# REGINA V. MURPHY AND LANGUAGE RIGHTS LEGISLATION*

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Before examining the existing and proposed legislation on language rights in the courts, both federal and provincial, it is desirable to review briefly the previously existing state of the law in New Brunswick. One of the rules of interpretation is that legislation will be interpreted in the light of the previously existing law.

The definitive statement on the state of law in New Brunswick prior to any contemporary legislation is undoubtedly the judgment of the Court of Appeal in *Regina* v. *Murphy*.[1] Although this judgment was rendered after the enactment of one major piece of contemporary legislation in New Brunswick, namely s. 23C of the Evidence Act, enacted in 1967[2], the Court held that this legislation did not affect a criminal case. Since there was no federal legislation on the matter, the state of law prior to Confederation applied. Further, it would follow that until the 1967 legislation the law of New Brunswick in all proceedings, civil and criminal, was that set out in the judgment of Hughes J.A., since there was no provincial legislation on the matter prior to 1967.

The decision in the *Murphy* case was that English is the language in which court proceedings in New Brunswick must be held. I submit that a reform-minded bench could have reached a different conclusion in that case, but then, as indicated by the words of Hughes J.A., the bench was not reform-minded. In his view:

> It is, however, the function of this Court to interpret and apply the law, not to remake it, that being the responsibility of Parliament and of the Legislature.[3]

But even without a reform-minded bench, I submit that there are weaknesses in the judgment in the *Murphy* case, and that the

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1 (1968), 69 D.L.R. (2d) 530.

2 S. N. B. 1967, c. 37, s. 1. S. 23 C states: "In any proceeding in any court in the Province, at the request of any party, and if all the parties to the action or proceedings and their counsel have sufficient knowledge of any language, the Judge may order that the proceedings be conducted and the evidence given and taken in that language."

3 (1968), 69 D.L.R. (2d) 530, at p. 535.

elimination of these weaknesses might have left the Court with a choice as to the result.

At the outset I would make it clear that I am not going to dispute the constitutional ruling in the case. The Court proceeded with this issue on the ground that the language in which a court proceeding is conducted is more than a rule of evidence which involves the admission or rejection of certain types of evidence. The Court concluded that the language of the proceedings was a basic question of procedure. Under s. 91(27) of the British North America Act, procedure in criminal matters is a federal power, and cannot be regulated by a provincial legislature. Evidence itself, of course, is a matter of procedure, but federal law incorporates provincial laws of evidence under s. 36 of the Canada Evidence Act.[4] But it would be going rather far to suggest that under this section Parliament intended to incorporate provincial law on something as distinct from the rules of evidence as the language in which the entire process shall be conducted.

That still leaves the question as to what was the pre-Confederation law of New Brunswick on language in the courts. The Court in the *Murphy* case found the pre-Confederation law to be stated in two English statutes, one, 12 Car. II, c. 3, adopted in 1650 during the Commonwealth and repealed in 1660 upon the Restoration, and the other, 4 Geo. II, c. 26, adopted in 1731 to take effect in 1733 and which was still in effect in 1784.

In determining whether either or both of these old English statutes are part of the law of New Brunswick, it seems desirable to distinguish between the two possible methods by which they might have been introduced into the law of New Brunswick. These methods are by reception of English law into the common law of New Brunswick and by express application of the English law to New Brunswick. The difference between these two methods lies in the fact that reception is a common law concept, while express application involves the interpretation of some legislative instrument. The legislative instrument could be a statute of either the British Parliament or the New Brunswick Assembly, or an order of either the British Privy Council or the Executive Council of New Brunswick.

In Ontario and some of the Western Provinces it is unnecessary to distinguish between reception and express application for common law reception has been covered by statute in those jurisdictions and becomes a matter of legislative interpretation also.

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4 R.S.C. 1952, c. 307.

The rule as to reception of English statute law into the law of New Brunswick was considered in the 1830's by Chipman J. in two cases, *Rex* v. *McLaughlin*[5] and *Doe d. Hannington* v. *M'Fadden*[6]. In the *McLaughlin* case, Chipman J. dealt primarily with the date relevant for reception of English statutes into New Brunswick. He concluded that English statutes adopted prior to the Restoration were considered as extending to the colonies "if applicable to [the] colonial condition", but later statutes were not unless expressly stated to extend to the colonies. The reason for this dividing line was that after the Restoration the British Parliament began including in statutes provisions that expressly extended the statute to the colonies. These provisions raised a presumption that in the absence of such a provision the statute did not extend to the colony.

