "lawyer." Briere also notes that knowing the meaning of "give" and that of "up" does not guarantee knowing the meaning of the phrasal verb "give up." This fact would not necessarily be appreciated by judges, he observes (p. 241).

To remedy the problem, Briere proposes rephrasing the Miranda warnings, as follows (see p. 243):

--You don't have to talk with us and you don't have to answer our questions if you don't want to.

--If you decide to talk with us, anything you say can be used against you.

--We can tell the judge what you tell us.

--You can talk to a lawyer and you can have a lawyer with you while we ask you questions.

--If you want a lawyer but don't have enough money for one, then we will get one for you without charge.

--Do you understand what I have said?

--Do you want to have a lawyer with you while I talk to you?

--Do you want to talk to me now?
Briere seems to feel that "don't have to talk with us" would carry the same force and reassurance as "have the right to remain silent" but a right to do something may differ from the mere absence of a legal compulsion to do otherwise. What would Briere say about the s. 10(b) vocabulary--"right," "retain," "instruct," and "counsel"--all of which have other meaning in everyday life (when they are used at all)?

There is of course a specialized register called "foreigner talk" which represents on-the-spot simplification of language designed to facilitate communication with non-native speakers of the language (see the summary of its characteristics in Hatch 1983, pp. 183-184). However, these modifications are less likely to be used when the major intention is not to communicate but merely to speak, and when a set prescribed utterance is involved, as would be the case with the Charter caution. It is ironic that the greater ease of psycholinguistic processing that foreigner talk is "designed" to facilitate is unavailable in situations where it is needed most, such as informing ESL-speakers of their rights. One feature of foreigner talk that warrants special attention here is the greater reliance placed on tag questions, e.g., "Your were there, weren't you." Tag questions make it easier for the auditor to know what the focus of the question is, and also offer a model for the proper response to the question. One question which arises in this connection is whether in some circumstances the tag question may function as a leading question if the interlocutor's belief or expectation is known.

The last social science study to be considered at length does not deal with ESL-speakers but with juveniles. As such, it offers a number of implicit comparisons. To place this study in its proper perspective,
two earlier studies of suspects' comprehension of their Miranda rights should be mentioned. One observational study of the comprehension of rights found that the warnings, when given,

... were often intoned in a manner designed to minimize or negate their importance and effectiveness. Since most suspects had little education--and many could not even read--and appeared both ill-at-ease and dazed by the process, the warning so given seemed to have little impact (Wald et al. 1967, p. 1572).

This matter of course is not dealt with in the Charter at all, nor is there any mention of it anywhere in the case reports. Another perspective on the impact of the rights within the interrogational context is provided by another observation by the researchers:

In the few cases where a suspect showed an interest in finding a lawyer and did not already know one, the police usually managed to head him off simply by not helping him to locate one. Sometimes they refused to advise the suspect whether he should have a lawyer with him during questioning; more often they merely offered him a telephone book without further comment, and that was enough to deter him from calling a lawyer (p. 1552; emphasis added.)

ESL-speakers might resemble the "inner city" suspects in this study with regard to literacy in English and, probably, familiarity with the legal process.

Another study conducted around the same time focused on students at a prestigious university who were being investigated. They did not do much better:

In most of the interrogations, the [FBI] agents assumed the offensive from the outset and imposed their format upon the encounter. They would begin by asking questions, and in the social situation [of being questioned in their homes or offices, without an arrest having been made yet], a question demands an answer (Miranda states legal, not social rules). The suspect is thus in a position of having to decide whether to answer each question (Griffiths and Ayres 1967-68, p. 316; emphasis added).
This not only is in accord with the picture of the coercive nature of interrogation found in the studies mentioned earlier, but adds a valuable sociolinguistic dimension to the discussion. The investigators found that the interrogation process itself was more coercive than the Miranda warnings were effective in helping suspects protect their rights:

[T]he psychological interaction between the interrogator and the suspect in an interrogation is extremely subtle, and the interrogator has most of the advantages. Even when we explained the right to silence and counsel to a group of very bright and extremely willful people, they felt pressed to answer at least some of the questions put to them by the agents (p. 318; emphasis added).

This study suggests that, even with good linguistic comprehension, protection of legal rights is problematic. What can be expected in the case of ESL-speakers can be guessed at by setting Briere's study alongside that of Grisso (below).

Grisso (1981) distinguishes two components in competence to waive rights (a relevant measure of appreciating rights). The first one he calls "comprehension of rights," what the courts typically call the ability to "understand" or "comprehend", or "be cognizant of" one's rights. Grisso feels that this shows that "courts have not equated the mere fact of having been told one's rights (a procedural matter) with knowing one's rights" (p. 44). (Is the s. 10(b) right to "be informed" a procedural matter, or a right to know?) The second component, "beliefs about legal context," refers to beliefs about how the rights actually function in the legal process, and what the consequences of waiving one's rights might be. He states:

It is one thing, for example, to know that one has a right to consult a lawyer, and perhaps quite another
thing to know what a lawyer does or what the potential consequences of calling for a lawyer might be (p. 44).

We should not approach s. 10(b) of the Charter, then, as if it were a dictation test-type measure of linguistic comprehension.

Grisso used the following indicators to measure comprehension: ability to paraphrase the Miranda warnings, ability to define important words in the warnings, and recognition of other sentences with similar meanings (see p. 47). The six lexical items used to test understanding were "consult," "attorney," "interrogation," "appoint," "entitled," and "right." Understanding the rights is not enough. For instance, a person can "understand" the right to remain silent, but if he believes that he can be made to testify in court against his will, what is gained by exercising the right to silence during the investigation?

A major aspect of the legal context of waiver of rights is appreciating the nature of a right. This involves more than mere knowledge of the everyday sense of the term:

[T]he right to remain silent should be perceived as an irrevocable protection from self-incrimination. That is, one should realize that the powers of police, judges, or other authorities do not include the power to lawfully waive or revoke that right, to apply coercive pressure on the juvenile to do so, or to demand a response to questioning after a suspect has laid claim to that right (p. 54).

This is directly relevant for the present study since the s. 20(b) caution uses the term "right." Grisso cites a study of children's definitions of a right in which

... a frequent response was to confuse a right with an allowance provided by authority, rather than as a privilege which is legally protected against the whims of authority (Grisso 1981, p. 77, footnote 18).

In his own data, obtained from testing the comprehension of over 400 juveniles, "right" was most often equated with ideas such as "you can do
"It's up to you, if you want to do it you can do it," or "You can do anything if it's your right" (p. 77).

On the paraphrase test of comprehension, 55 to 80 percent of the subjects (depending on which of two criteria are used) showed deficient understanding of the rights (p. 73). The rights were not comprehended equally well. The rights to silence and to an appointed attorney were paraphrased adequately by nearly nine out of ten juveniles. However, only slightly more than half understood the warning that the statement would be used in court. As for the right to retain an attorney before and during interrogation, which corresponds to the s. 10(b) right in the Charter, only about 30 percent of the sample understood it adequately, and 44 percent were "clearly inadequate" in their understanding (p. 74). The most common error in understanding was in relation to the time and place when an attorney could be used, with many juveniles believing that the right pertained to their court hearing rather than during interrogation. In some cases, this aspect of the right was not understood even after the researcher inquired further of the juvenile (pp. 74-75).

On the vocabulary comprehension test, nearly two-thirds of the sample had inadequate comprehension of one or more of the items. "Attorney," "entitled," and "appoint" were understood by from 65 to 80 percent of the respondents, but they had less success with the others: "interrogation" (37 percent), "consult" (28 percent), and "right" (27 percent). How many Canadian juveniles can define "retain," "instruct," and "counsel," we might ask? It might be assumed that adults would do considerably better. Grisso did administer the test to adults. Fewer
than one-half could adequately define the word "right." While they did better than the juveniles,

... the majority described a right as something one is allowed to do, and failed to express a sense of the protectedness of a right (p. 107).

While we do not have comparable data for ESL-speakers, there is little reason to believe that they would do well.

We can turn now to the issue of appreciating the legal context in which the rights operate. To establish some standards for what the legal context should be understood to be, Grisso consulted juvenile law lawyers, who were asked to specify what knowledge would be required for there to be knowing, intelligent, and voluntary waiver of rights by a juvenile. They agreed on three areas (see p. 111):

1. The suspect should understand that the police, in their role as interrogators, are in an adversarial position and are attempting to discover the degree of the suspect's involvement in a law violation.

2. The suspect should perceive a defense attorney as an advocate, skilled in law, whose function is to provide legal advice and guidance in the interest and defense of the suspect.

3. The right to silence should be perceived as a privilege: that is, as an entitlement which should not and cannot legally be violated or revoked by authority.

A variety of misconceptions held by juveniles were discovered. Some thought that the lawyer himself played a part in deciding guilt or innocence, and punishment. Others believed that lawyers would not represent juveniles who admitted that they had committed the violation. Most of the inadequate responses involved the belief that lawyers were required to tell the court about any evidence suggesting that the juvenile had committed the offense. About one-third of the juveniles in
the sample who had not had prior experience in serious court proceedings understood the lawyer's role wrongly:

> While the potential for defense and helpful advocacy is generally understood, they see this as available primarily to the juvenile who is being wrongly "accused" by the court; if the juvenile is being rightly "accused," they believe that the lawyer's role is to assist the court in disposition of the case (p. 120).

This may reflect some aspects of the juvenile justice system which the respondents had heard about from others. It also raises the issue of what beliefs foreign-born ESL-speakers bring with them to Canada.

Another potential problem for ESL-speakers from civil law jurisdictions, where the judge takes a much more "inquisitorial" role in the proceedings, is suggested by the finding in Grisso's study that juveniles held other beliefs which would cancel out the Miranda rights. For instance, most subjects thought that, the right to silence notwithstanding the judge could force them to reveal that they knew in court. Here are some beliefs (in Grisso's words) held by juveniles:

- The judge makes the law and has the power to assess penalties against those who do not comply with it.

- The sole purpose of a court hearing was to obtain a juvenile's confession, for which reason asserting the right to silence in court would be legally disallowed.

- Refusal to talk about one's illegal involvements when questioned by a judge would amount to perjury. As one juvenile put it, "If I'm in court, I have to tell the truth, the whole truth, and nothing but the truth. So when the judge asked you what you done, you got to tell him even if you don't want to" (p. 1224).

Grisso notes that three-quarters of the adults surveyed also believed that the right to silence could be taken away by a judge.

One of Grisso's observations would seem to have special relevance for foreign-born ESL-speakers in Canada. The interviews showed that
many juveniles believed that they would receive more lenient treatment if they confessed, even though they knew there could be undesirable consequences as well. In general, Grisso concluded, "dependent or frightened youths, or ... youths who feel guilt" would be more likely to choose confession, as a means of getting leniency (p. 158). The riskier strategy of denying the accusation might be more attractive to more experienced youths when the offense was a serious one, due to the greater consequences involved in confessing (p. 159). For most of the juveniles, the main consideration was that of avoiding detention (at that time); asserting their rights was seen as removing the possibility of going home to their families that night (p. 159). It would seem that this would affect ESL-speakers from certain ethnic groups more than it would affect others.

Grisso does not see linguistic simplification of the Miranda warnings as offering much hope of ameliorating the situation (p. 197). He cites a research study which failed to demonstrate increased understanding resulting from simplification. Further, the significance and the function of rights also need to be understood. Juveniles need to know about

... the nature of a legal right, the legally allowable response of police and court personnel to an assertion of that right, the various potential consequences of rights waiver, the nature of an attorney-client relationship, and the ways in which an attorney works for a client (p. 197).

In dealing with multicultural populations, it might also be necessary to explain that any individual can— and is expected to—retain the services of a lawyer on his own.

Grisso does recommend "extraordinary protections" for juveniles aged 15 and under, such as blanket exclusion of their confessions, or
mandatory legal counsel, since his data indicated that this group needs extra assistance if their rights are to be protected. Grisso favors a rebuttable presumption that younger juveniles who did not have competent legal counsel and advocacy at the time of interrogation were incompetent to waive their rights. For similar reasons, ESL-speakers could be treated in the same manner, it would seem. The biggest obstacle would be the present lack of empirical data showing that such a need exists. In this sense, the understanding of juveniles' needs in the United States can be said to be advanced beyond our understanding of ESL-speakers' needs in Canada.

Practitioners' Views

One factor which arose relatively often in the interviews with practitioners was what they saw as foreign-born individuals' lack of familiarity with the Canadian type of justice system. Many foreigners are from countries where there is no legal presumption of innocence, and this may greatly affect their behavior when they come into contact with the law. One court interpreter familiar with the legal system in France explained that there, once arrested, the individual would remain in jail until the case was heard, and would not be able to participate in the preparation of a defense. "Once they end up ... in this situation," she explained,, "that automatically means the end of it until they're in court and somebody else decides their fate." This type of expectation could affect the individual's making an effort to contact a lawyer during the investigative stage, when the need for legal advice might be most critical.
One of the bilingual lawyers pointed out that it is very difficult for individuals from some backgrounds to understand that they will have to go through a hearing as part of the immigration/deportation process but nevertheless they are considered innocent until the government can prove otherwise. It is difficult for this lawyer to convey to them...

... the notion that the only way they can fry themselves is by frying themselves, because this is a very difficult charge to prove, and it's only going to be out of your own mouth that you're going to get had.

Often the government lacks one crucial element in its case, but the clients think their only hope is to talk their way out of the situation. They may inadvertently provide the government with the information it needs in trying to show "that they're nice guys." Because of their background, they do not understand that, as the lawyer put it, "even if you did it, you're innocent until proved guilty." Consequently, it is difficult to get such individuals to be quiet and only answer the questions that are asked.

The immigration adjudicator was also aware of a relationship between ethnicity and attitudes toward the justice system. For some people, it might not be uncommon in their country of origin "to be thrown in jail and left there for weeks." If they expect that deportation is (already) a certainty, they may not appreciate that anything they say to an immigration officer conducting an investigation "may well then be trotted out at their inquiry," and may of course be the very thing that brings about that deportation. They do realize that "it's not like a coffee klatsch conversation with your buddy, Joe, at the local restaurant," the adjudicator continued, but they do not realize that they are helping the investigator construct a case against
them. In fact, the adjudicator observed, at that stage they do not even know there is such a thing as an inquiry, or that they may be the subject of an inquiry as part of the overall deportation process.

The tendency to give affirmative answers to police investigators and others in authority was known to the respondents. An immigrant services worker offered two different reasons why a South Asian might do so:

One, deference, and not wanting to make waves. Wanting to impress the policeman ... that, look, right from the beginning you are cooperation ... and ... simply because you don't want to show the person that you ... do not speak English, also because ... if the police officer thinks that you don't speak English, he might perhaps get away with something, you know, if there's this feeling that there's going to be discrimination, right off the bat when you're faced by a police officer, then you want to show them that you do know English, even though you might not.

This type of attitude toward police was mentioned as well by a bilingual lawyer. People who come from the villages of Punjab, in northern India, are really quite intimidated by police. As a consequence,

... they feel that they have to answer every question that's being asked of them, and they give all of the answers, true or false, but they try and give an answer to each and every question.

In an investigation, he continued, communication would be affected by what he termed a cultural "rule of expediency," viz., "you say what the other person wants to hear." This might be more pronounced in Punjabi culture: Because "the police officers commit all kinds of infractions in terms of their own behavior ... the ordinary individual on the street simply gives you what you want to hear as a police officer." The important thing in such a confrontation is "to please the policeman. And to get away at least for that moment." This general tendency was
noted as well by a Southeast Asian immigrant services worker. People from her culture

... don't like to lose face, so they will just say yes, to show that they did understand, because they want to show the others, they don't want to look stupid.

The county court judge added that the individual might indicate that he understood "in order to be cooperative and in order to be a nice person, in order to ingratiate himself to the police officer."

Culture may also play a role in the exercise of the s. 10(b) right. One bilingual lawyer observed that most members of the South Asian community would not know the names of more than one or two lawyers. In addition, as the other bilingual lawyer pointed out, it was infrequent that an interpreter was available to assist non-English-speakers in telephoning a lawyer, and that it was very difficult for an ESL-speaker to initiate contact with a lawyer on his own. In most instances, success in retaining counsel had required the assistance of the authorities:

In other words, they've done something to earn the sympathy of the police, the jailer, the immigration officer, who says, "Look, get ahold of MOSAIC [a community translation service]," or, "Call X, who speaks [your language]," or, "I think you need a social worker."

The majority of this lawyer's referrals in emergency situations were the result of someone at the jail having found the suspect a psychologist or social worker who spoke his language, or even having simply given the suspect this particular lawyer's name. He continued:

So to the degree that they're getting help from somebody in their language, it isn't because they know how to use the yellow pages or because the yellow pages ... advertise lots of people who can help them. It's because the authorities were nice enough to put
them in touch with somebody who put them in touch with somebody else. Truthfully. That's my experience.

Other, related factors he mentioned included the fact that the idea of being able to find a lawyer in the middle of the night, on your own, was a particularly American—not even Canadian—notion. In Vancouver, he observed,

None of the law firms keep answering services or 24-hour numbers or something, so the idea that you can drag your lawyer out of bed to give you advice about whether to blow [i.e., provide a breath sample] or not really comes to us via television more than out of being taught in school that you can do that.

He added that knowing how to choose the correct type of lawyer is another problem for foreigners. The unfamiliarity with the phenomenon of legal aid is another, as an immigrant services worker observed. Refugees, such as the worker herself was, simply do not know how to call a lawyer.

Initiating action on your own is also a culturally variable kind of action. A cross-cultural trainer stated that it would not be normal for members of some ethnic groups to try to retain a lawyer on their own, independently:

[They would have a tendency to check back with their family before they did anything else, particularly the person in authority within the family ... before making any other moves.

One of the bilingual lawyers commented on the extended family system that characterizes some Canadian ethnic groups. These families involve complex reciprocal social relationships, and one result, he said, is that

... you probably won't have the self-confidence or the know-how or in fact the inclination to phone up the lawyer immediately, a lawyer of your own choice. You want want to, by nature ... talk to your friends or relatives, brothers or sisters, before you do that.
Most members of such ethnic groups "probably will not have the courage to phone up a lawyer ... and say, 'Hey, I am at the courthouse here and I'm in the police cell. I want your help.'" This lawyer stated that typically he is contacted at night by relatives and friends, who report that such-and-such is in jail and would like to be represented by the lawyer. It would be much less common to be retained by the person in custody.

Before addressing the central issue of whether in fact the ESL-speaker does understand the s. 10(b) caution after it has been recited to him in the statutory language, we may note what one of the bilingual lawyers said about the use of yes/no questions. He was the only person interviewed to mention this factor, but his observations seem very well considered. In his experience, interrogators favored yes/no questions in dealing with ESL-speakers in order to increase the likelihood that an understandable answer would be forthcoming (the foreigner talk rationale, apparently). When queried by the researcher, he agreed that such a practice leads ESL-speakers into responding to questions or propositions which they understand only imperfectly, whereas their lack of comprehension would be more apparent if open-ended questions were used. In fact, he added that "that's why those questions are asked."

By this he meant that such questioning "makes a person far more passive." The investigator is in the process of course of building up a body of evidence against the suspect:

Then you can say, "He said he did this," or, "He said he did that." Somethings they ask open-ended questions and try and get the guy to hang himself, so I guess that's the other dangerous end of it.
It was his opinion that most people being interviewed were not in fact trying to block communication; they do want to communicate and are trying to get their point across. However, in that situation, he said, ...

... it's easier for them to go along with the yes/no than to say, "Stop, I don't understand that," or, "Hang on, there's more than two alternatives," and take control of the interview themselves.

The lawyer qualified his remarks by adding that he had on occasion observed clients ask for clarification, but noted as well that "they also launch into an attempt at responding "way before they really know what the hell's going on."

Pure linguistic comprehension by itself is a formidable problem, even without the possible coercive effect of forced-choice questions. One of the bilingual lawyers estimated that 79 or 80 percent of the individuals from his ethnic group living in Vancouver would not understand the s. 10(b) right and the right to silence, and if this were told to them in a non-threatening way, "you would find over ninety percent of the people won't make any statements to the police." He thought that the manner in which the caution is delivered would be especially important to ESL-speakers. (This might be because they would have to pay comparatively more attention to paralinguistic and other nonverbal aspects of the communication.)

Other respondents said much the same thing. An immigrant services worker complained about the statutory language used in the caution:

It didn't say, "Do you want a lawyer?" It said, "Do you need counsel?" How can you understand? I couldn't even understand what "counsel" means. I said, "What's counsel? Advice?" Is it advice, you know?

It required many experiences in court before she herself appreciated that the warning referred to hiring a lawyer. In Vietnamese, she
explained, the equivalent term for "counsel" is not "lawyer," which raises the possibility that the very wording of the statute itself discriminates against some people. She added that the individual's emotional state at the time could affect his comprehension. The people she knew about had been terribly frightened:

[W]hen the policeman read that, they didn't understand one bit of what the policeman said. They're just scared, they're out of their wits. They just said to themselves, "Oh, my God, I'm thrown in jail."

She mentioned a case of a woman accused of shoplifting who cried and cried:

She said, "Please, don't throw me in jail," and she would right away confess, you know ... and the policeman of course will write down whatever she said ... They're too scared, they don't understand anything. Usually that's what happens. So only ... if you tell them their rights properly, you know, maybe they won't say anything.

One more perspective on the reading of the s. 10(b) right was provided by the county court judge, who mentioned the "Breathalyzer demand," which might be given in the same situation. He said of the demand:

[The very wording is in such legalese that you surely cannot expect a person those first language is not English to comprehend that .... I don't think a police officer is really discharging his duty if he simply reads from the card, because the card's got a lot of pretty formal language in it.

In fact, the wording come directly from the Criminal Code:

I have reasonable and probable grounds to believe that you are committing, or within the preceding two hours have committed, an offence under section 234 or 236 of the Criminal Code. I hereby demand that you provide now, or as soon as practicable, such samples of your breath as are necessary to enable a proper analysis to be made to determine the proportion, if any, of alcohol in your blood and to accompany me for the purpose of enabling such samples to be taken.
Refusal to provide the breath sample without a good excuse is itself a crime, and the judge noted that police officers do tend to explain the meaning of the demand to suspects in simpler language. At the same time, he, too, emphasized the role of the suspects's emotional state in comprehending: "There's a real danger that you don't understand because of this very oppressive environment that you're now being put into ...."

It is important, then, in safeguarding rights, to see to it that the benefits and protections intended are actually delivered. The views of practitioners surveyed above suggest that we should not assume that this will happen automatically.

The Legal Perspective

In the law reports, there is virtually no mention of culturally variable factors that could influence the communication process during investigation. A number of cases (not reviewed here) have suggested that the right to retain counsel must be exercised by the suspect in the form of an actual attempt to contact counsel. That is, the right may be held not to have been denied if a telephone and a telephone book were available. As an illustration, in R. v. Smith (1984) it was held that a "shrug" by the suspect was a waiver of the right to retain and instruct counsel. The summary report states:

The actions of the accused amounted to a failure to take further advantage of the opportunity afforded. In essence her actions amounted to a waiver of continuing to exercise her right.

This approach might be unfair to ESL-speakers if, due to their ethnic origin, it would not be natural for them to be so insistent in dealing with police.
A major issue is whether the exact language of the Charter decision which is cited with some frequency is *R. v. Nelson* (1982), a case decided by the Manitoba Queen's Bench. The suspect, charged with murder, had been told while in the police station that he could "call a lawyer to instruct and receive advice from." Asked, "Do you understand this?", he replied, "Yup, yup." The police then proceeded to interrogate him, obtaining answers to over 60 questions. The accused was never read his rights in the specific language of the Charter.

Scollin, J. felt that the language of the statute itself should be used:

If the unsophisticated accused is to be confused, it is better that he be confused about what the Constitution states rather than confused about what the police say the Constitution states (p. 92; emphasis in the original).

He went on to note that in the instant case, the police were dealing with an individual

... whose mental condition should at least have raised a query as to the full extent of his understanding and reasoning power as distinct from the relatively more simple ability to narrate (p. 92).

Despite this recognition of variability in comprehension, the court did not explain precisely how the Charter language was superior in terms of accomplishing the communicative goal. On the other hand, Scollin, J. did allow that "[f]or some accused an elaboration of how that right works might be necessary if requested" (p. 92; emphasis added). However, on the whole the court favored the statutory language:

[I]t invites difficulty from the outset if the accused is not upon his arrest informed as soon as practicable in exactly the terms enacted, that is: "You have the right to retain and instruct counsel without delay" (p. 92).

Thus the suspect himself would have to decide that his understanding was deficient before he could get a translation into simpler English from
his interrogator. How the officer might go about explaining "how that right works" was not discussed in the report, either.

Later cases displayed a more results-oriented view of how the rights should be communicated. In R. v. Shields (1983), the accused had said that he had understood his rights, and later signed a confession. At trial, he explained that he had not known any lawyers at the time and had not known that free legal assistance might be available. He had never heard the term "duty counsel" (i.e., legal aid), and the police did not tell him how he could contact a lawyer. The judge held that the accused had in fact been informed of his rights, and in a timely manner, but he was of the opinion that "mere repetition of the words" of the Charter followed by asking the accused if he understands is not enough. In this case, when it became clear to the officers that the accused did not know how to exercise his right,

... the police should have advised him of how he could contact a lawyer and should have informed him that if had could not afford to to retain and instruct counsel then legal aid was available (p. 201, per Borins, Co.Ct.J.).

The court felt that the accused's rights should be explained to him "in easily understood language." Another suggestion offered by the court was that the rights should be written out if possible, as should any waiver of the rights. (Does this discriminate against members of cultures with no written language? Against illiterate Canadians?)

Most of the comprehension questions decided by the courts have involved drunkenness rather than second-language issues. One reason for this may be that the Breathalyzer demand is even more difficult to understand than the s. 10(b) warning. R. v. Rudd (1983) offers a straightforward example of how the court can proceed when comprehension
is considered important. The court there concluded that the arresting officer "did not instruct the defendant in a sufficiently clear way to enable the defendant to understand what he was to do" (p. 221). This holding is important because it says that there is more than one way to explain a legal matter to a suspect, and the suspect's actual comprehension is the criterion of adequacy in communicating the matter to him. As a legal question, we may ask whether being informed of the s. 10(b) rights should be judges by the same standard used in the drunk driving cases.

For a look at how the court may try to resolve discrepancies in the evidence, we may turn to R. v. Croke (1983), where a deaf-mute, the trial judge found, had not understood the demand to provide a breath sample. On appeal, the comprehension issue was discussed, and the factual finding made by the trial judge was overturned. The appeal court noted that the accused could have told the interpreter present at the time that he did not understand. Here, the statutory language of course could not be used. The interpreter testified at trial that her explanation of the demand had included a lot of "show-tell," and for much of the explanation, she added, the accused "could actually see what was happening" (p. 209). This departure from the statutory language posed no problem for the appellate court, nor did the fact that the interpreter admitted that she had had difficulty in explaining the technical terms "chemical" and "analysis" and had had to substitute simpler wourd, which she said she thought the accused had understoood.

Other courts have been more insistent that actual comprehension be proved. In R. v. Richardson (1984), for instance, the court held that the words "without delay" in the s. 10(b) caution need not be used as
long as the accused understands the meaning. An often-cited decision from Prince Edward Island, R. v. Ahearn (1983), used the comprehension of the suspect as the ultimate test when it was argued that the accused had been informed of his rights because there was a sign posted on the police station wall. In informing someone of his rights, the court explained, "the important object is to so inform him and to make certain that he understands the matter being communicated to him" (p. 196, per MacDonald, J., for the court; emphasis added). As a question of fact, in this case, the court found that the accused had been informed of his rights by the sign (p. 196). An opposing "sign case" is Lussa v. The Health Science Centre and Director of Psychiatric Services (1983), where Kroft, J. was not satisfied that the posting of a sign was sufficient to inform someone of his Charter right to have the validity of his detention determined by way of a hearing.

Another insight into the interrogation process—not involving the s. 10(b) right—is provided by R. v. Stewart (1972), a British case which could be brought to bear on the Charter issues by way of analogy. This was a arson case, and the accused had a mental age of 5 or 6 years, and the language ability of a 3-year-old. On the voir dire, where his confessions' admissibility was in issue, a physician testified regarding the accused's comprehension and responses to questions during interrogation:

[T]he answers to the questions would be determined by the form of the question with a tendency either to answer: "Yes," or to give the answer which the defendant thought the questioner wanted. "He might well answer a question only parts of which he had understood although the answer might suggest that he was answering the question as a whole." "She [the physician] gave an example of this. She said: "If you ask the question: 'Where did you start the fire?' the defendant would get the words 'where' and 'fire' and,
therefore, would take you to where the fire started, but" she said, "that would not be an indication that he had started the fire because he would not fully have understood the question" (p. 279).

In this case, where there was a fairly clearly defined pattern of linguistic deficit, the confessions were excluded. ESL-speakers might have some of the very same types of comprehension problems, yet in the cases we see no comparable discussions of these issues.

Some cases have held that the Crown need not prove comprehension of the breath sample demand or Charter warning anyway. In R. v. McLellan (1983), which is only briefly reported, it is stated that the Crown need not prove beyond a reasonable doubt that the accused was informed of his Charter rights—instead, he must prove that he was not informed. Similarly, R. v. Bauditz (1981) held that the Crown "has understood and comprehended it." In the Lussa case (above), the court implied that some evidence of comprehension must be presented however:

Because I have been given no evidence either as to her capacity or incapacity to understand, I have nothing that satisfies me that s. 10 has been compiled with (p. 254).

R. v. Simon (1984) also held that the Crown must establish that the accused understood the warning, as did R. v. Simon (1984). On the other hand, R. v. Saulnier (No. 2) (1980) held that the trial judge should not have assumed that the accused did not understand English merely because he had spoken to the arresting officer in French.

What should the investigating officer do? In R. v. Lundigan (1984) the brief report states: "Police officers do not have a duty to ascertain with any precision if an accused completely understands his rights." In Nelson (see above), however, the court made recommendations for determining, and recording, the suspect's response to the warning.
And in R. v. Shields (above) the court advised that the rights should be explained in writing "to make certain that he understands his rights" (p. 201).

The courts are not unwilling to recognize that some circumstances do create something like a duty on the part of police to take special steps to determine that the suspect understood the warning or demand. In R. v. Schmidt (1984) it was held that if something in the circumstances suggests that an accused does not understand, the police officer may have to go further and see that the rights are explained. Cases of this general type include Nelson, where the suspect was an "unsophisticated accused"; Lussa, where the applicant was a person of "questionable mental capacity"; and R. v. Michael Johnny (1984), where the defendant was "handicapped to the extent that he could not communicate beyond the level of a seven-year-old child." In this last case, Wood, J. commented that "it was obvious to the police that the accused had a major disability which made communication with him at best a risky proposition" (p. 53). The court spoke of a "language handicap" in R. v. Bento (1983). The accused was too drunk to understand the Breathalyzer demand in R. v. Peters (1978), a pre-Charter case. In R. v. Pottie (1980), the appellate court held that the accused, who had just been in an accident prior to the breath sample demand, was agitated and in a state of shock, and so did not properly understand the demand. In R. v. Evaltaligak (1984), the accused was a nervous, unsophisticated person, and had not understood the warning for that reason.

If the police do have a duty to ascertain comprehension, then "incapacity" of some sort seems to trigger it. For example, in R. v. Yensen (1961), McRuer, C.J.G.C. did not think that an accused with the
verbal ability of an eight-year-old understood the meaning of the (pre-
Charter) caution, calling the mere reading of the caution "an empty
performance." He made these suggestions:

I do not think it is sufficient to ask a child if he
understands the caution. I think the officer must be
in a position when he comes into Court, to demonstrate
to the Court that the child did understand the caution
as a result of careful explanation and pointing out to
the child the consequences that may flow from making
the statement (p. 322).

Certainly this principle could be applied to ESL-speakers. The
suspect's accent would always be immediate evidence that he might be
suffering from something legally similar to a 'language handicap.' The
courts have been reasonably careful in safeguarding the rights of
suspects with organically demonstrable retardation, and they could
conceivably take the same attitude toward ESL-speakers, given the right
frame of mind.

We can consider two cases which illustrate the differing
approaches in this area. In R. v. Beaule and Ragot (1977), MacDonald,
Co. Ct. J. stated: "It is not good enough for this Court to say that
the accused must have understood the gist of the police officer's
conversation" (p. 239). As this case's opposite, there is R. v. Warnica
(1980), where the court spoke of understanding as being "apparent if ...
the accused used English words to refuse the demand" (p. 104). This is
a particularly dangerous position to take because almost any ESL-speaker
can be expected to be familiar with the question which the police
officers use, "Do you understand?", because that is probably the most
common inquiry they encounter in an anglophone country. Certainly, they
know that they are being asked if they understand; what else they may
understand is quite another question. The prejudice, so to speak, tends
to run in one direction when it comes to resolving ambiguous situations, as we see in *R. v. Sabourin* (1984), where the following interchange is reported (at p. 70):

Q: Did he appear to understand that?
A: Yes.

Q: How did you know?
A: He showed me no signs. I asked him and he said yes. Our conversation was quite coherent. He seemed to understand any directions I had given him before.

Similarly, in *R. v. D.M. and J.P.* (1980), the court accepted the investigator's testimony that he "could tell" that the interviewee understood (p. 375).

The courts do occasionally recognize that linguistic ability can vary situationally, as in *Evaltaigak* (above). Such a distinction involving an ESL-speaker was made in *R. v. Tanguay* (1984), where the court observed that the accused, a francophone with a grade 6 education, might well not have understood a Breathalyzer demand made in English.

Kovacs, Co.Ct.J. observed:

While he might be able to function to some extent in the English language in such things as paying a utility bill and perhaps following simple instructions as a labourer, ... he would not comprehend or understand a reading of his rights in English as was done in this case (p. 17).

The variation in language demand was also a factor in *R. v. Petrovic* (1984), but there the challenging situation was the courtroom:

A person may be able to communicate in a language for general purposes while not possessing sufficient comprehension or fluency to face a trial with its ominous consequences without the assistance of a qualified interpreter (p. 423).
Similarly, in *In re Citizenship Act and in re Abdul-Hamid* (1979), the judge found that the appellant could discuss his work, his family, and his background with ease: "His ability to comprehend and express himself in English as to matters within his personal experience is not merely adequate, it is competent" (p. 601). However, he had not been able to deal with questions in a citizenship examination. (This is a promising line of attack for protecting the s. 14 right.) Whether the differences in comprehension are attributed purely to emotional factors, higher linguistic demands, oral combination of the two—as in reading a suspect his Charter rights—an argument can be made for closely examining the contention that the suspect understood. A perfunctory reading of the s. 10(b) right followed by the yes/no question, "Do you understand?", and an affirmative response from the ESL-speaking suspect, ought not to be considered sufficient proof of comprehension.

**Comment**

Using the intercultural communication perspective in combination with the social science literature on interrogation, we saw that the risk of "oppression" would be greater in the case of ESL-speakers due to their ethnic origins. At the time of interrogation, further, the need for an interpreter seems clear, given that the suspect is being engaged in communication which, if the police are successful, may well form the basis of the evidence which will lead to his conviction. We saw as well that it is doubtful indeed that an ESL-speaker would be likely to truly understand the s. 10(b) warning, especially if the language of the statute itself is used. In general, the interview data was in accord with the social science literature in this area; and it suggested also
that there is a culturally variable tendency to give affirmative answers to questions from individuals in authority, as was stated in the intercultural communication textbook summarized at the beginning of this chapter.

The appellate and lower-court cases, on the other hand, show divergent tendencies in the issues which arise. Of crucial importance of course are the legal questions of whether the Crown must prove that the s. 10(b) right was comprehended by the suspect, and the whether a police officer is always under a duty to take special steps to ensure comprehension when questioning someone with an accent (an ESL-speaker). The courts have not delved very deeply into the matter of how adequate an ESL-speaker's "understanding" really is. One gets the feeling that the courts are somewhat handicapped by the need to make simple binary findings of fact, e.g., the suspect either did or did not understand the right. This tends to obscure all the detail, all the variation among individuals, and the handicap faced by ESL-speakers.
CHAPTER FIVE

COURTROOM INTERACTION
A number of considerations merge in the courtroom. For one thing, interpretation occurs there and must be governed according to some set of principles which need to be considered. The linguistic ability of the witnesses and the accused must be assessed in order to determine whether the right to interpretation given in s. 14 has arisen. The credibility of witnesses is evaluated by the trier of fact. At the start of the trial, the accused pleads to the charge; at the end, if found guilty, he may be asked to "speak to sentence" on his own behalf, i.e., make submissions to the court regarding his sentence. Throughout, the effect of the specialized register of the legal language will play a part, as will cultural differences in communication norms. In all of this, equality for ESL-speakers is problematic. The first task is to establish what factors may be involved; for that, we can turn to the social science literature, first, and then to the practitioners.