In the *Hannington* case, Chipman C. J. quoted with approval Blackstone's statement of the general rule of reception:

> Colonists carry with them only so much of the English law as is applicable to their own situation, and the condition of an English Colony; such for instance as the general rules of inheritance; and of protection from personal injuries.[7]

Since the *Hannington* case involved a pre-Restoration statute, the rule of common law reception appears to be that pre-Restoration statutes were received into the common law of New Brunswick if applicable to the situation of the Province, while post-Restoration statutes were received into New Brunswick law if they expressly extended to the colonies.

On the basis of this rule, the English statute of 1731 could not have become part of the law of New Brunswick by common law reception. It was a post-Restoration statute. It expressly applied only to England and Scotland. If further evidence of its limited application is desired, an express amendment was considered necessary in 1733 to extend it to Wales.

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5 (1830), 1 N.B.R. 218.

6 (1836), 2 N.B.R. 153. In spite of citations to the contrary in the Canadian Abridgment and the D.L.R. report of Hughes J. A.'s judgment, 2 N.B.R. 153 is the correct citation. The Abridgment and the D.L.R. report, citing 2 N.B.R. 260, appear to have been led astray by Stockton's second edition of Breton's Reports which are now cited as 2 N.B.R. Stockton added extensive annotation to Breton's Reports, resulting in the addition of many pages to the pagination in Breton's edition. However, Stockton also indicated the original pagination, so no double citation seems necessary to enable the user of either edition to find material in the Report.

7 *Ibid.*, at p. 159.

The question remains whether the English statute of 1650 became part of New Brunswick law by common law reception. The only factor pointing in favour of its reception is that it was a pre-Restoration statute. There are two other important factors against its reception which the Court in the *Murphy* case did not consider adequately. Moreover, there is a fourth factor which is the most important of all, but which the Court in the *Murphy* case dealt with only indirectly. It is on this fourth point that there would have been an opportunity for the Court to have reached a different result in so far as reception of the English law was concerned.

The two factors against reception of the English statute of 1650 were the express terms of the statute and its repeal in 1660. By its terms the statute of 1650 applied to "Courts of Justice within this Commonwealth". It is submitted that these words do not in their natural sense include the overseas colonies. Even at that time the colonies were administratively distinct from the territory of Great Britain which constituted the Commonwealth. While pre-Restoration statutes of general application might be presumed part of the law of the colonies, it does not follow that pre-Restoration statutes expressly limited in their application to Great Britain should be considered part of the law of the colonies.

The judgment in the *Murphy* case ignores the repeal of the statute of 1650 on the basis that as a post-Restoration statute the repeal did not become part of colonial law unless expressly extended to the colonies. However, it should at least be considered whether that rule is to be applied unreservedly to repealing statutes. The effect of a repealing statute is to remove the former statute from the law for future time. Although 1660 may be the dividing line for presuming in favour of or against the adoption of English statutes into New Brunswick law, it can hardly be considered as the actual date of reception. The whole basis of reception is that the colonists bring the common law with them. New Brunswick was clearly not settled by English colonists until after 1660. Whenever the English law was received, therefore, the 1650 statute was simply not law at all.

The final factor, and the most important one, is whether the statute of 1650 was applicable to the condition of the colony. Except to indicate that circumstances have changed since the establishment of New Brunswick in 1784, the Court in the *Murphy* case never examines the applicability of the English language statutes to New Brunswick's circumstances at any time. The relevant date is probably 1784. While French is undoubtedly the mother tongue of a larger proportion of New Brunswickers today

than it was in 1784 after the invasion of the Loyalists, there was nonetheless substantial French settlement in 1784. While the central organs of government were firmly in the hands of the Loyalists, we should remember that the *Murphy* case was dealing, not with the central courts of New Brunswick, but with a Magistrates Court. Magistrates Courts have at least some relationship with the history of local courts in New Brunswick. It is submitted that the Court in the *Murphy* case should at least have made some examination of the circumstances in which local courts in New Brunswick were established to determine the applicability of the English language statutes to those courts. Moreover, since the historical evidence on these matters is generally unsatisfactory, it might well have been a case for the Court to examine present practices on the assumption that these are merely manifestations of what the law is and has always been. If this had been done, it might have appeared that French is used as a working language in many Magistrates Courts. Consequently, the English language statutes might have been found not to be nor to ever have been applicable to the procedure in Magistrates Courts.