The Social Science Perspective

Several quite relevant studies which bear on ethnic or cultural differences in courtroom interaction were located. First is Bennett and Feldman's (1981) ethnographic study of courtroom interaction which led to the view of "storytelling" as the essential form of courtroom testimony. The researchers began with the proposition that jurors could not perform their somewhat technical task without importing some everyday competence to use in their fact-finding role:

If trials make sense to untrained participants [i.e., jurors], there must be some implicit framework of social judgement that people bring into the courtroom from everyday life. Such a framework would have to be shared by citizen participants alike. Even lawyers and judges ... must rely on some commonsense means of presenting legal issues and cases in ways that make sense to jurors, witnesses, defendants, and spectators.
They did find such an everyday framework: Legal narratives take the form of stories. From this, it follows directly that cultural or other differences in story-telling ability could lead to discrimination:

Stories are symbolic reconstructions of events and actions. People who cannot manipulate symbols within a narrative format may be at a disadvantage even when, as witnesses or defendants, they are telling the truth. Moreover, the interpretation of stories requires that teller and listener share a set of norms, assumptions, and experiences. If witnesses and jurors differ in their understanding of society and social action, stories that make sense to one actor in a trial may be rejected by another. The biases that result from storytelling in trials are more difficult to combat than the sort of bias that is based on a straight-forward social prejudice (p. 6).

It is important to note that the researchers found that everyone connected with the courtroom scene, from judges to spectators, was relatively unaware of the role that the story framework plays. They had guessed that lawyers and judges would be able to supply insights into the organization of discourse and interaction in court, but found instead that their informants had no formal ("scientific," we might say) theories about courtroom processes. They were basically "unreflective" and their descriptions of courtroom events never included anything like storytelling. Instead, they

.. almost always referred to courtroom procedure such as the rules of evidence, or to simplistic behavioral explanations involving lawyers' tactics or damaging testimony (p. 14).

The informants' legalistic, non-interactional views are not in conflict with the basic operating procedures of the justice system. The researchers observe that objectivity in courtroom outcomes refers only to the formal practices for producing legal judgements--there is no philosophical test objectivity other than that of conformity to
procedural rules and guidelines. Thus a result is considered correct only because it was "correctly" arrived at. However, the researchers point out, in the case of stories the matter is never clear-cut and completely factual:

Judgements based on story construction are, in many important respects, unverifiable in terms of the reality of the situation that the story represents. Adjudicators judge the plausibility of a story according to certain structural relations among symbols in the story ... Stories are judged in terms of a combination of the documentary or "empirical" warrants for symbols and the internal structural relations among the collection of symbols presented in the story. In other words, we judge stories according to a dual standard of "did it happen that way?" and "could it have happened that way?" (p. 33).

This leeway in interpretation permits discrimination against those whose stories are not immediately sensible or normal.

Stories are not comprehensible per se, but must be actively interpreted by the listener, who relies on his own sociocultural competence to get a fix on the meaning of the story:

[The interpreter shifts among the information or sets of symbols that have been assimilated, the emerging idea that seems to be the point of the story, and new bits of information or groups of symbols. The emerging set of connections and constraints guides the listener's use of the vast store of [cultural] background knowledge about social life that is necessary for sensible interpretation. The inferences that fill in the framework of connections among story symbols are based on various types of background understanding that can enter into the interpretation of social action: empirical knowledge, language categorization, logical operations, [cultural]norms, and aesthetic criteria (p. 50).

The listener of course is guided in his interpretation of the plausibility of stories by the categorization and symbolization available in the English language (see Berger and Luckmann 1967), so the ESL-speaker is at a disadvantage both culturally and linguistically,
especially if Kaplan's (1966) hypothesis of cultural variation in rhetorical styles is valid.

Bennett and Feldman suggest that storytelling, as the central activity in trials, may actually explain more about trial outcomes than do traditional variables such as social class, racial bias, individual differences, and the like. They do make mention of cultural and socioeconomic factors, stating that

... their true role is most likely manifested in the discrepancies in language skills, patterns of language usage, and cognitive styles characteristic of different groups in society (p. 144).

Later, they deal more specifically with the ways in which cultural or ethnic differences can lead to unintentional discrimination:

Some individuals and groups in society may become victims of justice processes simply because they fail to share the communication and thought styles used by dominant segments of the population .... The victims of the justice process are people who cannot communicate in commonly accepted ways about their actions, and who, as a result of this communication gap, are also unable to explain convincingly the sense of frustration and injustice that results from their encounters with formal legal processes (pp. 167-168).

When testimony does not meet the expectations of the average judge or juror, "[t]he presumption is that the speaker's version of an incident is suspect" (p. 174). The listener does not take a social scientific approach in rendering judgements. The researchers contrast the more plausible stories told not only by police officers but by "white, adult, middle-class witnesses (and defendants)" with other people's stories; the result is what the authors term "a bias in the trial justice system against members of subcultures" (p. 174). It should be abundantly clear that their argument applies directly to the case of the ESL-speakers.
As a final point, we may note what the researchers say about "fact-finding" and the difficulty in detecting the influence of the storytelling framework. It would be discomforting to suggest to judges or jurors that factors involved in what they do are "anchored in quite different realities" (p. 177). Since, as laymen, jurors can only apply their everyday norms, understandings, expectations, and experience in making judgments of credibility, "any effective demonstration of the social relativity of facts and norms would attack the very basis of legal judgement" (p. 177). This would make it difficult to secure equality for ESL-speakers, then: We cannot convey what their special needs are without in effect challenging the validity of the criminal justice system itself! Since judges are laymen in this regard, too, in the researchers' view, the problem is compounded even further.

Another researcher who sought to shed some light on courtroom interaction is McBarnet (1981), who conducted an empirical study of lower-court trials in Scotland and England in an attempt to bridge the gap between sociological studies of extra-legal factors which enter into decision-making in the criminal justice system, and summaries of case law. She examined some of the methods through which conviction is accomplished. She took as her basic issue the paradox that, while the justice system is widely believed to incorporate numerous procedural protections for the accused person, and indeed sometimes it is even argued that the balance is tipped in favor of the accused, still most accused plead guilty, and of those who take their cases to trial, anywhere from 90 to 99 percent are convicted (p. 2). She observed a total of 105 trials and scrutinized legal decisions in the attempt to link outcomes in court (convictions) with the structure of the law
itself. She framed the research question thusly:

Given the ambiguities and uncertainties that dog real-life incidents, how are clear-cut facts of the case and strong cases produced? How do judges and juries come to be persuaded beyond reasonable doubt by one case or another? Evidence, the facts of the case, strong and weak cases are not simply self-evident absolutes; they are the end-product of a process which organises and selects the available 'facts' and constructs cases for and in the courtroom (p. 3; emphasis in the original).

It can be seen, then, that McBarnet shares with Bennett and Feldman (1981) an interest in the role of essentially commonsensical or at least non-scientific processes in fact-finding and decision-making in court.

She notes two significant aspects of evidence in court. First, "truth" does not exist independently, but rather emerges as the result of a question-and-answer sequence. She emphasizes the power of the questioner over the person being questioned:

Interrogation [in court] means not just filtering potential information but imposing order and meaning upon it by the sequence and context of questions asked--whatever meaning it may have had to the witness, control by questioning can impose the meaning of the questioner (p. 23).

Here, obviously, the foreigner and/or ESL-speaker tends to be at a disadvantage relative to others. Second, especially in trivial infractions, which fill the lower courts, often it is only the policeman's word, or his perspective, which leads to arrest, trial, and conviction (p. 31). Often conviction is quite simple in terms of the elements which must be proved:

The law in marginal offences leaves very little to be proved, and since the offences presupposes a specified offender 'caught red-handed at the scene of the crime' and eye-witnesses, there is nothing left at issue but the credibility of the police versus the accused (p. 34; emphasis added).

She offers an example from her data of the presumption that the accused
"must have done" something:

Prosecutor: You weren't shouting and swearing?

Accused: No sir.

Prosecutor: Then how do you explain why you're here [in court]? (p. 34)

McBarnet speaks of "two tiers of justice" (see Ch. 7), by which she means that the popular idea of the law,, including procedural safeguards, the struggle between brilliant lawyers, and even the careful, deliberate trying of the case, may apply to higher court trials, but it does not represent the reality of the lower court. She found that only two percent of cases are tried in the higher courts; the remainder are handled in the lower courts, without traditional due process, in her opinion (p. 153). The 98 percent which are tried in the lower courts constitute "exceptions" to the supposed true rule of law (which can in fact be observed in the higher courts). McBarnet concludes that the lower courts are treated as less than real, so that the image of justice can persist.

One observation she makes which fits in nicely with Bennett and Feldman's work is that avoiding conviction requires more than merely telling one's story. A trial is a contest between two competing viewpoints, and while the prosecutor will find and exploit the apparent inconsistencies in the accused's story, the unrepresented accused is in no position to properly cross-examine the prosecution's witnesses. Yet the accused must cast doubt on the prosecution's case, and this has to be done through active means. She relates one instance where an unrepresented accused using an interpreter declined to cross-examine the prosecution witness, explaining to the judge: "No, I don't want to waste the court's time with language problems" (p. 130). He was assured
that there was plenty of time, and that the court's time would not be wasted. However, he then merely stated what he thought was incorrect about the witness's testimony. Unfortunately, this was not the point in the trial where he was entitled to give evidence. "The magistrate, having gone overboard to invite him to speak, now simply stopped him: 'You'll get your chance later'" (p. 130).

McBarnet made other observations about the micro-politics of courtroom interaction. It is not just that lawyers are able to do things that laymen cannot, she notes. The opposite problem also can be observed, as in this example:

Magistrate: It seems strange a young girl like you should know all this jargon if you've not been in trouble before (p. 137).

"[T]o be too au fait with law, procedure, and advocacy can mean inviting not just ridicule or interruption but suspicion," (p. 136), McBarnet observes.

McBarnet sees her research as illuminating the issue of how convictions are produced by making conviction analytically problematic. A commonly held view is that "[t]he large majority of cases are straightforward and the facts are uncomplicated and clear-cut" (p. 147), but her study suggests that such a view is misleading:

The facts of a case--a case of any sort--are not all the elements of the event, but [only] the information allowed in by the rules, presented by the witnesses, and surviving the credibility test of cross-examination. The facts of summary cases may not be simple because of the nature of the offence but because of the lack of professional expertise in manipulation of the rules, persuasive presentation of one's own case and destructive cross-examination of the other side's. It is not that complex facts need lawyers, but that lawyers can make 'facts' complex. That is exactly their trade (p. 148; emphasis in the
Overall, McBarnet's viewpoint implies that the various cultural factors in courtroom communication and courtroom interaction are that much more significant, because the factors of the case do not "speak for themselves"—they are constructed.

Wodak's (1980) research conducted in Europe offers a nice complement to McBarnet's analysis. Her approach to social class in terms of communication norms and sociolinguistic repertoires offers an analogue for cultural differences. In fact, she frames her topic in explicitly cultural terms:

A legal proceeding in court is an institutionalized discourse situation. Individuals can manage this situation in a positively evaluated way only if they know the explicit and implicit values and norms [or the justice system] and are able to verbalize and operationalize their knowledge in spontaneous interaction (p. 373).

She sought to verify a number of hypothesis which predicted generally that working- and lower-middle-class defendants would do more poorly in courtroom situations due to class differences in linguistic and cultural/interpretive factors.

In the qualitative portion of her analysis, she stress that the accused has considerable leeway in "interpreting " himself to the court, and predicted that middle-class defendants would make a better impression on the court, by "acting in accord with the implicit commonsense rules or routines of courtroom interaction" (p. 374). As a negative example of this, she notes that working-class defendants might plead not guilty even when their guilt was apparent. "They didn't understand that the guilt question was much less important than appearing good, honest, and sincere, despite being guilty" (p. 375).
Middle-class defendants, on the other hand, were able to build up a positive identity through courtroom interaction:

These defendants know the strategies and values dominating court interaction; they plead guilty, their story of the accident is consistent, and their facts are plausible (p. 375).

This accords with Bennett and Feldman's (1981) emphasis on the construction of stories. Wodak also noted a tendency for lower-middle-class defendants to speak in an elaborate (hyper correct) manner, which is not helpful in constructing a positive identity in the courtroom (p. 375). She offers one example which illustrates what it means to fail to develop a positive identity in court, or to have developed a negative identity:

J: Yes, and what else?

D: Well, I was near the crossing, suddenly the car came from the right, I saw it, but I couldn't manage to brake anymore. So--

J: You couldn't brake, couldn't you try to swerve somehow?

D: No.

J: Do you know what that is?

D: No.

J: No again. You can't answer this question either?

D: Yes--to steer somewhere else, did you mean? Or?

J: Yes--every vehicle has a steering wheel. If one turns it around, the direction changes, doesn't it? If it's not broken. If one turns this thing, it is called swerving--to put it briefly. Understood? Yes? (p. 380)

In the quantitative analysis, Wodak charted shifts of defendants' speech among varying linguistic cues, from Standard German to Viennese
Dialect, which was taken as indicative of insecurity (see p. 376).

Again, a number of findings supportive of the general hypothesis emerged:

Middle-class defendants maintain one linguistic style throughout the whole interaction. They manage conflicts, and ambivalence is not manifest.

Working-class defendants don't know the situation. They will react more strongly to parameters like fear. They shift styles more often.

Lower-middle-class defendants are very insecure in such a formal situation, having no stable identity. They try to speak as well as possible, leading to hypercorrection (p. 377).

This research can easily be applied to ESL-speakers, in that they may suffer much the same fate if required to get by with their limited English, as compared with having the assistance of an interpreter.

A somewhat similar approach was taken by Spencer (1983) in his study of probationer's "subjective orientation." He used field observations, interviews with probation officers (PO's), and audio tape recordings of 23 interviews to analyze the way that PO's classify probationers. He identified four components of the subjective orientation of the probationers: explanations ("accounts") of the offenses; attitudes toward the offenses; attitudes toward the consequences of the offenses; and attitudes toward changing future behavior. His study is comparable to others reviewed here, and relevant in the same way, in that it deals with relatively subtle, out-of-awareness factors which play a part in the evaluation of individuals.

Spencer divided accounts (reasons) into "rational" and "non-rational." The former showed independence and planning on the part of the criminal; the latter type of account was characterized by lack of
control or independence, and lack of planning. The non-rational account might lead to a lesser sentence since less personal responsibility was implied. The PO's themselves believed that offenses which had been planned should be treated more harshly (p. 572), but they did not like to accept non-rational accounts without corroborating evidence.

Defendants who offered rational accounts' were generally viewed as cooperative and responsible; those who made (unwarranted) claims to non-rational accounts were seen as presenting a "line" (p. 572).

Probationers from other cultural backgrounds whose non-rational accounts seem unwarranted because their motivations are unfamiliar might run into a kind of prejudice, it would seem. On the other hand, one the existence of particular types of pressures peculiar to specific groups is known, the legal system may "discount" such accounts just to keep such individuals from thereby gaining an advantage.

The PO's favored defendants who acknowledged the wrongfulness of their actions and shared the PO's definition of the offense as serious, while

... defendants who did not even pay lip service to acceptable [norms] in ... interviews were seen as not taking the proceedings seriously--in effect an improper demeanor (p. 573).

Much the same result was found in the case of expressing concern about the consequences of the offense and displaying a willingness to pursue an appropriate solution to reduce the likelihood of a recurrence of the offense. Every part of the subjective orientation is "negotiated." In applying this viewpoint to ESL-speakers' courtroom interaction, we can ask what similar evaluations of defendants' attitudes are made by the court; and how the defendants' linguistic skills and familiarity with the values which are important to display in court may affect courtroom
evaluations of character and credibility. Again, the implication is that ethnic origin affects equality before the law to the extent that such factors which influence outcomes are culturally variable.

Nonverbal communication in the courtroom is another variable of undoubted yet unmeasured significance. According to the New York Times (June 17, 1985), an intensive questionnaire study of people who had been jurors revealed that verdicts were often based on witnesses' "demeanor, reputation, social life and appearance." While no study was located which deals specifically with cross-cultural differences in nonverbal communication in courtroom settings, it is known that nonverbal communication does vary across culture, so it is worthwhile considering a manual for lawyers (Rasicot 1983) which treats "the visual trial" and explains how to manage courtroom behavior for optimum persuasiveness. Rasicot points out that, while judges and lawyers are used to the greater reliance on verbalization that characterizes courtroom interaction, and can therefore attend more closely to verbal communication and pay less attention to nonverbal communication, this is not the case with jurors. Rasicot's viewpoint is particularly relevant for the present study in that some of his observations are cast in specifically sociolinguistic, sociological, and cultural terms.

Rasicot outlines five communicative cues used in everyday life in assessing others: dress, body language, use of space, time, and verbal image. He makes this observation about time and attention spans: "After seventeen to twenty minutes, the likelihood of jurors completely processing what they hear rapidly diminishes" (p. 13). In addition, attention spans are longest early in the morning, and early in the trial (p. 13). One implication is that the relative effect of nonverbal
communication changes from time to time. Another is that when witnesses' testimony has to be translated (which takes twice as long), the jurors are less well able to pay attention to defense counsels arguments, since the prosecution presents its case first.

Rasicot makes some unique observations concerning verbal behavior as well. One is that mispronounced words and the use of slang have a negative effect upon credibility in the eyes of jurors. Inappropriate use of slang is a feature of the speech of some ESL-speakers who have acquired English in informal environments. This thesis is one well worth investigating empirically, since it bears on the s. 14 right or, at a minimum, the equality provision.

Under the rubric of "cultural norms," Rasicot discusses a number of factors, two of which apply directly to ESL-speakers. The North American cultural norm of fairness applies in the courtroom in the case of what Rasicot calls "overkill." Jurors will tolerate a lawyer discrediting a witness only up to a point--after that, they may feel sympathy for the witness because he has been subjected to overkill and is now a victim. Rasicot observes that "[o]ne can effectively discredit facts or actions, but not the person" (p. 15). ESL-speakers from cultures where the preferred verbal style is one which strikes North Americans as exaggerated might violate the overkill norm when defending themselves, it would seem. On the other hand, prior experience with judicial systems where guilt is presumed and one must establish his innocence, through strenuous persuasion, might also violate jurors' cultural expectations in a similar manner. (Certainly some ethnic groups are stereotyped as "pushy."