On the question of express application, the relevant documents appear to be the commissions issued to the first Judges of the Supreme Court in 1784. These provided for the hearing of cases "according to the laws, statutes and customs of that part of our Kingdom of Great Britain called England, and the laws of our said Province of New Brunswick, not being repugnant thereto." The judges were also empowered:

> to award, and to act, and do all things which any of our Justices of either Bench or Barons of the Exchequer in England may or ought to do; and to make such rules and orders in our said court as shall be judged useful and convenient, and as near as may be, agreeable to the rules and orders of our Courts of King's Bench, Common Pleas, and Exchequer, in England.

While these instructions could be interpreted, not so much to adopt English procedural law, as to adopt English substantive law and empower the Court itself to determine its procedure on English models, it appears that the courts of New Brunswick have regarded this as an express adoption of much English procedure. Hughes J. A. cites a number of precedents to that effect. The rule of law which he draws from the precedents is that "the Court by virtue of the Royal Instructions adopted all the practice of the Court of King's Bench of England considered applicable."[8] This statement of the rule is taken from the argument of Mr. Gray for

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8 (1968), 69 D.L.R. (2d) 530, at pp. 534-535.

the plaintiff in *Milner* v. *Gilbert*.[9] Chipman C.J., in delivering the judgment in the *Milner* case, preferred to rely on a later New Brunswick statute expressly adopting the English rule in issue. But since the Court in the *Murphy* case chose Mr. Gray's statement of the rule, they and we must abide by it.

The question remains whether, through the adoption of English procedure by the courts of New Brunswick, the English statutes became part of the law of New Brunswick. On this aspect of the question, the English statute of 1650 can be as summarily dismissed as the English statute of 1731 can be dismissed in the case of common law reception. The references to English law in the instructions to the first New Brunswick Judges must surely have referred to English law and procedure as it existed in 1784. The English statute of 1650 had long since been repealed.

Of course, this immediately raises the question of how one reconciles the instructions to the common law rule of reception in New Brunswick providing for adoption only of pre-Restoration statutes. It would appear that the instructions have been interpreted as relating only to procedure, and not to substantive law. The *McLaughlin* case, which set out the pre-Restoration rule for reception of statutes, involved a substantive rule, as did subsequent cases which have applied that rule.[10] On the other hand, all of the cases involving procedural questions refer to adoption at the date of the instructions to the Judges or later statutes, and make no distinction between pre-Restoration and post-Restoration English statutes.[11] In other words, statutes relating to substantive law became part of the law of New Brunswick by common law reception with the Restoration as a key date in determining whether the presumption is for or against reception. In matters of procedure, on the other hand, express application through the instructions to the Judges and later New Brunswick statutes brought English procedure at the date of the adopting instrument into the law of New Brunswick.

Of course, this raises a strong indication that the English statute of 1731 did become part of the law of New Brunswick. It was part of the procedure of the English courts in 1784 when the instructions to the Judges were issued. That the English statute of

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9 (1847), 5 N.B.R. 617, at pp. 621-622.

10 See the *Hannington* case *supra* fn. 6; also *Boyd* v. *Fudge* (1965), 46 D.L.R. (2d) 679, 50 M.P.R. 384 (N.B.C.A.).

11 See the *Milner* case *supra* fn. 9; also *Gilbert* v. *Sayre* (1852), 7 N.B.R. 512; *Marks* v. *Gilmour* (1855), 8 N.B.R. 170; and *Kerr* v. *Burns* (1860), 9 N.B.R. 604.

1731 was by its terms applicable only to England and Scotland, and later Wales, would not matter because it was the procedure in England that was adopted.

But it appears that the adoption of English procedure by the New Brunswick courts was not without limitations. In *Attorney-General* v. *Baillie*,[12] for instance, the Supreme Court held that it had no jurisdiction in equity, although the instructions to the Judges included reference to Exchequer and Exchequer included a court of equity as well as a court of common law. The statement of the rule quoted above in the *Murphy* case seems quite appropriate — that the practice of the English courts considered applicable was adopted.

The key factor is whether the English law was applicable to New Brunswick. Again the Court in the *Murphy* case might have given more attention to the circumstances in New Brunswick in which the English law was adopted. The same considerations would apply as stated earlier with respect to common law reception of the English statute of 1650. The Court might have ultimately relied on the practice of Magistrates Courts in recent times in New Brunswick as evidence of a continuation of ancient procedure. This approach should have given the Court a choice as to whether it would decide, as it did, that English was the only language properly used in New Brunswick courts prior to contemporary legislation, or that some use of French as a working language was permissible.

It must be admitted that the Court would have had to work harder to reach a result different from that it reached in the *Murphy* case. Even if the Court had found the use of French as a working language permissible, it still would not have established that the judge of the Magistrates Court was outside his jurisdiction[13] in deciding that this particular trial should be conducted in English. It was certainly much easier for the Court to pile together the precedents in favour of adoption of the English law and thus make the judgment of the trial judge not only right as a matter of discretion, which it probably was anyway, but also a judgment required by law. But the fact remains that the Court took the easier path on this matter, and in the course of taking the easier path bypassed intensive analysis of the precedents. This suggests that the Court may, however unconsciously, be taking a position out of step with contemporary thinking on the matter of language rights as expressed in proposed federal and existing and proposed New Brunswick legislation on language rights.

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12 (1842), 3 N.B.R. 443.

Existing and proposed federal and New Brunswick legislation consists of:

(1) Section 23C of the Evidence Act of New Brunswick[13] which provides that, in any court proceeding in the Province, the judge may order proceedings conducted and evidence given and taken in any language if the parties to the proceedings and their counsel have sufficient knowledge of the language;

(2) Section 133 of the British North America Act which provides that in any federal court proceeding any person may use either English or French;

(3) Section 11 (1) of Bill C-120 now before Parliament which provides that in any federal court and in a criminal proceeding in any court evidence may be given and persons appearing may speak in either English or French without being placed at any disadvantage as a result;

(4) Section 11 (2) of Bill C-120 which provides that every federal court, when holding proceedings in the National Capital Region or in one of the federal bilingual districts created under the proposed legislation, shall provide simultaneous translation if feasible;

(5) Section 11 (3) of Bill C-120 which provides that in any criminal proceeding a court in its discretion on the request of any accused person may order the proceedings to be conducted in either English or French as requested by the accused if that is feasible:

(6) A proposal in the "Statement on Language Equality and Opportunity" tabled in the New Brunswick Legislative Assembly on December 4, 1968, that any person charged with an offence should have the right to be tried in English or French, according to his choice;

(7) The objective declared by the government of New Brunswick in the "Statement on Language Equality and Opportunity" that court process be available to persons in English or French according to their choice.

Since the last two provincial proposals have not yet been made public in legislative language, it is not possible to comment on any problems of interpretation that they may create. The major problems of interpretation surrounding most of the provisions which now exist in legislative language involve the considerations of convenience that are allowed for. In section 23C of

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[13] R.S.N.B. 1952, c. 74, as amended by S.N.B. 1967, c. 37, s. 1, reproduced in fn. 2.

the Evidence Act these considerations are expressed in these terms — "if all the parties to the action or proceedings and their counsel have sufficient knowledge of [the] language." Under Section 11 (2) of Bill C-120, simultaneous translation facilities need not be provided if "such facilities cannot conveniently be made available" or if "the court, after making every reasonable effort to obtain such facilities, is unable to obtain them." In section 11 (3) of Bill C-120 the proceedings may be in one language "if it appears to the court that the proceedings can effectively be conducted and the evidence can effectively be taken wholly or mainly in one of the official languages". These qualifications are likely to be the subject of some legal dispute. If a particular court takes an unreceptive view of the rights of persons to have proceedings in a particular official language, it would seem that these provisions will allow it considerable scope to avoid the would-be impact of this legislation.

Of course, it should be noted that under section 11 (1) of Bill C-120, the first presumption is that in any proceeding affected by federal law a person has a right to speak in either English or French. This is in substance true bilingualism. The onus is on the court to specifically order that proceedings be limited to one language. The only problem is that, where people in fact are not generally bilingual, the right to speak in a language which others around you do not generally understand may not be of much use, whatever the law says about a person "in being so heard . . . will not be placed at a disadvantage". It is in the simultaneous translation provision that the federal legislation may have its most substantial effect, and at present this provision is very easy to avoid. Mere inconvenience in obtaining simultaneous translation is sufficient to render them unnecessary. Moreover, this provision applies only to federal courts in which at present, pursuant to section 133 of the British North America Act, persons may use the language of their choice.

One other problem which arises is as to what is a provincial court and what is a federal court.