An observation of some potential significance for ESL-speakers
made by Rasicot is that, socially, many persons in the immediate social environment are "nonpersons," by which Rasicot means "a person we view as an object or as a service provider" (p. 16). "It is much easier for the jury to sentence an 'object' to prison than it is to sentence 'John' to prison," especially because "[v]isual images are assessed emotionally" (p. 16). When the accused uses an interpreter, it would seem, he is thereby cut off from the judge and the jury in terms of the most important medium of communication in the courtroom, spoken language. Thus both ESL-speakers who need interpretation and those who are not called to testify by their lawyers because of their poor English may find themselves in this situation.

Another nonverbal communication channel which varies across cultures and ethnic groups is dress. In North America, the "power continua" for men and women alike share several attributes with respect to dress. The credible person of either sex wears: three-piece suits (dark blue preferred), white shirts with straight collars, plain-toed shoes, inconspicuous jewelry; and short hair (pinned up if necessary, in the case of a woman) (see pp. 23-26). In cultures with greater role separation than is found in North American culture, it will be more difficult for women in particular to conform to these expectations; indeed, for a woman to dress like a man would be proscribed in many cultures. Another problem for ethnic groups is what Rasicot's manual would classify as "exotic" dress or facial hair.

All such factors might apply even when an interpreter is used, and, further, the interpreter himself may be involved, if a study by Kassin (1983) or juries' reactions to individuals who read out testimony in court given by a witness who cannot appear in person can be applied.
In deposition testimony, the witness has previously given testimony under oath at a pre-trial hearing, and the transcript of that testimony is read aloud from the witness stand by the "deposition reader." Kassin notes two reasons for concern with the reading of depositions. First, other things being equal, the witness's testimony is less effective when read out in court by someone else. Second—and more relevant to the present study—jurors' impressions of the absent witness, and the weight placed on that testimony, "may be biased by the manner in which the deposition is read by a third party" (p. 282). Kassin found this warning in a trial lawyers manual:

[W]hoever is playing the part of the witness on the stand will, most assuredly, be identified with the witness. True, he is nothing more than an actor, but human beings tend to associate a voice with a person; so be certain that the "actor" projects a favorable image (quoted at p. 282).

Kassin set out to test this hypothesis. If this "messenger effect" could be demonstrated, it would have implications not only for the use of deposition readers but also, it would seem, for interpretation.

In his experiment, Kassin presented 88 undergraduate subjects with a written summary of a criminal trial and asked them questions concerning both the defendant's guilt as well as specific aspects of the testimony given. In addition, the subjects viewed a videotape of the transcript being read. Kassin varied the role played by the person reading the transcript in the videotape. For half of the subjects, the reader was said to be the witness himself, reading a sworn statement he had made earlier. For the other group of subjects, the reader was said to be someone other than the witness who was reading the witness's testimony (the deposition reader). The second variable was demeanor. In half of the cases, positive demeanor was portrayed. The actor was
"attentive, polite, confident, and unhesitant in his style of answering questions" (p. 283; emphasis added). In the negative condition, he was "impolite, often annoyed, cautious, and fumbling" (p. 283; emphasis added).

The results were as predicted. The mock jurors' assessment of the supposed witness's credibility was influenced by his demeanor. In addition, the subjects were influenced by the demeanor of a "surrogate reader":

In the surrogate condition, although subjects' inferences about the character of the actual witness were not affected by the manner in which the deposition was read, their verdicts and their perceptions of the testimony were indeed biased by the presentation factor (p. 286).

This raised the possibility, of course, that interpreters, too, can influence trial outcomes by their demeanor. Also, it suggests that ESL-speakers testifying without the assistance of an interpreter are at a disadvantage in that they will be comparatively "fumbling," rather than "unhesitant." (The first problem can be avoided by using well qualified interpreters.)

Kassin felt that the results corroborated the general thesis advanced long ago that "people cannot evaluate the content of a message independent of the speaker who delivers it" (p. 286). Similarly, accent may affect trial outcomes in some way. Seggie (1983) studied the attribution of guilt as a function of ethnic accent. Experimental subjects were presented with descriptions of one of three different types of crimes (theft, violence against property, and violence against the person) and told that it was not known which types of individuals were involved in which crimes. After that, the subjects heard the voices of three individuals, only one of whom, they were told, had been
charged with the particular crime. Each individual had a different accent: English "Received Pronunciation," Broad ("non-standard") Australian, and Malaysian Chinese English. They were requested to estimate the probability that each of the three individuals had committed the crime. They were also asked what punishment they would favor if the individual were found guilty by the court.

The data did not reveal a simple relationship between evaluated probability of guilt and either accent or type of crime, but there was a highly significant difference between anglophone accents:

The Australian accent was rated as being significantly more probable of being guilty of the crimes involving violence whilst the English accent attracted a higher guilt attribution for the crime of embezzlement (p. 203).

For the Asian accent, no clear picture emerged. Seggie felt that this indicated that "pre-existing structures with respect to the English and Australian accents are highly formed whilst those related to Asian accents are less distinct" (p. 204). (In fact, few subjects identified the accent; most thought it was Japanese.) For the Charter, besides the obvious question of the disadvantage of having to speak in accented English, there is also the question of what the effect is of testifying through an interpreter with a noticeable ethnic accent.

The specific question of how legal language affects courtroom interaction where ESL-speakers and interpreter are involved is also important in framing the issues. In the case of both legal language itself, and the effects of speech styles in the courtroom, there exist competent studies which can help us appreciate what variables are involved. The survey of legal language by Danet (1980) is apparently the most well balanced treatment available at this time. It differs
from other works which limit themselves to a narrow conception of language as a strictly linguistic phenomenon: It carefully locates language within adjudication, and adjudication within culture.

Applying speech act theory distinctions, Danet points out that language is used in law both to create legal relations and to adjudicate. Many legal actions in adjudication are performed linguistically:

[L]awyers' objections, sentences, and appellate opinions ... "count" ... because of the institutionalized authority of speakers to engage in these acts (p. 460).

One subclass of such speech acts is that of "representative declarations," such as indictments, confessions, pleas, and verdicts. These are "fateful" regardless of their truth value. The effect of the utterance can be avoided only by showing, for instance, that there was a lack of mental capacity, mistake, duress and so on.

Danet discusses the questions of whether legal language truly is a language. It is not, she concludes, but a case can be made for considering it either as a dialect or as a register (p. 474). She adopts Ferguson's concept of "diglossia," according to which legal language would be a form of English which is not the native language of any group, which is acquired through formal education, and which differs in grammar, syntax, and vocabulary from the other (lower) form of the language. ESL-speakers, it seems, do not stand in the same relationship to legal English as do native speakers of English; they are one more step removed, as it were. This, combined with the performative nature of language in interrogation, for instance, may put them at a considerable disadvantage.

A number of studies have surveyed the differences between legal
English and ordinary English (see pp. 474-484). The lexical and syntactic differences are becoming more widely known in social science and even in society at large, and need not be reviewed here except insofar as they may affect interrogation and court interpreting in a direct manner. More interesting perhaps are discourse-level differences. One point Danet makes is that legal sentences are often not connected one to another as they are in ordinary English. Instead, they may be strung together in lists, so that the reader (or listener) has difficulty in determining which sentences are most important. A similar point is that legal English is "overcompact":

> Each sentence is made to count for too much. In other kinds of prose, the writer often expresses an idea one way and then restates it in somewhat different form, giving the reader more time to digest (p. 482).

This is even more important, it would seem, when legal language intended to be read is, for whatever reason, read aloud to a listener, as is the case with the s. 10(b) caution. The caution is already dense with meaning, and this difficulty is added to the ESL handicap. Danet reviews the Plain English movement in law but is reserved in her enthusiasm for it, and questions whether linguistic changes can do very much to alter "sociolegal realities."

"Language" and "facts" are often inseparable in law, Danet shows. In the case of persuasion, she notes that, in effect, legal arguments can be made only to the extent that they do not violate commonsense beliefs, as McBarnet implies (see above). "The facts" of the case do not preexist, but are constructed in court through interaction (p. 509):

> Speakers can develop arguments only by linking them to the taken-for-granted premises of listeners. All argumentation depends on what is accepted and acknowledged as true, normal, or probable; many of
these premises are drawn from the realm of common sense. In human affairs there is no direct and immediate means of attaining truth, the employment of which would be preliminary to any rhetoric. Truth is rather the outcome of dialogue, discussion, and the confrontation of opinions (p. 509).

An example from one of Danet's own empirical studies is that of basing a legal argument on the commonsense assumptions which are keyed to the lexical items "fetus" versus "a baby" (see p. 511). It is doubtful whether even the assistance of an interpreter enables an ESL-speaker to handle this aspect of courtroom communication as well as a native speaker of English.

Danet also discusses the idea that the essence of lawyers' work is the translation of lay discourse into legal discourse (p. 511). This would challenge the view of court interpretation as merely a kind of technical task. Perhaps it should be viewed as double translation. A related point involves the role of cultural competence. Danet quite properly observes that effective persuasion implies framing the argument in terms of the particular kinds of justifications and excuses recognized in the culture in question (see 512). Overall, she states, "[w]e have little systematic knowledge about the circumstances in which justifications and excuses succeed in getting the accused off the hook" (p. 535). She summarizes the finding of one of her own earlier studies, which is rare in that it focused directly on the role of cultural differences in intercultural persuasion:

In a study of persuasive appeals in letters of complaint to the Israeli customs authorities, people of Middle Eastern origin, either unemployed or in low-status occupations, tended to choose altruistic appeals, whereas those of Western origin, employed, and in higher-status occupations, offered more normative appeals. Although members of the former category were more likely to "get a brake," it was not because they appealed to the altruism of the
Extrapolating, we can guess that foreigners will not be as successful as native-born Canadians in justifying or excusing their actions, due to both cultural and linguistic variables. This may not bear directly on finding of guilt, but it can surely influence sentencing or what the probation recommendation is.

Danet, too, notes that the interactional force of questions differs according to their structure:

Declaratives are the most coercive because they tell more than they ask ("You did it ."); next are interrogative yes/no or choice questions ("Did you do it?"; third are open-ended who-what-where-when-why questions—wh questions, for short ("What did you do that might>"; least coercive and most indirect and polite, are "requestions," questions that superficially inquire about the witness's willingness or ability to answer but indirectly require information ("Can you tell us what happened?") (p. 521)

Danet reports that in a study of criminal trials in Boston, an average of 87 percent of lawyer's questions in cross-examination were coercive, while on direct examination the proportion was only 47 percent (p. 521). The proportion of coercive questions on cross-examination increased with the seriousness of the offense, which Danet figures may mean that "questions may also be a form of symbolic punishment" (p. 521). This has direct implications for the question of whether the s. 10(b) comprehension check ("Do you understand?") is a suitable one for ESL-speakers. In addition, since yes/no questions are used proportionately more often in foreigner talk (see Hatch 1983, discussed earlier), ESL-speakers will experience more coercion in interrogation, and courtroom questioning.

Danet shows that answering questions can also be problematic. She
cites two studies which suggest that ESL-speakers "have difficulty managing both the form and content of replies and therefore make an unjustifiably poor impression" (p. 536). She notes as well that while native speakers of English may interrupt a prosecutor more often than he interrupts them, in one study a prosecutor cross-examining an ESL-speaker interrupted her seven times as often as she interrupted him (see p. 533). This suggests that ESL-speakers have difficulties on their own (the effect of using an interpreter is unclear).

While Danet's survey was conducted as if societies were linguistically homogeneous, she does acknowledge that many facts of her survey should be

... expanded, qualified, and reworked in order to incorporate situations in which the communication difficulties separate not just speakers of different dialects or registers of the same language but speakers of drastically different language (p. 546).

Not long after her review appeared, one of the most frequently cited empirical studies of language in the courtroom was published. O'Barr (1982) took a basically intracultural approach, but again the variable dealt with are closely linked to ethnic origin. O'Barr wanted to study the effect of linguistic form in courtroom communication. Though, as stated, he does not treat intercultural communication directly, he does conceive of the ability to respond to form in communication as culturally patterned: "[T]o hear the message communicated by form, a listener must rely on vast knowledge acquired through membership in a particular culture" (p. 2). Knowledge of this sort "is among the hardest to explain to foreigners and among the most difficult to acquire in another culture" (p. 2). Another aspect of courtroom communication is that lawyers are guided by practical advice found in
practice manuals. This pragmatic, commensensical body of knowledge is not part of the "official" lore of the law, e.g., it is not taught in law schools. Much of what transpires in courtroom, then, cannot be gleaned from the rules of evidence or the court's own rules of procedure.

O'Barr briefly surveys the well-known analysis of legal language authored by Mellinkoff (1963) and also recounts some observations made by Crystal and Davy (1969). Among these writers' observations we may note some which are more relevant for ESL-speakers' situation. For one thing, some common words are give a different meaning in law, e.g., "action" to mean lawsuit, or "instrument" to mean legal document. We might add to these, "retain" to mean hire, and "instruct" for get advice from. For another thing, the instrumental nature of legal language brings with it the requirement of unambiguity, and the consequence that, since it is intended to be read by other legally-trained individuals, "[a]lmost no concern is given to whether it is comprehensible to lay people since it is not really intended that they should read legal documents" (p. 19). It is unusual, then, to find written legal language used orally with laypersons, especially if they are under stress at the time. Both the Miranda and the Charter warnings are good examples of this.

O'Barr, an anthropologist, had found in earlier research that four varieties of spoken language can be found in the courtroom: formal legal language, such as that used by judges in giving reasons for their judgements; Standard English; informal English; and subcultural varieties, which for O'Barr refers to dialects spoken by poor people of all races. O'Barr observes that courts seem to assume that no one who
speaks English needs "interpretation" of "court-talk" (formal legal language); but if they do, it is for the lawyer, not the court, to assist. These problems, he states, have not received the attention that speaking through an interpreter has (pp. 39-40).

Another judicial "working assumption" is that "'English-speaking' jurors understand 'English-speaking' witnesses, regardless of cultural background and differences in dialect" (p. 41). This we might call the naive view of intercultural communication. O'Barr notes another problem: ESL-speakers may not be able to understand their lawyers. There is also something which could be termed the naive view of interpersonal communication. In this view, sociolinguistic variation has no effect on interpersonal communication:

Variations in presentational style on the parts of witnesses or lawyers, although possibly important, are not matters with which the law should concern itself since these are not questions of fact, but of idiosyncratic, stylistic variation (p. 41).

Another way to view this aspect of the legal perspective is to say that the systematic variation among different groups is not recognized. Demeanor evidence is recognized, however. This can include paralinguistic features, style, or nonverbal behavior. Since the appellate court ordinarily has no record of witnesses' demeanor, usually the trial court's determination on this point will stand (pp. 42-43). The paradox that O'Barr sees is that while American courts recognize the significance of demeanor, "the nature of this significance is so obscure that no rules can be established for assessing such evidence," and thus "an element at the very center of the functioning of the legal system is outside the law's control" (p. 44). This could be said as well for assessments of parties' or witnesses' linguistic ability.
O'Barr's methodology involved observation of many trials in North Carolina (150 hours' worth were recorded on audio tape), and interviews with lawyers and judges. He relates that most informants quickly came to understand what problems the researchers were interested in, but the legal professionals themselves added little in the way of insights, as Bennett and Feldman found in their research (see above). O'Barr says:

> Although lawyers and judges expressed the opinion that language strategies are important in the courtroom, they could seldom identify with any precision what styles they though were significant (pp. 55-56).

Such a finding implies that judges, in dealing with ESL and intercultural communication issues, lack a suitable conceptual framework for appreciating the problems involved.

The initial studies led to a four-part classification scheme for analyzing speech style in court. The four patterns observed were:

a. "powerful" (rather than "powerless") speech style  
b. narrative (versus fragmented) testimony  
c. hypercorrection [as Wodak (1980) found]  
d. interruptions or simultaneous speech

Subsequently, the researchers conducted social psychological experiments using college students as subjects wherein different versions of the same taped testimony were listened to, and questions concerning the speaker on the tape were answered.

O'Barr found that powerless speech, sometimes conceptualized in terms of "women's speech," was used by both men and women in the courtroom, though more women used such speech. The features of powerless speech have become better known in recent years: hedges (e.g., "sort of"); (super)polite terms; tag questions; question intonation; "empty" adjectives (e.g., "divine," "cute"); hypercorrect grammar and pronunciation; lack of sense of humor; use of direct
quotations (rather than paraphrase); special lexicon (e.g., domain of colors: "magenta," "chartreuse"); and "speaking in italic" (intonation equivalent to quotation marks indicating meta-issues); "intensifies" such as "so," "very," with exaggerated pronunciation. The data showed that both male and female witnesses who used the powerful style were considered more convincing, truthful, competent, intelligent, and trustworthy (see pp. 74-75), which suggested that "differences [in style] may play a consequential role in the legal process itself" (p. 75).

The second variable investigated experimentally, narrative versus fragmented testimony styles, refers to the length of the witness's response during direct questioning (by one's lawyer, rather than in cross-examination by the other side). In the earlier, observational part of the study, it had been found that individual witnesses tended to be somewhat consistent as to the length of their answers. One factor which seemed important in response length was that of the lawyer's role in questioning his client:

It appeared ... that long, narrative answers by witnesses are possible only when lawyers relinquish some control, allowing more leeway to witnesses in answering question. When such opportunity is "offered," it is by no means always accepted. But it seems virtually impossible for it to be assumed without open conflict except when the opportunity for a narrative answer is offered. Thus, it seemed information about both the assertiveness of the witness and the lawyer-witness relationship is encoded within the mode of lawyer-witness interaction (p. 77).

Jurors would "decode the relationship that apparently existed, and draw inferences about the witness's assertiveness and his relationship with his lawyer, according to attribution theory. The general hypothesis was confirmed by the data, but with one interaction effect noted. When
psychology students heard a male witness who gave fragmented replies, they gave the expected negative response. O'Barr theorizes:

[T]he lay subjects may believe that only a lawyer who dislikes a male witness would deny him the usual opportunity to exercise male assertiveness through delivering his testimony in a narrative style (p. 81).

Law students, on the other hand, gave unusually high ratings to females who delivered narrative testimony. O'Barr hypothesizes that, from their training, the law students would expect the lawyer to maintain tight control over his witness, so the fact that a female is "allowed" to give narrative answers must indicate a positive evaluation of her by her lawyer.