The *Murphy* case does not appear to have raised any argument that in criminal matters any court was a federal court, but in *Regina* v. *Watts*[14] such an argument was rejected. The test applied was that since the appointment and jurisdiction of the Magistrates Court was governed by provincial legislation, it was clearly a provincial court. Of course, the Court was clearly wrong in saying this. Part of the jurisdiction of the Magistrates Court was gov-

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14 (1968), 69 D.L.R. (2d) 526 (B.C.S.C.).

erned by federal law, including its jurisdiction in the *Watts* case itself. But the implication is clear that it is the substantial basis of the court's composition and jurisdiction that characterizes it as provincial or federal. The *Watts* case was approvingly referred to in the *Murphy* case, although without specific reference to this point. It was recently affirmed on appeal.[15]

Many courts in Canada depend substantially on both federal and provincial law for their existence and jurisdiction. For these courts it is likely to be some time before the exact application of language rights legislation will be worked out by the process of judicial interpretation.

There are a number of cases dealing with powers of the different levels of government in Canada to create and assign jurisdiction to courts. A number of these are relevant on the question of whether a particular court is for a particular purpose a federal or a provincial court.[16] But none of these cases states any general test that would help determine in all cases when a court is provincial and when a court is federal for the purposes of the language rights legislation. In the present state of the law, case by case determinations respecting particular courts, and possibly specific nomination of specific courts in language rights legislation, may be necessary. The existing and proposed legislation, however, deals only in broad general terms with the courts as a whole.

An early resolution of what courts are bound in what way by proposed language rights legislation seems to depend on closely parallel provincial and federal legislation so that it will not matter whether the court is federal or provincial. The rights will be the same in any event. The legislative wording of the proposed New Brunswick legislation, and any amendments to the federal proposal that may follow consultations with the provinces, will have to be studied closely.

An amendment to section 133 of the British North America Act may also be in order. This prescribes certain language rights for federal courts, as well as the provincial courts of Quebec, namely the right to speak at will in either English or French. Without an amendment, any attempt at parallel federal and provincial legislation which stops short of this will still be subject to uncer-

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15 (1968), 1 D.L.R. (3d) 239 (B.C.C.A.).

16 See *Valin* v. *Langlois* (1879), 3 S.C.R. 1; *Ward* v. *Reed* (1882), 22 N.B.R. 279; Re *Vancini* (1904), 34 S.C.R. 621, 8 C.C.C. 228; Re *Solloway, Mills & Co. Ltd.*, [1937] O.W.N. 450, [1937] 4 D.L.R. 26 (C.A.).

tainties. Federal courts will still be subject to the British North America Act rule, while other courts will be subject to the legislative rule.

It has been suggested that the federal Official Languages Bill is unconstitutional. This conclusion is apparently based upon section 91 (1) of the British North America Act which provides that Parliament may amend the Constitution of Canada except as regards the use of English and French. Section 133 of the Act, which is admittedly part of the constitution of Canada, provides that either English or French may be used in the federal Parliament and in the federal and Quebec courts. This provision regards the use of English and French. The Official Languages Bill amends the use of English and French by extension. It is therefore an amendment to the constitution of Canada as regards the use of English and French and is contrary to section 91 (1) of the B.N.A. Act. It is therefore unconstitutional.

This argument is syllogistically very neat. But it has a weakness. There is one step too many. The Official Languages Bill amends the use of English and French. Section 91 (1) prohibits amendments to the constitution as regards the use of English and French; it does not prohibit amendments to the use of English and French. It says that Parliament may not amend the constitution respecting the use of English and French, not that Parliament may pass no law whatsoever respecting the use of English and French.

The B. N. A. Act in section 133 makes only a very limited provision regarding the use of English and French. Language rights in the sense that those rights are amended by the Official Languages Bill are a much broader subject than that covered by section 133. It is a most superficial argument to say that any change in the law with respect to this broader area of language rights is automatically an amendment to section 133. Surely section 133 must be considered within the scope of its own operation. That operation is not affected in any way by the Official Languages Bill. The Bill is very careful to avoid any such change. In other words, just because the Official Languages Bill amends language rights in Canada, it does not follow that it amends the constitution of Canada.

On languages in the courts, subsection (1) of section 11 of the Official Languages Bill merely repeats the requirements of section 133 of the B. N. A. Act and extends it to provincial courts in criminal cases. Subsection (2) dealing with simultaneous translation does not stop the use of either English or French required by section 133. The person speaking continues to use the English

or French according to his choice and the translator uses the other. Subsection (3), providing for unilingual proceedings, is expressly limited by subsection (4) to courts to which section 133 does not apply. Thus, the Official Languages Bill does not amend this part of the constitution of Canada as regards the use of English or French.

Of course, it is also necessary to examine whether the Official Languages Bill amends any other provision of the constitution regarding the use of English and French. It is not clear what exactly makes up the constitution of Canada. It clearly includes the B. N. A. Act. It may also include certain other fundamental law relating to the government of Canada. But it is submitted that section 133 is the only readily apparent provision relating to the use of English and French in any of the law that might be regarded as part of the constitution of Canada.

In interpreting section 91 (1) of the British North America Act it is useful to look at the previous state of the law and the purpose of section 91 (1). Prior to the enactment of section 91 (1), it is submitted Parliament could clearly have passed the Official Languages Bill. It falls within Parliament's power to regulate its own institutions, including the federal courts and civil service, its power to regulate procedure in criminal cases, and its power to spend money as it sees fit. Parliament lacked power to amend the B. N. A. Act, including section 133 of the Act, but again the Official Languages Bill does not amend section 133 or any other provision of the B. N. A. Act. Section 91 (1) was added to the B. N. A. Act as a new head of specific power granted to Parliament. In view of the interpretation of section 91 of the B. N. A. Act by the courts, the specific heads of power are the principle sources of the power of Parliament. The obvious intention, therefore, was to expand Parliament's powers by creating a new specific head of power. The limitations were upon this new power, not upon powers Parliament already had. Unless section 91 (1) compels such a result, therefore, it should not be read as limiting powers Parliament already had. As already shown, nothing in section 91 (1) compels such an interpretation. The limitation merely prevents Parliament from amending its constitution in certain ways. With respect to the use of English and French, section 133 is the only relevant constitutional provision. The Official Languages Bill affects language rights entirely outside the scope of section 133. It does not, therefore, amend the constitution as regards the use of English and French, however much it may amend the larger field of language rights not touched by the constitution.

Legislation of language rights in the courts in Canada is undoubtedly opening up a whole new field of issues that may be litigated. In view of the political aspects of this matter, I would add one *caveat*. It is to be hoped the legal profession will approach these issues with a view to the resolution which best suits not only the interests of their clients, but also the future of Canada as a nation.

## *AUTHOR'S NOTE*

*Since this paper was originally written both the federal Official Languages Act, S. C. 1968-69, c. 54, and the Official Languages of New Brunswick Act, S.N.B. 1969, c. 14, have been placed on the statute books. S. 14 of the New Brunswick Act sets out language rights in the courts in substantially the same terms as the original federal bill, although this section has not yet been proclaimed. It creates a primary right for persons appearing and giving evidence to use the official language of their choice. Subject to this right, a court may order proceedings to be solely in either language.*

*The federal provision on language rights in the courts has been considerably diminished in scope from that proposed in Bill C-120. S. 11 (1) grants the primary right to use the official language of one's own choice only to witnesses. Under the bill, as in the New Brunswick Act, parties and lawyers would have enjoyed the same right as witnesses, but under the federal Act they have no such right.*

*In the federal Act, as in Bill C-120, the power of a court under s. 11 (3) to hold criminal proceedings solely in English or solely in French at the request of an accused person is not applicable to federal and Quebec courts where the use of both English and French is constitutionally guaranteed. In the federal Act the power of a court under s. 11 (3) is further restricted to those provinces which provide a similar power in civil cases. As a result in common law Canada an accused person will only be able to obtain a French trial in those provinces like New Brunswick which introduce language rights legislation. Although s. 14 of the New Brunswick Act relating to language in the courts has not yet been proclaimed, the similar power created by s. 23C of the Evidence Act would put s. 11 (3) of the federal Act into force in New Brunswick at present.*

*This considerable reduction in the provision for language rights in the courts between the federal bill and the federal Act was undoubtedly a concession to those provinces which strongly opposed the federal Act as a whole. It leaves little potential impact upon court proceedings in the federal Act. On the other hand,*

*even in the bill the discretionary and feasibility qualifications on these rights allowed for minimal impact. It was probably a strategic retreat for the federal government to give way on these provisions which would have little practical effect for some time and to concentrate on retaining other provisions with more immediate consequences. As soon as the legal profession and institutions are in a position to offer adequate French language services throughout Canada to accused persons, s. 11 can always be amended back into a more forceful form.*