O'Barr's discussion of the lawyer's role in this aspect of testimony has direct implications for the role of court interpreters:

[I]t is not only possible but even likely that lawyers quite literally put a language style into the mouth of their witnesses. For example, short questions are likely, according to the response-matching phenomenon, to elicit short answers, or the fragmented style. Similarly, longer questions might be expected to elicit more narrative responses. Since we know that the two styles are not evaluated equally, it would seem that this represents an opportunity for a linguistic leading of the witness, one that is consequential in the reception and evaluation of testimony (pp. 82-83; emphasis in the original).

Interpreters can control the testimony of the speaker, it would seem, by providing translations at shorter intervals. They may seek to produce shorter responses from the witness in order to avoid being seen as "generating' long-winded responses. In addition, it is often noted that interpreters may shorten the witness's response in their translation of it, i.e., summarizing it. If so, then ESL-speakers are forced into speech styles which have been found to be comparatively negatively evaluated, i.e., if the interpreters act in such ways.
The same research technique was used to study the effect of hypercorrect speech. Following Labov's view, it was hypothesized that hypercorrect speech would be interpreted as indicating either low social status or a desire to be ingratiating. The data showed that hypercorrect speech was considered less desirable, in that the witness was viewed as less convincing, less competent, less qualified, and less intelligent. There was even a greater tendency for mock jurors to vote for larger monetary awards against the defendant who used the hypercorrect style! This offered further evidence of the ability of jurors to react to subtle differences in style and of "the particular tendency to discredit the testimony of and be punitive toward a witness who attempts to speak with an inappropriate degree of formality" (p. 86). Again, the ease with which this can be applied to court interpreters is clear: Bearing in mind the reality of the "messenger effect, does an interpreter who translates the witness's testimony into hypercorrect English affect the evaluation of the witness and his testimony?

As for the fourth variable, interruptions and simultaneous speech (talking at the same time), O'Barr wondered whether such clashes would be viewed as indicators of relative dominance and acquiescence. Experimental tapes were produced which allowed for four different conditions: one with no overlapping speech, and three which presented the lawyer, the witness, or neither speaker as dominant in terms of persevering when interrupted. In all three experimental conditions involving overlapping speech, the witness was perceived by the subjects as having greater control. In contrast, when an interpreter is used, it would seem, it is unlikely that the much interrupting could be done by
either side, and so the witness could never appear to have whatever positive qualities are attributed by jurors to witnesses who participate somehow in interruption.

By way of recommendations for lawyers, O'Barr offers some ideas for lawyers when their witnesses cannot be coached to testify in ways that will enhance the value of their evidence in the eyes of the jury. One tactic would be simply to explain to the jury what speech style the witness has, and how it might affect his testimony. A second tactic would be for the lawyer to "translate" the testimony, restating it. The researcher had found examples of this in their observations of trials in North Carolina:

Lawyers often "elevated" the style of poorly educated black and white witnesses by restating their testimony in more standard and formal English. For example, a witness might say, I ain't go no usual job. The lawyer on hearing this might restate it as, You don't have any regular job, and then proceed to the next question (p. 114, footnote 2).

This would be impossible to do when an interpreter is used, obviously. Coincidentally, O'Barr feels that non-English speaking witnesses could offer an analogue for the witness who uses a powerless speech style in that, in both cases, there are "functional differences in the language used by the court and the litigant, with the distinction being one of degree rather that kind" (p. 116). This view would fit well with the situation faced by ESL-speakers.

There are two more suggestions O'Barr offers which are not directed to lawyers, but related to courtroom procedures. One possibility is that of altering the standards for leading questions. This is currently permitted, O'Barr reports, when the judge feels it is necessary in order to ensure fairness to the witness. Greater use of
leading questions might reduce the differences between powerful and powerless speech styles. Also, yes/no questions ought to have the same effect, it would appear: Since there is little possibility of setting out on a long narrative reply, "fragmented" speakers' relative disadvantage might be reduced.

A somewhat more direct approach would be to reform the rules of evidence themselves. The rules are designed to ensure the reliability of evidence, but this goal cannot be achieved if factors which are known to affect juries' decisions are ignored. O'Barr frames an issue which could be applied whole to the case of ESL-speakers:

A question for the law to consider in dealing with all this is whether a witness should be held incompetent, for example, if he or she cannot present testimony in a style that will receive an unprejudiced hearing. It would seem that to the extent that speech style may distract jurors from a relatively objective assessment of the facts, the principles of equity, if not constitutional law, require that the courts develop a more active response to the problem (p. 118).

O'Barr actually envisions interpreters being used for individuals who speak "an unusual style of English" (see p. 118), complete with official guidelines regulating their uses, as is done with ordinary court reports in the American federal court system. This suggestion would be highly appropriate for ESL-speakers, except there, the simpler solution is merely to lower the standard for the right to the assistance of an interpreter. Practically, virtually every ESL-speaker should be presumed to be incapable of speaking in a way which does not lead to a devaluation of his testimony.

While only two studies which focused specifically on cross-cultural differences in courtroom testimony were found, the studies are very thoughtful and illuminating. First is Liberman's (1981) study of
Australian Aboriginal witnesses. Liberman presents a number of excerpts from trial transcripts which show that Aborigines face difficulties related to their cultural practices regarding communication. He describes two important features of Aboriginal discourse which can affect trial outcomes. One is that...

...[individuals do not assert themselves or their points of view too vigorously, but maintain a self-deprecatory manner which emphasizes the importance of group cohesiveness over individual aims. Competitive arguments are discouraged, and Aborigines avoid directly contradicting others in order to prevent their embarrassment. Decisions are made by a gradual consensual exchange which emerges from a round-the-rally exchange of comments during which participants do not express personal views but make more or less anonymous contributions (they speak as members not as individuals) that objectify the general inclinations of the group. These consensual exchanges employ a great deal of repetition of previous utterances and also phrases of affirmation ("yes," etc.) which facilitate the congenial ambience they desire ... (p. 248).

Norms and values of this sort are undoubtedly found in ethnic groups living in Canada, too, of course.

A second important difference found by Liberman is that...

..."[e]ither-or" choice questions are almost unknown in Aboriginal discourse, and answers to such questions usually refer to the last alternative preferred. The Aboriginal court translator Lester has reported that if Aboriginal people are asked, "did you or did you not do that," they will answer "yes," meaning, "Yes, I did not do it" (p. 248).

This echoes the expert testimony given in R. v. Stewart (1972), which was discussed earlier, and shows that ethnicity can lead to the same phenomenon. Would ESL-speaker status elicit foreigner talk which includes a greater proportion of yes/no questions, exacerbating these communication problems?

Liberman states that in addition, Aborigines are also unfamiliar
not only with the fundamental rules of judicial proceedings (such as the right against self-incrimination) but also with the necessity to make one's present testimony consistent with one's prior testimony, much as Wodak found (see above). Liberman cites a Darwin, Australia magistrate who notes that

... Aboriginal people tell their stories honestly under examination-in-chief but ... they contradict themselves under the pressure of cross-examination, not understanding its functions. Anglo-Australians realize that any modifications must be carefully reworded so that they remain consistent at least with the formal structure of an original utterance (p. 254).

Another problematic difference noted by Liberman has significant implications for the equality provision in the Charter:

Aborigines frequently become confused when they are told that they must tell the truth and then almost in the same breath told that they need not say anything which is self-incriminating, particularly when the invocation to tell the truth comes after a lengthy ordeal about the meaning and importance of taking the oath (p. 251).

Other ethnic groups' communication expectations have not been studied in this way, but they could be. Certainly an accused does not receive the equal protection of the law if he is unequally cognizant of how the law operates.

A second very interesting study of cross-cultural differences which cause trouble in legal proceedings was conducted by Gumperz (1982). He presents a fascinating analysis of miscommunication in the case of a Filipino doctor in the American navy who had been accused of perjury due to apparently inconsistent statements made by him on two different occasions. Gumperz shows that the charge of perjury can be explained by cultural differences in what he calls contextualization conventions, and by first-language interference.
In the following example, Gumperz explains, in the doctor's native language, Aklan, the communication difficulty which arose in the courtroom testimony in English would not have arisen, since Aklan would place a particular temporal meaning on the word which causes the problem in the exchange, "sunken":

Q: Did you check to determine if dehydration was present?
A: Yes.

Q: What steps did you take to determine that? If it was present or absent?
A: When the child came, I initially examined the patient and I noted the moistness of the tongue, sunken eyes, the skin color, and everything was okay.

Q: Are you suggesting that there were no sunken eyes?
A: No.

Q: I think we better slow down a little bit more and make sure the record ... did you observe sunken eyes?
A: No (p. 176).

The doctor's reply, Gumperz observes, is ambiguous. It could mean, "No, that's not what I'm suggesting," or it could mean, "No, there were no symptoms of sunken eyes."

By comparing English-speakers' and Aklan- or Tagalog-speakers' interpretations of similar interchanges that had been problematic in the testimony, Gumperz is able to show that misinterpretations of meaning or intention can occur even when an individual speaks English relatively well. It is significant that such miscommunication seems to increase in situations of stress, or where unusual language forms are involved.

Gumperz concludes:
We have demonstrated that many aspects of Dr. A's behavior can be explained by his linguistic and cultural background. The features [of his speech] are automatic and not readily subject to conscious control. They do not affect his written performance, yet they are likely to recur whenever he is faced with complex oral communication tasks, so that, in spite of the fact that he speaks English well, he is more likely than native speakers of English to be misunderstood in such situations. This does not of course constitute proof that he was actually misunderstood. In the relatively informal [earlier] Navy hearing where he was represented by his own counsel and questions were rephrased whenever problems arose, there clearly was no miscommunication. On the contrary, his testimony was quite effective. But given the nature of the FBI interview, given the fact that only 15 minutes were allotted to obtaining the information, that part of the meeting was taken up with questions about background, and that there was hardly any time at all to go into details, check out initial impressions, and clear up possible misunderstandings, the likelihood that misunderstanding did occur is very high (p. 195).

In general, of course, whenever such misunderstandings occur regarding what was said during interrogation, it appears that the witness is now lying.

Practitioners' Views

Recalling that few insights were contributed by practitioners in the studies conducted by Bennett and Feldman, and O'Barr, whatever we learn from the respondent's comments in this study should be viewed as something of a bonus. The bulk of their remarks concerning courtroom interaction fell under the heading of court interpreters' performance, yet the interviewees did have some observations to offer on related matters, some of which, we will see later, bear directly on one of the legal issues in court interpretation, viz., the need to translate everything which is said in the courtroom for the accused.

It appears from the interviews that certain attitudes toward
interpretation exist which run counter to the legal system's official rules. Several respondents mentioned the fact that both judges and lawyers prefer to avoid interpretation because of the extra time required. The court interpreter trainer said that lawyers "always feel that the interpreter's a nuisance" because "it slows down the proceedings and makes it difficult to get your answers." The provincial court judge, too, remarked that people in the justice system considered interpreted trials as something of "a nuisance."

The preference to do without interpretation may grow into pressure to dispense with it. This was described by one of the bilingual lawyers as "unexpressed pressure, implicit pressure," to proceed without interpreters if possible. Another lawyer stated that "especially if the person is a permanent resident or a Canadian, the immigration officials get quite put off if they don't speak English well." (His solution is to try to have the client go through the hearing in English, but with an interpreter available on a standby basis.) A typical way for a judge to express this preference/pressure, one of the bilingual lawyers stated, would be: "This man has been here for the last ten years, he must be able to speak English--let's just proceed and see what he says." As a result, the lawyer observed, "the person may understand enough to hang himself," which he had seen happen more than once.

It is possible, however, that parties have been in Canada a long time but still do need interpretation. A probation officer referred to the case of a Spanish-speaking immigrant who had been in Canada for ten years but whose English was so inadequate that he had pleaded guilty to a shoplifting charge without realizing what he was doing; he also did not understand, later, what probation was. A counselor-interpreter said
that it is not uncommon to find Japanese sixty years of age or older who have been in Canada ten years or more and still have very minimal English ability. Another probation officer described a South Asian who claimed not to have understood that he had pleaded guilty to a charge in court. This individual, too, had been in Canada about ten years, and had

... led an isolated life and remained within the East Indian community, mostly spoke Hindi, all his social activities were within that, and most of the jobs he got were through East Indian employers and not formalized applications.

A third probation officer mentioned a case involving a serious offense, where there were two co-defendants. One had been in Canada only a few months; the other, fourteen years. In passing sentence, the judge noted the length of time the latter had been in Canada, and imposed a lengthier sentence on him.

There is nothing to prevent an accused from attempting to misrepresent his need for the assistance of an interpreter. Actual fluency is never tested in anything resembling a serious manner. A probation officer expressed his concern with this, but did not link the request for an interpreter in court with the special linguistic demands made of an accused in a criminal trial. Yet, a bilingual lawyer explained, there is a credibility problem for a defendant who, the evidence suggests, communicated in English on a previous occasion:

You would have an accused in court who's made a statement to the police and that statement is let in on the voir dire and the judge refuses to believe that your client didn't really understand what was being said, because the police officer takes the stand and says, "Oh, he understood me; he gave me all the answers I wanted." And what they really don't understand is that this chap who may have given the statement probably misunderstood the question and didn't understand the implications of the question or
[took] the question at its face value, and gave the answers to the question that he perceived it to be, rather than what the question was.

The other bilingual lawyer observed that this problem involved the existence of two levels of communication, one which was sufficient to have an elementary conversation with an investigating officer, and the other which is necessary to understand courtroom English:

['Y']ou've really caught in a dilemma about using an interpreter because the police'll already know that they dealt with this person in English, and they make a big case about the fact that, "I spoke to the person for half an hour," or the immigration officer knew that he spoke to the person and some level of communication was going on.

He felt that it was "really risking your client's credibility " to use the interpreter in such cases. The first bilingual lawyer also said that the passage of time added to the problem--the client obviously has had time to think about the event, and now apparently he is trying to create an excuse by giving exculpatory testimony. Once this type of damage to a client's credibility has occurred, he said, it's very, very difficult to undo it because the courts then don't believe you." He added that, in his opinion, there was a general suspicion on the part of the court toward people who do not speak English. The hypothesis is that such individuals actually do understand English, but insist on interpretation because it

... gives them time to think and frame their answers.
I've had many lawyers tell me that, and many judges tell me that. Not in court, but ... non-judicial circumstances.

This, he observed, runs counter to the presumption of innocence!

He explained that the statement of the police officer regarding the suspect's comprehension of English during the investigation will be admitted without any additional proof, after which the accused is placed
in the position of having to rebut that evidence. He observed:

[I]f you say you don't understand, I mean, that's taken with a grain of salt. Nobody's going to believe you until it's proven that you really don't understand. You're not given the benefit of the doubt, and you shold be able to explain why you said what you said. The courts are readier to believe that you understand than to believe that you don't understand.

In this respect, in that the accused in effect is not believed without additional proof, while the investigating officer is, "you are placed in the position where, at least on that sub-issue, you are being considered 'guilty.'"

For the witness or the accused, the biggest danger may be that of overestimating one's own English ability. Even for non-professional interpreters, there is a danger, as an immigrant services worker explained. It is possible to

... end up saying things that you don't really mean, and ... [things] come out in a way that, they sound more harsh, and very offensive at times, and even the interpreter may not mean it that way, so the impression that's created by the [client or the interpreter] ... tends to be wrong, and so the whole future or whatever that particular work that needs to be done on that particular project, does not come out as well as it should.

An example she offered involved an interview with a court counselor. The client thought he spoke well, and "tried to handle the communication by giving definite yes-or-no answers and felt secure when he was doing that." However, when the worker explained things to him in his native language, "then he realized that there was a lot more to it." After the explanation, his answers became both longer and more indicative of understanding on his part.

It was fairly widely agreed that many individuals do not like to admit that they need an interpreter, especially if they have been in
Canada for a long time. If the judge asks, "Do you understand?", they will answer affirmatively, the court interpreter trainer said, but later "it becomes apparent that they don't." Of course they thereby put themselves in jeopardy at trial. A court interpreter explained that there are

... people who give [the] initial impression that they do have enough English and they can conduct their own defense quite sufficiently, and then they find in the middle of a trial ... that there is not enough.

She said she had spoken to many such individuals afterwards, and they had said,

"Oh, but if I knew that I can have an interpreter, I would have. I didn't know." You know, "I couldn't express myself, I couldn't say this, I couldn't say that."

The concept of "false fluency," as it might be termed, was encountered several times in the interviews. The county court judge referred to ESL-speakers who apparently do not need an interpreter as a "middle, gray area." Typically, he said, they have been in Canada for ten to fifteen years, and had "a pretty good understanding, working knowledge of English." They could go downtown and go shopping, and hold a job with no problem, "but once they get into a courtroom, they may not understand all of the language" used there. A court interpreter referred to such individuals as having "a medium knowledge of English" which serves them well in daily life; but in court, she said, "because of their nervousness, ... they lose that ability to use a second language."

A few viewpoints relating to the mechanism through which the court may be misled were offered by the respondents who seemed to have the best working knowledge of these problems. A bilingual lawyer described
his clients as tending to understand English better than they could speak it, which would perhaps lead a court to overestimate the person's ability to express himself fully in court. Still, it is their own self-estimate which is perhaps most dangerous:

There are quite a few of them, i.e., clients, who understand what's going on, at least they think they do, and they understand perhaps over ninety percent of what's being said. They miss words here and there and they don't get the nuances, all of the nuances of various sentences or structures or the idioms. But they get the jist of what's being said and they believe that they understand. And that misleads the courts and the bar into thinking that these individuals understand what's going on.

Pride, mentioned earlier, is another factor. Some of these individuals are often "quite understandable," a court interpreter explained. If asked, they say, "Well, yes, I speak English," he said, and "that's the end of it," even though such a person, "although he sounds good, he sounds fluent, really does not understand probably more than sixty, seventy percent that's being said." Such a person may appear to be more fluent than he actually is because, he continued, ESL-speakers "latch on to expressions, and they will just repeat them, because they know they sound good."

While witnesses may understand English better that they can speak it, a bilingual lawyer remarked that, in the case of someone who had a a basic level of communicative ability in English, at some point the judge or prosecutor might say something like, "Look, this person can speak as well as anybody with grade 7--what are you trying to pull on me?" This problem might be compounded by the fact that the client had previously been interviewed and asked various questions which were not beyond his ability to discuss, e.g., name and address, occupation, or marital status. There are also cases where the judge thinks he has understood
what the witness meant, but did not, one court interpreter said. The fact that court findings have to be justifiable on the face of the record (i.e. on the transcript), a bilingual lawyer pointed out, means that replies tend to be taken at face value. The judge, he observed, "has to believe that you said what you meant," and while he may provide an opportunity for the witness to clarify his remarks, he "can't think that it means something else, because on appeal his decision then becomes unsupportable, or least that's the way he's been trained to think."

As stated much earlier, neither the Charter nor any other statute offers explicit guidelines for determining what level of understanding of English is required on the witness's or accused's part. There are at least two questions: What level of understanding removes the right to an interpreter, and what level must be attained before s. 15 can be said to have been satisfied? A bilingual lawyer, asked whether one hundred percent comprehension was the practical goal in courtroom interpretation, stated:

Well, I get the feeling from the criminal courts that [a lesser standard] is the ... rule of thumb they go by, and they try to get the jist of the evidence, as they say, into these cases.

He thought that the seriousness of the offense would make a difference, though. Interpretation would have to be more "thorough" in capital cases, for example, whereas in more minor cases, he opined, both the courts and the bar have the view that "it's alright as long as you get the jist of it." It might seem self-evident that the accused is not in a very good position to decide how adequate his level of understanding is when he himself is not legally trained and is not a native speaker of the language. However, it is common in both criminal proceedings and
immigration hearings to give the person facing charges the responsibility for deciding. The immigration adjudicator related that the subject of the inquiry is cautioned as follows:

If at any time you don't feel you can adequately explain yourself in English, ask for the interpreter to interpret for you, or if at any time you don't understand what has been said in the room, ask that it be interpreted.

It seems doubtful, for one thing, that the person would use the same criterion with respect to every type of communication in the courtroom or hearing room, which then places him in the position of also having to decide the importance of various utterances.

A different view was offered by the provincial court judge regarding the type of cases tried in provincial court. Sometimes comprehension is not considered all that important:

The defendant may be asked questions by his lawyer about the evidence, but usually not. Usually the lawyer is conducting the case, so that the lawyer is going to be the most concerned, I think, about understanding what's going on. You know, in many cases it's not a question of what the accused is going to say; it's whether the Crown can lead the evidence to prove it beyond a reasonable doubt.

This is of course a practical observation--this judge would not maintain for a minute that such was the way the law works best. He repeated, "in a lot of cases, the result doesn't depend on anything the accused does," because he may not testify.

This issue may be linked to another consideration which, strictly speaking, is irrelevant. One of the probation officers felt that when the defense was not very strong or the lawyer cared very little about the case, a guilty plea may be entered because of the defendant's language problems:

I know ... from experience that I've seen lawyers
treat people like this ... and if they're only paying eight hundred dollars or a thousand dollars and the case isn't that strong ... a guilty plea may be entered just due to the fact that to put this fellow on the witness stand and ... have him go through his testimony or be asked questions, and have to be asked slowly and his answers have to be listened to very carefully by the prosecutor and the judge, sometimes it's just too much effort and it's not worth it.

In other words, the fact that the accused does not testify may result from extraneous considerations, and so may not be a good reason to pay less attention to the accused's comprehension problems. Also, the observation of the probation officer implies that whether or not an interpreter is used, there are problems in the eyes of practitioners. The choice is between the extra time required for interpretation, and the undoubted' losses in translation; and the frustration of trying to understand a non-native speaker of English (and the undoubted losses in his comprehension of others' testimony). On the other hand, the probation officer felt that an ESL-speaker receives the special attention necessary when it comes to speaking to sentence: "[P]eople do take the time to listen to them and it isn't assumed that they would lie at that stage." One reason, he suspected, was that such a person "doesn't know the language well enough to lie" anyway.

There is another way that guilty pleas and comprehension may be interrelated. Native Canadian Indians are believed to plead guilty with unusual frequency. The administrator of a courtworker program observed that if a native person had no assistance, typically he would walk into the courtroom and plead guilty just to get it over with:

He doesn't want to come back and face the court again, because he's by himself, he has to go through the process of getting [and] filling out a legal aid form .... [Y]ou have to fill out three forms now ... but if you have the assistance of another native person in there to help you, then it's a different story ....
The implication is that cultural differences in this type of communication situation place some individuals at a comparative disadvantage.

In general, the county court judge observed, the language used in the courtroom is not modified to accommodate the linguistic limitations of the ESL-speaker who is not using an interpreter (though he himself makes a practice of speaking more slowly in such cases, he said, and makes comprehension checks from time to time). He described the ESL-speaker as representing the type of accused where "I think you have to be concerned." It is a problem, however, knowing just which words might require further explanation for the benefit of an ESL-speaker. The immigration adjudicator said that if it is suspected that the court interpreter has not understood what was meant(!). An explanation will be offered, but again we do not know how this decision is made. For instance, some questions are totally formulaic, and adjudicators are accustomed to repeating these questions over and over, even though they contain many ordinary words which are used in a technical sense (e.g., "claim" to be a "permanent resident" of Canada). One lawyer stated that he makes a practice of briefing his clients on the key questions before the hearing, for just this reason.

An interesting observation regarding comprehension in the courtroom was made by the monolingual immigration lawyer interviewed. When the client speaks some English, but uses an interpreter, he actually receives two sources of information. He can understand all or some of the original communication in English and then receives a translated version. The instinctive response, he said, is to reply to the original English question,
... even though they might not understand it well enough.... [It's very difficult to get people who are ... twenty percent, thirty percent proficient in English ... to just try to turn that off and listen only to the translation and to respond only in their own language, because they'll attempt to respond in English.

This contrasts somewhat with the suspicious view of witnesses who use an interpreter in order to gain extra time in which to formulate an untruthful response.

Most of the respondents seemed to have thought about their problem of how to detect lack of comprehension in the courtroom. Again, intuition seemed to be the key. The immigration adjudicator related that the test would be that the individual is "obviously trying but things aren't working." In contrast, if the witness's responses can be viewed as making sense one way or another, comprehension would be assumed:

If they're giving you what sound like reasonable answers to the questions that they're being asked, then one has to assume that they're understanding what they're being asked, or their answers wouldn't be on point.

Another assumption is that the person understands the language as well as he seems to speak it (the opposite assumption was discussed above).

A court interpreter with extensive experience stated:

If a person is understandable or makes himself understood, and quite often [his English is] very broken, well, they [i.e., the court] will accept it, and what really amazes me is that even though a person is speaking very broken English, they will quite often accept that or prefer to have that testimony because it's direct.

Two respondents mentioned observing the individual's face as a method of detecting lack of comprehension, but nothing more specific emerged from the interviews. An interesting counterpoint was offered by the
provincial court judge, who said he could not recall any situations "where something a person has done or said has made me question whether or not he understands what's being done."

One last area where respondent made some valuable observations is that of translating everything which is said in the courtroom. One bilingual lawyer felt that some lawyers or some judges are simply "not that sensitive to the issue" of translating everything, and fail to make it clear to the interpreter that every word uttered in the presence of the accused has to be translated for him. (Note the assumption that court interpreters do not necessarily know what to do.) In addition, he suggested that the interpreter may bring certain attitudes to the situation:

I think some of the interpreters that do attend various cases have ... a very elitist attitude--not everything has to be told to the accused. The accused doesn't have to know everything that's going on. They sometimes begin to play judges and lawyers and may not interpreter everything that's said to the accused and at other times it may be simply a lack of caution from the judge to the interpreter.

He added that the focus in the courtroom on the lawyers and the judge may deflect attention away from the accused, with the result that he is ignored:

I think in the courtroom judges and lawyers do get carried away in the heat of the moment and that's one reason why ... the witnesses or the clients or the accused who have English as a second language or don't understand the language properly get left out of the whole show and they're simply there ... as a part separate and apart from everything else that's going on, rather than a part of the whole.

The other bilingual lawyer stated simply that, in the provincial courts, ...

... there's no concern at all for translating all of the process. I mean they don't stop at anything; at the best the interpreter quietly sort of gets to whisper in the defendant's ear what is going on, and
whether that's right or wrong, there's never any way of proving it. So the concern in both [criminal trials and immigration hearings] is always with the English version and not whether the question that's being asked or the evidence or the process that's going on is being properly explained in that person's language.

The court interpreter trainer, too, mentioned the tendency to "ignore" the accused. Courtroom personnel, especially the lawyers, have difficulty in slowing down to accommodate the linguistic limitations of the accused. The immigration adjudicator also noted that it is difficult to get a lawyer to slow down "when he's got up a head of steam and he wants to make a point." It is rare that simultaneous interpretation can be performed in that situation, the adjudicator said.

Another, possibly more important point the adjudicator made is that when simultaneous interpretation is performed in an immigration hearing,

... the court reporters complain that this is coming over the top of everything else and it's making it difficult for them to hear what's being said by the principal speaker.

But the biggest problem is the lawyers. In one instance, the lawyer had been stopped five times because he was speaking too quickly. He was told, "You absolutely have to wait for the interpreter to interpret what you're saying or it's of no value." The lawyer replied, "Well, my client doesn't need to hear this." (The adjudicator, fortuitously, disagreed.)

The communication which the accused is least likely to receive a translation of is that between judge and lawyer. The county court judge asked:

How can you expect an interpreter to interpret back to the accused comments made to the judge and from the counsel back to the judge and from the judge to the
counsel, that deal with points of law? I think that usually what they do is, they just sit there.

This respondent, too, observed that the lawyers and the judge do not want to slow down and wait for the interpretation, especially on points of law.

The accused, I'd say, practically speaking, ... is forgotten about at that time. As a matter of act, most other accuseds don't understand it in any event, and, you know, sometimes you'll find that the accused only becomes incidental in cases, period.

The last illustration of problems in translating everything for the accused is one which never should have transpired. A court interpreter described a case he had observed where, after the Crown witnesses had testified, the interpreter left. The respondent explained:

The court adminstration quite often will just pay for the interpreter when required for the Crown's witnesses .... They felt that they didn't want to pay, or they were not obligated to pay for [that] .... [T]he accused would not have an interpreter because the court administrator felt that he didn't want to pay the funds ... for that .... He only needed an interpreter for the Crown's witnesses.

With the coming of the Charter, surely we can expect some changes and some regularity in procedures involving interpretation.

The Legal Perspective

As should be clear by this point, the courts restrict themselves to a fairly limited, standard set of considerations in addressing issues that might be implied by cultural and linguistic differences. In the present study, there were no cases located which dealt directly with cultural differences in communication style; in fact, none touched upon interactional aspects of courtroom communication at all. The issues which do receive attention from time to time are those which relate to
the question of when translation is needed, when the right to interpretation has been waited, and whether everything needs to be translated for the accused.

R. v. Reale (1973) dealt with the failure to have every part of the trial translated. The trial judge had decided that simultaneous translation of the rather lengthy judge's charge to the jury might "distract" the jury. The Ontario Court of Appeal, in a judgement later affirmed by the Supreme Court of Canada in R. v. Reale (1975), referred to the Canadian Bill of Rights' guarantee of the equal protection of the law and held that rendering an accused unable to understand any part of the trial by refusing to provide translation violated his rights, since he could not then be said to stand "on the same footing or in an equal position with respect to the application of the criminal law as others" (1973, pp. 348-349). Such arguments would be even stronger now that s. 15 of the Charter has taken effect.

Several other sub-issues have arisen in the cases. In R. v. Turkiewicz, Barrow and MacNamara (1979), a French-speaking witness asked for interpretation assistance, after which the judge spoke to her in French. The Ontario Court of Appeal thought not only that a judge should not become an interpreter, but noted that "what was said was apparently not understood by counsel and the accused--and perhaps the jury" (per Zuber, J.A., at p. 414). Another case where an unusual event occurred was R. v. Sadjade (1982), where the judge refused to have an interpreter provided for the Crown's evidence, which would be given in French, because the accused's lawyer could translate for him. Crown counsel agreed to translate after the defense lawyer refused, but that, too, was unacceptable. The Quebec Court of Appeal upheld the conviction
that resulted for these reasons; No notice of the need for an interpreter had been given until the trial was ready to begin; Crown counsel had offered to translate; and there were "only" 22 pages of evidence to be translated. On appeal to the Supreme Court of Canada, the decision was overturned: see R. v. Sadjade (1983).

A somewhat different approach was taken by the trial judge in R. v. Lapierre (1980). Having been informed that an interpreter was needed, the judge recessed the court, suggesting that someone might speak to the accused regarding his right to request a trial in his native language, French. Apparently an interpreter was not sought at all. The conviction for tax evasion which ensued was reviewed in Ontario District Court, where Loukidelis, D.C.J. pointed that the failure to translate the charge had not been so serious because the accused did know about it before the trial.

A similar "relaxed" view of interpretation was displayed in one of the very few civil cases which turned up in the original computer search of reported cases, Brochu v. Tanguay (1982). A francophone appealed against a judgement made under the Saskatchewan Children of Unmarried Parents Act whereby he was adjudged to be the father of two infant children and ordered to contribute to their maintenance. One of the grounds of the appeal later was that, though his lawyer had advised the trial judge that he did not speak English very well, the accused had not been provided with an interpreter. Wimmer, J. ruled that there was no obligation upon a court to provide interpretation for a litigant in civil proceedings. The Court of Queen's Bench upheld this, noting that

... the trial judge made every effort to assure that Brochu was able to substantially understand the nature of the evidence presented and no more was required of her, especially when Brochu was represented by counsel.
The suggestion that counsel should also serve as interpreter was not elaborated on.

In *Brochu*, the trial judge had relied on an English civil case, Hartely *v.* Fuld (1965) where a defendant charged with fraud could not afford to pay for an interpreter. The English judge drew a distinction between civil and criminal cases in that in the former, it's a matter of the parties—"they need not fight" (p. 655); he admitted, however, that in the fraud case the charges were grave and bore "a strong family resemblance to criminal charges" (p. 655). The judge suggested that there was rarely any need in the ordinary case for all the evidence to be translated as it was given. It would be expensive and time-consuming. In addition, he noted, legal aid might possibly be available, in which event

... the mere fact that evidence would have been given which Herr Saueracker will not have understood will not matter very much because there will be available a transcript of each day's evidence (pp. 656-657).

This line of thinking is potentially troublesome, implying as it does that only when it is the government that places someone's property or liberty in jeopardy is there is a right to free interpretation. The failure of the *Charter* to include this factor in the s. 14 right could lead to discrimination or oppression.

Two immigration cases can also be noted here. In *Re Weber and Minister of Manpower and Immigration* (1976), the issue was specifically whether every single thing that happened at the immigration inquiry had to be translated for the person concerned. At the hearing, the testimony of a witness called by the person concerned herself had not been translated; instead, a summary was provided. The Federal Court of
Appeal did set aside the deportation order, but did not rule on the legal effect of the failure to translate one exchange between the lawyer and the adjudicator, so this could be argued to be a permitted exception to the translate-everything rule. Urei, J., for the court did note that the exchange "was not in respect of an essential part of the proceedings since the exchange did not advance the proceedings in any material way" (p. 477). The Federal Court cited Reale as authority for the general proposition that everything must be translated, but the dictum mentioned above regarding non-essential parts of the inquiry which do not advance the proceedings does not exemplify the philosophy expressed in Reale, where defense counsel had observed that, without complete translation, the accused would be unable to draw the attention of counsel to matters he thinks should be dealt with.

Leiba v. Minister of Manpower and Immigration (1972) held that a visitor to Canada who applies for permanent resident status while in the country should be provided with the assistance of an interpreter in making his application and having his interview. The reasoning was that, when such an application is refused, a hearing should be held to determine whether the applicant should be allowed to remain in Canada or deported, and at the hearing, an interpreter would be provided. A case such as this had wide-ranging implications for such things as the numerous applications to extend foreign student visas which have to be made each year, or whenever a student wishes to change schools.

The next group of cases to be discussed deal with assessing the need for interpretation. As stated earlier, no guidelines for making this finding of fact have been provided. Opposite tendencies can be found in the cases. Sometimes the court bends over backwards to provide
interpretation at the slightest indication that it is needed. Other times, the court is sceptical when there is a suggestion that the individual is not being forthright about the need for an interpreter.

One way that evidence of ability to understand the language of the proceedings is proved is through evidence that shows that the individual had engaged in conversations in English prior to the trial. The King v. Meceklette (1909) was the earliest reported case found which dealt with the need for an interpreter at trial. The appellant in that case claimed that he had not known that he was on trial, and did not understand the evidence that was given. The court did not believe him, preferring the court interpreter's opinion on this point. The court also took note of the police officer's testimony:

A policeman also swears that he, upon arresting the defendant, had a conversation with him for about ten minutes, that the defendant spoke fairly good English, and that he (the policeman) understood practically all the defendant said, and that the defendant answered intelligently questions put to him in English (p. 18).

It is not quite accurate to say that the court let others make its decision for it, but certainly there is a tendency in that direction.

A modern case with the same flavor is R. v. Petrovic (1984). A police officer fluent in the foreign language spoken by the accused testified that he had had a conversation with the accused and the accused understood English better than he spoke it; also, the accused appeared to understand everything that went on at trial. The appellate court spoke to the request to reexamine the record and look for evidence of lack of understanding:

[I]t is not for the trial court and much less for an appellate court to conduct a detailed inquiry into the party's or witness' ability to understand or speak the language of the court proceedings (p. 423).
This is not an encouraging attitude. On the other hand, the court did state that even speaking "broken English or French" would not remove the constitutional right to the assistance of an interpreter. The trial court should not deny the request for an interpreter, said the appellate court, in the absence of strong evidence that the request was not made in good faith. But the court does not want to take on the challenge of analyzing trial transcripts.

The appellate court's interpretation of what happened at trial is sometimes interesting. In R. v. Abraham (1977), a teen-aged Montagnis-speaker appealed her conviction on the ground that she had not understood what the proceedings were all about. Denying the appeal, the Newfoundland Court of Appeal accepted the trial judge's opinion that the girl had "a working knowledge of English" and did not understand the charges she was facing. The court emphasized the fact that, though an interpreter had been provided at trial as a precautionary measure, the record did not indicate that the interpreter's services had been "required." Thus the accused's failure to use the interpreter can be taken as evidence of comprehension, assuming that the accused is a good judge of his own level of comprehension at trial.

Two other related cases can be mentioned here. In R. v. Marinello (1980), the brief case summary notes that there was no affidavit evidence concerning the accused's need for an interpreter at trial, nor had the accused requested an interpreter. There seems to be a presumption of comprehension, then, which would have to be rebutted one way or another. In R. v. Blentzas (1983), the Nova Scotia Court of Appeal saw nothing wrong with the fact that no interpreter had been used at the preliminary hearing, but one was provided at trial. Had the
accused learned English so rapidly, or was there a lesser need for interpretation at the preliminary hearing? (Is there a double standard?)

The trial transcript does receive scrutiny in some appeals, contrary to Petrovic. In Marinello, the court looked at the transcript and saw no "lack of familiarity with English" there. More extensive comments were offered in R. v. Berger (1975), which was reviewed earlier in this study. There, the accused sometimes used an interpreter at trial, and sometimes not. The appeal court examined the transcript and found evidence of comprehension:

[The accused] had a good and clear understanding of English and could express himself clearly in speech. He gave most of his evidence in clear if sometimes ungrammatical English. He answered most questions put to him in English and his answers were clearly responsive to the questions put and rational replies to them (pp. 375-376).

The court rarely searches for misunderstanding, it would seem.

The "strongest" approach is merely to presume that the accused can communcite. In Sadowski v. The Queen (1963), for instance, the court concluded that since the accused had been a Canadian resident for several years, he must have learned the rudiments of either French or English. On the other hand, the trial judge's discretion in determining the accused's language ability was emphasized in R. v. Unterreiner (1980), discussed earlier. In the judgement, the following quotation from a law textbook is quoted with approval:

[T]he trial judge is not bound to accept the statement of counsel producing the witness as to the linguistic ability of the witness, but may allow the examination to proceed to determine the matter for himself (p. 380).

This is in contrast to official procedure in immigration hearings, it
should be noted.

The existence of the right to an interpreter in court is perhaps the most important facet of this problem, but waiver of the right can be just as important in practice. The presence of competent counsel seems to relieve the court of some of its responsibility in deciding when the right has been waived. In R. v. Hijazi (1974), although the accused received "a running translation of the evidence as it was introduced," the judge's charge to the jury was not translated. After five or six minutes, defense counsel noticed the lack of translation but said nothing to the judge. This, the Ontario Court of Appeal held, could be "fairly interpreted as a waiver of the right of the accused, ... a waiver which binds the appellant" (p. 185). In Re Hilts and the Queen (1984), counsel acquiesced in the use of an interpreter who had not been sworn, and even used the interpreter himself. Henry, J. held this to be a waiver of the right to have the interpreter sworn, relying on the Supreme Court of Canada decision in Matheson v. The Queen (1981), which established that an accused could waive compliance with the rule that witnesses be sworn. The court also noted that the American authority, Wigmore, was of the opinion that an interpreter is a kind of witness, and must be sworn, but that failure to object to unsworn evidence at the time amounted to a waiver, and objection could not be taken later. (Treating the interpreter as an expert witness is an approach which could bring competence into the spotlight.)

The law on waiver in general was summarized by the court in R. v. Heaslip et al. (1983). Martin, J.A., speaking for the court, stated:

As a general proposition, an accused may waive a procedural requirement that is enacted for his benefit. In the case of a procedural requirement enacted for the benefit of both the Crown and the
accused, the concurrence of both parties is necessary. The waiver must be express and mere silence or lack of objection does not constitute a waiver. Although no particular words or formula are necessary, the validity of any waiver is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights (pp. 491-492; emphasis added).

The Reale case bears mentioning here since it was said there that the accused cannot choose to dispense with the translation, and it is immaterial that he may not apply for the assistance of an interpreter (p. 347). Healslip has important implications for the s. 14 right since the accused or party might have to be told about the linguistic and interactional effects of having and not having interpretation.

**Comment**

To social scientists, courtroom interaction is a highly complex phenomenon, one which is not well-known event to those for whom it is the workplace. Numerous subtle yet real currents run throughout the interaction, such as patterned expectations for storytelling, informal and unstated indices of truthfulness, nonverbal communication preferences, language which is challenging even for native speakers of English, prejudices regarding accent, and comprehension problems caused by the intermixture of language and culture. Practitioners seem to have varying kinds of awareness of these factors, and few if any possess a comprehensive view such as emerges from the social science literature. Since the data collected in the present study seem to suggest that bilingualism or biculturalism is necessary for some of the issues to be fully recognized and appreciated, it must be hypothesized that there are many members of both the bar and the bench, and many court interpreters
as well, whose awareness is limited.

The courts do not recognize any of these issues save those which can be fitted into its categories of procedural and legal questions. Until the Supreme Court of Canada settles these issues, of course, we must expect a variety of responses from the courts and lawyers must select the case precedents most favorable to their point of view in each particular situation. This is always the case, of course, but there are also opportunities to improve the picture which the courts have of interrogation and courtroom interaction, including the role of interpretation in both situations. The s. 15 equality provision, it would seem, offers a way to highlight various issues which have lain dormant until recently. The courts do not discuss ethnic origin, yet it is central to social scientists as well as practitioners in their understanding of the legal process. Ethnic origin represents a lacuna within the legal perspective, and one which may be capable of being filled through the Charter.
CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS
The research reported herein was designed to compare the viewpoints of social scientists, practitioners, and jurists regarding the role of ESL-related factors which affect the two communication-related rights contained in the Charter of Rights and Freedoms, the right to be informed of the right to retain and instruct counsel without delay upon detention or arrest, and the right to the assistance of an interpreter in any proceedings where the individual does not speak or understand English. Any differences between the legal viewpoint and the other viewpoints would indicate areas where concern might be warranted. When it seems that the legal perspective reflects a lack of awareness or appreciation of ESL-speaker-related issues, there may be an opportunity to provide the needed background. And when there is a conflict between the legal perspective and the other perspectives on any particular issue, there is a need to further explore the situation and explain the differences. In cases where the courts so far have failed to recognize the existence of ESL-speaker issues, there is the possibility that judicial notice can be taken of various considerations which affect interrogation and courtroom proceedings. This implies disseminating information about the issues which arise so that these become matters which qualify as something in the nature of "common knowledge." In other cases, it may be possible to use expert testimony in broadening the court's perspective.

It must be borne in mind that it is not enough to show that the rights of any person have been violated. There is no automatic remedy contained in the Charter. Instead, there is only the right to request a remedy, in s. 24:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may
apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Usually, the remedy sought in individual cases such as those surveyed in the present research project has been the exclusion of evidence which was obtained in violation of the accused's rights, which is allowed in the second subsection of s. 24:

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

While this is a legal issue which does not involve ESL-speakers in particular, we may note that in some cases, the courts have simply held that the administration of justice would not be brought into disrepute by admitting illegally obtained evidence. Typically, the reasoning is that since the crime was an especially nasty one, the public would not object to convicting the accused through the use of illegally obtained evidence.

A possibility which has yet to be taken up is that of applying to a court for amelioration of unfairness which affects a number of persons, e.g., members of one or more ethnic groups, regarding standard procedures followed in police investigations or in legal proceedings. A number of examples of this type will be offered below in discussing the issues that were uncovered in the research and the way that the court typically handles the issues. In the attempt to reduce or eliminate discrimination which is caused by ethnic origin or other factors, use can be made of s. 15(2) of the Charter, which allows for "affirmative
action" in the form of "any law, program or activity" designed to ameliorate the conditions of "disadvantaged individuals or groups including those that are disadvantaged because of ... ethnic origin ..." (emphasis added). Conceivably, the court could mandate special police procedures to be followed in dealing with ESL-speaking suspects, for example.

There is precedent in Canadian statutory law for requiring special procedures to be followed in the case of special types of persons: The Young Offenders Act, a statute enacted at roughly the same time as the Constitution Act, calls for modified police procedures and evidentiary rules in the treatment of persons under the age of eighteen. For example, s. 56(2) provides that no statement is admissible against the younger person unless it was both voluntary and it had been "clearly explained" to the individual, "in language appropriate to his age and understanding" (emphasis added), that he had a right to silence and that any statement he made might be used against him in court. Other provisions which seem relevant to the present discussion include the requirement that the younger person be given "a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person ... [s. 56(2) (c); emphasis added]. Another provision is that any waiver of the rights mentioned in the Act must be made in writing "and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving." Both age and ethnic origin are mentioned in s. 15 as factors which must not lead to discrimination, so the Young
The Right to an Interpreter

The quality of interpretation

The most obvious problem which the research uncovered with respect to interpretation is the adequacy of interpretation provided in court. The same considerations apply to interpretation during interrogation, but this problem was not encountered very often in the research; however, the same principles apply. While the legal judgments did not display any awareness of variation in the quality of interpretation, the interviews with practitioners suggested strongly that variation is the norm. This could be considered prima facie evidence of unfairness since it means that some accuseds receive better interpretation than others. In some cases, the location (e.g., urban-rural) may be a factor. While it does not seem unfair to assign the better interpreters to the more "important" trials, and it is not reasonable to expect the more highly qualified interpreters to live in remote regions where they are not likely to be able to work enough to earn a decent living, the ESL-speaking accused is not the cause of these problems, and should not be made to suffer on this account. At present, an ESL-speaker would probably be well advised to get arrested in a large city with a substantial foreign-language-speaking population; or to request a change of venue if he is facing a hearing or a trial in an upcountry location where it may be necessary to make do with whatever interpreter happens to be available. There is no equality if adequate interpretation depends on where the arrest was made.
Professional interpreters set high standards for themselves, and show great concern for maintaining those standards. In the social science literature, it was seen that professional interpretation is a highly demanding undertaking, one which requires not only excellent linguistic ability in both languages but intelligence and specialized training in interpretation. Both the interviews with practitioners and the cases indicated that interpreters of this standard are not always found in the courtroom. The fact that not all court interpreters can be assumed to be highly trained professionals and the difficulty of detecting inadequate interpretation point to the need for formal training and official certification of court interpreters.

This problem raises the question of what "interpreter" means. Does s. 14 of the Charter merely guarantee the right to the assistance of a bilingual individual, whose linguistic competence has not been tested, and who translates the accused's words into non-native-speaker-like English? This would be completely unacceptable in conference interpreting, according to the literature. If the Charter guarantees what professional interpreters mean by "interpreter," there is all the more need for training and certification of court interpreters. The equality section seems relevant in this connection, for without excellent interpretation, an ESL-speaker cannot present his evidence as well as a native speaker of English.

A similar issue involves the simultaneous interpretation provided by the "party interpreter." The interviews with practitioners seemed to suggest that relatively less concern is devoted to providing the accused with continual translation of everything said in court. In the cases, too, we can detect the (unofficial) belief that simultaneous
interpretation of the proceedings is not of the same importance as the consecutive interpretation of testimony. Further investigation in this area might well reveal that the concept of interpretation in the legal system refers to translation of testimony. Such a belief, which might be held by judges and lawyers alike, would make it even more important to establish clear expectations for simultaneous interpretation. Since it is well established in the literature that simultaneous interpretation is the more challenging type, there is even less justification for pressing into service whatever bilingual person may be handy.

The cost of interpretation

It is regrettable that the Charter does not stipulate that the assistance of an interpreter shall be free. From the cases, one gets the feeling that the interpreter is viewed as an adjunct to the courtroom equipment, i.e., part of the machinery with which the government tries accused persons, much like the court clerk or the court stenographer. In this view, interpreting the testimony of non-English-speaking witnesses is a necessary evil. In other words, the concern with interpretation arises from the practical necessity of prosecuting people, rather than from a desire to ensure that ESL-speakers' legal rights are protected at every turn. The Charter may offer real improvements over case law in terms of protecting those rights, but if interpretation is not in fact made available in all cases where the right to interpretation arises, then the Charter will be an impotent statute. It is an empty right whose benefits are not available to all who enjoy the right. The argument which suggests itself in this
connection is that it would be a denial of the equal protection of the law to provide interpretation only for the Crown's witnesses.

When does the right to interpretation arise?

Just as the courts seem to take a non-problematic approach to the quality of interpretation, so the question of whether a particular individual speaks or understands English sufficiently well receives little attention in the cases. This issue is treated as a question of fact, and so jurisprudential issues are not apparently involved. However, it is not difficult to find such issues within the interview data and the literature review in the present study. These include what are essentially legal issues, i.e., questions which arise irrespective of the facts in a particular case.

Judges are not trained to evaluate the performance of interpreters or assess the English ability of parties or witnesses. This being the case, we can guess that judges have to rely on their commonsense abilities to perform such evaluations. Part of what needs to be done is to determine empirically whether commonsense judgments of linguistic ability are inferior to professional judgments, for example, in the Foreign Service Interview. If it can be shown that assessment of linguistic fluency is indeed a professional undertaking, there will be a basis for arguing that assessment should not be left to the judge as a matter of discretion. The cases reviewed in the present study do not show a welcoming attitude on the part of the court toward linguistic evidence, and it should not be assumed that courts would be enthusiastic about having their discretion narrowed or reduced.

Part of the problem is the necessity of making categorical judgments about linguistic ability, viz., the individual either does or
does not "speak English." It is necessary in everyday life to make simple classifications of numerous phenomena; in many if not most cases, experts can provide more detailed and more specific evaluations, but often it is not necessary to have the services of experts. However, legal proceedings are not everyday life, and there is reason to question what is tantamount to a legal fiction, that English proficiency is either present or absent, and all that is required is to categorize the particular case. Demonstrating empirically for the courts' benefit that the range of English ability is accurately described only by a continuum, rather than by mutually exclusive categories, might add weight to the argument that determining whether an individual understands or speaks English should be performed by scientific means, e.g., with the use of a performance-oriented test administered by trained personnel. Demonstrating that English ability is continuously distributed would show that there is actually very little difference between two individuals who fall on either side of the arbitrary line drawn between those adjudged to speak and not speak English.

Having a usable test of English ability might also be relevant for the legal question of what the cutoff point for the s. 14 right should be. It might be argued by some that the level of English ability which is adequate for everyday life is enough to remove the right to interpretation in legal proceedings. The interview data suggested that there are many individuals who do have such a level of ability but cannot function adequately in legal proceedings, so this issue is a significant one. The obvious danger is that, if linguistic ability is decided according to commonsense standards, it is likely that recourse will be had to everyday life for an indication of what the standard is.
The equality provision could be used here to argue that an ESL-speaker should not be made to go through a legal proceeding with lesser English ability (made available) than that possessed by members of other ethnic groups, e.g., English-speaking Canadians. Thus it could easily be argued that the native-speaker standard should be used in deciding whether the party or witness speaks or understands English. Since s. 14 itself offers no guidelines, it is absolutely necessary to look else where to answer this question. What is being argued here is that it is better to turn to the science of applied linguistics than to common sense for an answer. Note that it is not necessary to have trained linguists on call—all we need to is create an appropriate, useful test which can be administered by court personnel who have had suitable training in using the test.

The concept of interpretation

The cases showed that the court not only has a non-problematic attitude toward interpretation, assuming it to be adequate until and unless it has been demonstrated to be otherwise, but may display a lay view of what interpretation involves. The Charter not only fails to specify who is entitled to an interpreter and who is an interpreter, but does not explain what interpretation is. Again, the courts may have to turn to commonsense notions for guidance. In this case, it is exceedingly clear that the commonsense viewpoint is inadequate. It was shown in the professional literature on translation that there are in fact a number of different methods of performing what the courts treat as simply translation or interpretation. A question arises, then, as to which methods the courts prefer, or will accept; and how the judge can know which method is being used from moment to moment. In the cases,
there is no evidence that these questions are recognized, and the interview data collected in this study reinforce that impression.

The court's "naive" view of interpretation entails that the translated version must be treated as being the same as what a native-speaker utterance would have been. As one lawyer observed, the judge cannot think that the speaker meant something else—the translated utterance has to be evaluated as if it had been made in English by an anglophone. In this way, all "losses in translation" are wiped off the books, as it were. There is also the opposite consideration: what the party or witness understands. Misunderstanding on the part of the accused or the witness may sometimes be apparent in the transcript, as was the case in the example analyzed by Gumperz (1982), but there may also be confusion which will never appear on the record. These losses in translation, too, are edited out by the "bookkeeping' system which deems all translation to be adequate. A problematic view of interpretation in legal proceedings would not eliminate such problems, but it might prevent them from being swept away by fiat.

One other aspect of the lay view of interpretation which the courts seem to display is that it is non-cultural, i.e., language is treated as something distinct from culture. Cultural or ethnic issues are not recognized as bearing on court interpretation; in effect, cultural equivalence is assumed. In contrast, the social science literature is quite clear in emphasizing the interrelationship of language and culture, and the role of culture in the translation process. Equality issues arise in this connection in that an accused may be unable to state his case adequately if the different cultural meanings involved are not interpreted properly for the trier of fact.
In this sense, a verbatim or literal translation should be viewed as suspect since the implication is that any cultural meanings are removed from the translation, whereas the central core of meaning may well be cultural in nature. Certainly the s. 14 right should not be considered to be the right to have one's communication stripped of its cultural context, for that would be discriminatory.

**Recording the foreign-language utterances**

One need in enabling the problems in court interpretation to be addressed is to provide audio recording of the foreign-language utterances. This would allow the detection of any inadequacies in interpretation, which is significant both for the decision in the case and for the question of interpreters' competence. No doubt court interpreters would take their jobs more seriously if they knew that any errors they made would be recorded for posterity. The interviews with practitioners indicated that there are numerous, sometimes egregious errors committed by court interpreters, yet there is at present no way of checking the adequacy of interpretation in any particular case (other than having another bilingual, ideally also a trained interpreter, present in the courtroom). The need for recording the foreign-language utterances is connected with the issue of interpreter competency, in that if competence can in fact justifiably be assumed, recording is unnecessary; since the situation seems to be quite otherwise, according to the interviews, recording is needed.

**Being informed of the right**

The *Charter* does not say that either a suspect being interrogated or a party or witness in any proceedings must be informed of the s. 14 right. This leads to a number of problems. Most obvious is the
possibility that, as one interviewee stated, many people suffer through proceedings without the assistance of an interpreter because they were not aware of, and were not informed of, the right to the assistance of an interpreter. Since some cases hold that a right of this type cannot be said to have been denied if it was not exercised, there may be a real problem. While waiver of a right requires that the individual know of the right and appreciate what it involves, failing to exercise the right may mean that the entire issue goes by the board. One approach to this issue is the argument that Parliament cannot have intended that individuals enjoy rights of which they shall not be told, since then they cannot exercise the rights. On the other hand, there is a legal presumption that everyone knows the law, and this might include knowing of the right to an interpreter. In the literature, more than one commentator treated the right to silence as a right that should be communicated to suspects, as is done both in the Canadian Young Offenders Act and in the American Miranda guidelines. The same attitude could be taken toward the right to interpretation.

It addition to the straightforward legal question of whether the right must be communicated to those who may qualify, there are certain tactical considerations which arise. One of them is that knowing of the existence of the right at the time of interrogation may well influence a suspect in his decision to make inculpatory statements. If, for example, he believes that there will not be a reliable way for him to state his case in court, he may be more likely to accept a solution proposed by the investigator. Another possibility is that if the right to the assistance of an interpreter is not made known to the accused ahead of time, he will not be able to make whatever preparations he may
wish to make regarding interpretation. For instance, he may be in a position to retain his own interpreter for the purpose of providing simultaneous interpretation of the proceedings. In addition, he may wish to have a trained interpreter present in the courtroom to detect any shortcomings in the translation performed by the court-appointed court interpreter. These things he cannot do if he is not informed ahead of time of the right to interpretation that he will enjoy at trial. In all of this, perhaps the simplest and most relevant observation which can be made is that it is a simple thing to inform him of his right, a right which Parliament has decreed that he shall enjoy.

The hearsay issue and the role of the interpreter

As we saw in the cases, it may offend the rule against hearsay evidence if an investigator testifies as to what the suspect said on the basis of a translated conversation. The specific legal issue is whether the words of the interpreter are, in law, those of the suspect. The opposing viewpoints found in the cases appear to be based on the question of whether the interpreter acts as a mere mouthpiece of the suspect, as a "bilingual transmitter," or contributes something of his own and uses his own judgment. To the extent that interpretation is a mechanical process which neither adds anything to nor subtracts anything from the communication, the courts seem to be willing to treat the interpreter's words as those of the suspect.

Both the literature review and the interviews with practitioners bear on this issue. Among professional interpreters, according to the literature, it is not maintained that there is only one correct way to interpret a particular passage, for one thing. In addition, the concept of interpretation found among those who practice that profession does
not refer to word-for-word translation, though this is one subtype. The essence of interpretation as found in the literature seems to be that of functional or cultural equivalence. So far, the courts have not appeared willing to treat interpretation as dealing essentially with the translation of meaning; instead, the tendency is to see interpretation as the mere transposition of words in one language to words in another.

**Informing the Suspect of the Right to Counsel**

The s. 10(b) right is even more specifically directed at communication than is the s. 14 right in that it requires that investigators engage in a particular type of communication. Arguably, the section also indicates what level of success in communication is required: It does not state that the suspect should be given a chance to apprise himself of the right, but rather that he "be informed" of the right. The essential issues here involved the concept of comprehension, which is implied in the notion of being informed.

**Proving comprehension of the right**

A legal issue discussed in the cases is whether the Crown must prove that the suspect was informed of the right to counsel, or the defense must show that he was not so informed. This legal question is not made more clear by the present research project. However, there are factual questions which arise regarding evidence that the suspect was informed of the right. One is whether it can be assumed that the suspect was informed from the fact that a sign was posted on the wall of the place where the suspect was incarcerated. Besides the obvious matter of literacy in the case of native speakers of English, this question involves the distinction between everyday competence in
English, such as many ESL-speakers may display, and the ability to comprehend formal written English. For both native speakers of English and ESL-speakers, empirical studies of comprehension both oral and written s. 10(b) cautions would be useful.

The recommended oral comprehension check—"Do you understand?"—is another potential source of problems. In the cases, we see the view that an affirmative question settles the matter. As one interviewee observed regarding courtroom testimony, the judge cannot assume that things mean something different from what they appear on their face to mean. Both the social science literature and the interview data suggest that some individuals experience genuine pressure to give an affirmative response to a question posed by a person in authority. It may be true that such pressure does not originate with the investigator and that he is not responsible for it, but the issue is not who is at fault. Rather, it is whether pressure exists, such that an indication of comprehension cannot be given the weight it otherwise would be given.

The form of the comprehension check deserves mention. First of all, since the wording of the check is similar if not identical to the type of comprehension check which occurs in daily life in conversation between native- and non-native speakers of English when understanding is in issue, the suspect may well have become familiar with that particular question and may therefore understand the question itself as well as a native speaker of English understands it. However, that does not mean that he also understands the question's referent. Another consideration involving the form of the comprehension check is that it may amount to a leading question, which is defined as a question whose structure either indicates the answer expected or suggests the answer. It was also noted
in the literature that force-choice questions limit and control the response. In this case, the possibility of indicating doubt or incomplete comprehension is removed, as one interviewee observed. The yes/no form of the comprehension check, then, forces the suspect into choosing between two alternatives, one of which is apparently expected by his interlocutor, while the other may be proscribed by the suspect's cultural background. This is a situation where it needs to be explained to the court that sometimes it is possible that words do not mean what they seem to mean.

The court has available to it analogous precedent regarding the need to take special steps to ensure the suspect's comprehension of his rights. Some of the cases reviewed in this study involve suspects with fairly obvious disabilities, e.g., intoxication or mental retardation, and in such cases the court seems willing to place a higher duty on the investigating officer to check the suspect's comprehension. As mentioned earlier, recognition of individual differences in ability to comprehend legal rights is also found in the Young Offenders Act. It would seem that the same approach could be taken in the case of a suspect whose accent shows him to be a non-native speaker of English. Note that this is a separate question from deciding later whether the suspect actually understood—investigators should receive specific instructions to take extra precautions with ESL-speakers. If the advisability of such procedures is acknowledged, then it would be unfair to postpone the solution until the trial stage is reached. The American experience with the Miranda decision shows that when courts take a firm stand on such matters, police conform, not wishing to see suspects go free due to procedural irregularities.
Another perspective on comprehension of the caution can be gained from considering the matter of waiver of the right to retain and instruct counsel. It is fairly well established in the law that for waiver, there must be a full appreciation of what the right entails and what the consequences of waiver may be. If this general view of the requirements for waiver is applied to the s. 10(b) caution, there is even more reason to take pains to explain the right to the suspect, particularly when he is clearly foreign-born and/or a non-native speaker of English. This may involve explaining how the right is exercised when it is not waived, including information regarding the nature of the attorney-client relationship. In other words, the suspect's comprehension check, but from his appreciation of the full meaning of the right. While testing that appreciation is inherently as problematic as testing his understanding of the more limited view of the right (e.g., as understanding the meaning of the individual words in the caution), this issue bears on the question of what comprehension refers to. The comprehension check might be expanded to, "Do you understand what a lawyer is, how you can get one, and that you can have one right now?" Possibly a suspect would be comparatively more willing to admit that he did not understand what a lawyer's role is, since this would not reflect so clearly on his present interaction with the investigator (not even understanding what the investigator said might imply that the investigator did not know how to make himself clear). Empirical studies could be conducted to determine the extent to which the population at large truly understands the lawyer-client relationship; the results of such studies could provide guidance to the courts in deciding when
susppects have truly been informed of the right in a manner sufficient to enable the right to be waived.

This does involve the legal question of whether the test of comprehension of the right for purposes of discharging the s. 10(b) duty to inform the suspect of the right is the same as the test of comprehension for waiver of the right. One consideration which bears on this question is that suspects have the right to waive their rights, obviously, but they cannot exercise the former right unless they fully appreciate the latter rights. It is not just the suspect who is concerned, either. Society at large has an interest in whether suspects are enabled to waive their rights. The suspect may wish to cooperate with the police; and the community, too, may wish him to do so. Essentially, suspects must be rendered capable, in law, of waiving their rights. In this sense, then, the test for "being informed" and the test for waiving the right could be seen as identical.

Equality and the form of the s. 10(b) caution

It is a question of fact whether a particular suspect understood his right to counsel well enough to waive it, but the courts have also addressed the question of in what form the right should be communicated, i.e., in the language of the Charter itself or not. As some interviewees stated in regard to the Charter caution, legal language is likely to be problematic. One observation which was made by interviewees is that legal language tends to be relatively inaccessible for all people. What is of interest here, however, is whether ESL-speakers are placed at a comparatively greater disadvantage.

Two responses to the problem are to simplify the wording of the caution, and to translate the caution. Regarding the former, more than
one researcher has expressed doubt that linguistic simplification would be very effective, but they were thinking of native speakers of English. Briere (1978), who was dealing with comprehension by ESL-speakers, did favor simplification. This is a question which can be approached empirically, by presenting a random sample of ESL-speakers with several versions of the caution. The results of such a study might be brought to bear on the legal question of whether it can be sufficient to use the statutory language.

The other method, translation of the caution, is used by immigration investigators, who carry a card containing translations in a number of the more common foreign languages. This approach can be seen as conforming to the statutory-language approach since the caution is only translated, not modified. (The suspect is allowed to be confused in his own language, like native speakers of English, so the equality requirement is met!) Translation could also be effected through the use of audio recordings of the warning; this would be advantageous since some ESL-speakers are illiterate in their first language. Again, it would be a simple matter to design a study to test the comparative effectiveness of simplified and translated versions of the caution. The courts are well equipped to answer legal questions, but less well equipped to answer factual ones, so it would be highly appropriate for applied linguists to lend their assistance in this connection. Such research projects could also deal with an issue which is largely unappreciated both in the social science literature and in the courts: whether a suspect is a good judge of his own comprehension. More than one interviewee in the present study offered an example of an accused or a person in a similar situation who was mistaken in this regard.
ESL-speakers' ability to exercise the right to counsel

Some cases have held that the right to retain and instruct counsel must be exercised, and failure to exercise it can be held to be a waiver of the right. This assumes that exercising the right is not in itself a problem. However, such an assumption cannot be made in the case of ESL-speakers for more than one reason. The first obstacle is that the telephone book is written in English. Lawyers do not place foreign-language advertisements in the yellow pages. If an anglophone lawyer is contacted, then the translation problem arises. The remarks of one interviewee indicate that this is a daunting problem for suspects. It cannot be assumed that a police interpreter is always present at the time, not that such an interpreter would be available to assist in contacting counsel. One issue which arises is whether any alternatives to the telephone book would be suitable. The courts seem fairly willing to hold that police must take at least some minimal steps to facilitate the exercise of the right to counsel, such as providing a telephone book and access to a telephone. One solution would be to provide audio-recorded information equivalent to that which is found in the telephone book, e.g., names and telephone numbers of lawyers. Such minimal assistance need not be given only in English, either. Since portability is not a problem in interrogation which takes place in a police station, it would be easy to have a bank of recorded tapes on hand for this purpose.

The present research points to another, more comprehensive approach. Merely contacting an English-speaking lawyer is not necessarily sufficient for getting legal advice at the time of interrogation, since, as noted, there may be no interpreter available
(especially in the middle of the night, and certainly in some geographical areas). A simple and probably very effective solution would be to establish a national legal translation center with a toll-free telephone number. Suspects anywhere in Canada could call the center and receive legal advice from a staff lawyer at the center, with the conversation being translated over the telephone by interpreters at the center. While this might not often result in a lawyer-client relationship that endured past interrogation, it would allow the suspect to get legal advice in a language he can understand at the time when such advice is critical. That advice, it should be noted, would include information concerning the suspect's common law right to remain silent, and the presumption of innocence in Canadian law. Suspects who wish to waive their right to counsel and/or wish to make statements to the police would be helped to appreciate the consequences which flow from such actions. This is the type of situation contemplated in the Charter, i.e., this is what the exercise of the s. 10(b) right amounts to. Funds to operate such a center could be contributed by a coalition of groups across the country, since the center would serve all of Canada. If such a center were established, then it would be reasonable to expect that police would dial the toll-free number and hand the suspect the telephone, or at least give the suspect the toll-free number and tell him the call is free. Public legal education could also play a role in disseminating information about such a center (e.g., "dial 800-ESL-HELP").

Weighing ESL-speakers' confessions

The biggest problems by far in terms of the s. 10(b) right are those of communicating the right to suspects and enabling the effective
exercise of the right, but the results of interrogation also raise certain issues since any inculpatory statements will be entered in evidence against the accused in court. Besides the issue of waiver, discussed above, voluntariness and oppression are issues. The literature reviewed in this study suggested that certain aspects of the interrogation situation may have a differential effect on suspects according to their ethnic origin, such as the threat of involving family members or holding a suspect incommunicado. In the cases, we see no recognition of the existence of ethnic variation which could affect the decision to confess, including the voluntariness of confessions. This would have to be approached a case-by-case basis, since the literature offers no way of arriving at specific, reliable expectations for members of various ethnic groups.

Courtroom Interaction

The issues involving interpretation and interrogation are somewhat more clear-cut than those which arise in the courtroom setting. The cases are virtually silent regarding courtroom interaction, largely because fact-finding is what the court does, not what it seeks to understand. However, there are some compelling studies to be found in the social science literature, and they will applied to the present research project's concerns.

Waiving the right to the assistance of an interpreter

It is in legal proceedings that the statutory right to the assistance of an interpreter arises, and it is there that the right can be waived. Remembering that, to be valid, waiver must be based on a full appreciation of what the right entails and what the consequences of
waiver might be, we can address the question of what that means in relation to the s. 14 right. This is not discussed anywhere in the cases or in the social science literature, but the social science point of view assembled in the present study can be utilized to arrive at a starting point for such a discussion. Using an interpreter involves certain advantages, but also certain disadvantages, according to the sources reviewed in the present study, and perhaps knowledge of both is necessary for there to be informed waiver.

An accused who may choose to waive the interpreter right should be aware of the type of problem found by O'Barr (1981) in his research on the effects of speech style in the courtroom, viz., his speech may be negatively evaluated by the trier of fact, with the resulting implications for credibility. He should also be made aware of the fact that the type of language he is likely to encounter in the courtroom is different from that which he is accustomed to dealing with in his daily life. Here, he should be told both that ordinary words may be given different, technical meanings; and that language itself takes on a more important role than it has in everyday life. He should be told as well that it is not uncommon for individuals in his position to overestimate their ability to go through a trial without the assistance of an interpreter. The above would be the least that an accused should know about the problems involved in doing without interpretation. In addition, he might wish to use a party interpreter, to provide simultaneous interpretation of others' speech, but give his own testimony without an interpreter. There can be no informed waiver if his right to both a party interpreter and a witness interpreter is not explained to him.
The disadvantages of using an interpreter should also be explained. The linguistic limitations of the interpreter available on that day should be taken into account. The accused might even wish to conduct his own test of the interpreter's ability in the foreign language, since this might bear on his decision either to use the interpreter or to request a different interpreter. Also, the accused should be apprised of the possible "messenger effects" involved in having one's testimony translated into non-native-speaker-like English (if that would be the case). It seems that, since some interpreters, according to the interviewees in the present study, are hardly better at speaking English than the people they interpret for, this aspect of the interpreter's linguistic ability might also influence the accused regarding waiving the right to interpretation. In principle, the effectiveness of the interpreter whose services are being waived may be a significant factor in any informed decision to waive the right to those services.

The right to have everything translated

Having everything translated is both a due process issue and an equality issue, yet both the interview data and some of the cases point to the conclusion that this expectation is not always taken literally by the judge. It seems, from a legal point of view, that the accused can waive the translation of some portions of the trial, particularly if he is represented by counsel. It is arguable, however, whether an accused who is unrepresented is able to make informed decisions as to what parts of the trial he does not need to know about. Any errors made in this regard surely ought to be in the direction of translating more rather than less of the trial. In these instances too, it may be that society
at large has an interest in seeing to it that all accused persons are "linguistically present" at every point in their trials, since it is desirable neither that the guilty go free nor that the innocent be convicted. This line of thinking can be applied as well to waiver of the right to the assistance of an interpreter.

Cultural differences and courtroom communication

The ESL-speaker, by virtue of his ethnic origin, may be unfamiliar with the type of communication used in the courtroom; this may bear on his decision to waive the right to the assistance of an interpreter. In particular, he may not appreciate what the role of testimony is, or how the trier of fact makes decisions regarding the credibility of witnesses. He may be unaware of what type of burden the Crown must discharge, or what the standard of proof is. These are important components of the communication which takes place in the courtroom, and the ability of the accused to participate in that communication in every way is central to the administration of justice.

Taking the complementary perspective, we may ask which features of the ESL-speaker's courtroom communication that are attributable to his linguistic and ethnic background should be explained to the trier of fact, per O'Barr's (1982) suggestion to that effect. A number of studies reviewed earlier point to the existence of such factors, e.g., Seggie's (1983) study of accent, Rasicot's (1983) treatment of nonverbal communication, Kaplan's (1966) hypothesis regarding cultural differences in rhetoric, and Bennett and Feldman's (1981) finding regarding the story structure of testimony. It might have to be left to defense counsel in each case to "educate" the court, since it might not be practical to seek to apprise the court of all the variables. On the
other hand, through public legal education it might be possible to raise
the level of consciousness in society at large, and in the legal
profession in particular, regarding the very existence of cultural
differences of this sort, the reality of their effects, and the subtle,
out-of-awareness nature of their operation in the courtroom setting.
This might also facilitate the use of such arguments in particular
cases.

A few distinct strategies can be identified in addition to legal
and factual arguments made in court by defense counsel. Greater use
could be made of expert witnesses, including not only linguists but also
intercultural communication or other social science experts. Though the
Canadian cases reviewed in this study did not suggest that this is a
popular approach at the present time, the examples found in the studies
by Briere (1978), Gumperz (1982), and Liberman (1981) offer excellent
examples which could be used as starting points. A second strategy
would be to construct a comprehensive outline of cultural factors which
affect both interrogation and courtroom communication which could be
referred to by defense counsel when making arguments of this sort. Such
a treatise might one day also be useful if the court can persuaded to
take judicial notice of cultural factors. Both expert witness testimony
and intercultural communication reference works of established
reliability could be utilized as an adjunct to linguistic translation in
the interpretation of cultural meaning, as is implied in the concept of
the cultural interpreter. In the cases, there is no awareness who of
the reality of cultural differences in the meaning of things and events,
but the social science literature in this area is substantial and could
be brought to bear on the weighing of evidence in the courtroom. The
basic need is to bring the multicultural reality of Canadian society into the legal process, including both linguistic diversity and cultural diversity. The Charter offers a means of considerable potential in this regard, but it is in the nature of a tool which is supplied without an instruction manual. Ideally, the present study has shown that such a manual both could be constructed and should be constructed.
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