Date: 19971022
Docket: C.A. 00633

IN THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES
YELLOWKNIFE CRIMINAL SITTINGS
HEARD JANUARY 22, 1997

	COUNSEL	TRIAL JUDGE	COURT
HER MAJESTY THE QUEEN Appellant	A. Regel	Vertes, J.	Hudson, J.A. Schuler, J.A. Berger, J.A.
- and -			
DANIEL KAUNAK Respondent	V. Foldats, Esq.		

APPEAL #CA 00633

REASONS FOR JUDGMENT OF HUDSON, J.A. AND SCHULER, J.A.
DISSENTING REASONS FOR JUDGMENT OF BERGER, J.A.

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[1] The Respondent was found not guilty of sexual assault after a trial before Vertes, J. sitting with a jury in Igloolik. The jury was composed of ten people who spoke and understood both English and Inuktitut, one person who spoke and understood Inuktitut only and one person who spoke and understood English only.

[2] The question to be decided here, and which is raised on the evidence, is the course to be followed when translation services are agreed by counsel to have been confusing, inaccurate, in error and, in some instances, completely wrong.

[3] It is not disputed that the jury was properly selected pursuant to the provisions of

the ***Criminal Code***, and the ***Jury Act*** of the Northwest Territories, R.S.N.W.T. 1988, c. J-2 as amended.

[4] The Court is unanimous that there should be an order made for the entry of fresh evidence in the form of affidavits. The affidavits disclose that interpretation or translation of the instructions given by the trial judge to the jury was wrong.

[5] The majority agree that following an order for the entry of fresh evidence, the appeal should be allowed, and the verdict below set aside, on the grounds that because of the translation problems the Inuktitut-speaking jurors were not properly instructed.

[6] The deponents of the affidavits relied upon by the Appellant Crown propose that if there is a re-trial, all jurors should be English-speaking. We are not satisfied, however, that the affidavit evidence leads to the conclusion that concepts such as reasonable doubt, which are contained in any jury charge, are not capable of being translated into Inuktitut.

[7] With all respect to the makers of the affidavits, the affidavits filed do not persuade us that: 1) the deponents have sufficient experience with interpretation and jury trials, or, 2) that the deponents are saying that the concepts cannot be translated into Inuktitut.

[8] Ms. Napayok-Hvatum states in her affidavit that she has worked as an interpreter and translator for sixteen years. She has taken the course in Legal Interpretation offered by the Northwest Territories Court Services and says that although she is capable of translating in Court, she had an unpleasant experience in a community a few years ago and does not enjoy that type of work. She does not say how often she has interpreted for the courts or whether she continues to do so.

[9] Apart from the specific problems in the translation at the Respondent's trial, Ms. Napayok-Hvatum says:

> I verily believe that additional or different interpreters would not have made a substantial difference, and more particularly would not necessarily have resulted in the instructions being made intelligible. This is in part due to the fact that many of the concepts and words used in the charge do not have a direct translation.

[10] This falls short, in our view, of saying that the concepts (which are those

contained in any jury charge) cannot be translated into Inuktitut so as to make them intelligible to someone who speaks and understands Inuktitut only. We do not understand the reference to there being no direct translation to mean that the meaning of the concepts and words cannot be got across by any means.

[11] The affidavit of Elizabeth Qulaut does not refer to any experience or training that she may have had in working with legal terms or concepts. After referring to the confusing parts of the interpreted version of the jury charge, Ms. Qulaut says:

> Some of the confusion is due to the fact that some of the concepts used are not concepts that are traditionally associated with the Inuktitut language and so are very difficult to translate.

[12] In our view, this again falls short of saying that the concepts cannot be translated into Inuktitut.

[13] It is noted as well that there has been no attack on the provision of the ***Jury Act*** which qualifies as jurors those who are able to speak and understand only an Official language other than English. And, as counsel for the Appellant candidly admitted, the Crown has not sought on a regular basis, if at all, to prevent potential jurors who speak and understand only Inuktitut from serving as jurors in criminal trials that have taken place since the problem in this case came to light.

[14] Not being satisfied on the evidence before the Court that the legal concepts in question cannot be properly translated into Inuktitut, we would order a new trial, to take place before a jury properly selected in accordance with the ***Criminal Code*** and the ***Jury Act***.

[15] In our view, because of the translation problems encountered in this case, the interests of justice require a new trial. We do not understand the Appellant's position to be that the appeal should be dismissed unless this court is prepared to order that only English-speaking jurors be selected for the new trial. However, even if the Crown's position may be viewed that way, and even if we had the power to make that order, which we doubt, we would not make the order on the affidavit evidence presented to us. The Crown's position does not change the fact that the interests of justice require a new trial.

[16] Any attempt to correct the complained of failure of the translation service to fairly interpret the proceedings is a matter to be addressed by either the executive branch of government or the legislative branch. Indeed, it is entirely possible that Crown and

defence counsel, working conscientiously to a conclusion satisfactory to the interests of all, could find a way or craft a way in which translation services can be made effective and, in the circumstances of the case at bar, made understandable to persons who speak only the Inuktitut language, or a language other than English or French. This Court should not pre-suppose that such is impossible.

[17] Translation for the new trial may depend on where the trial is held and what interpretation services are available to the court at the time the new trial takes place. Any issues relating to translation and the selection of jurors are, in our view, issues which should be addressed before the trial judge.

[18] Accordingly, with the greatest respect for the contrary view of Berger, J.A. with respect to the disposition of the appeal, we order the entry of fresh evidence, being the affidavits filed, grant leave to appeal, allow the appeal, and order a new trial.

JUDGMENT DATED at YELLOWKNIFE, THE NORTHWEST TERRITORIES
this day of
A.D. 1997

_____
R.E. HUDSON, J.A.

_____
V.A. SCHULER, J.A.

BERGER, J.A. (dissenting):

The Facts

[19] The Respondent was found not guilty of sexual assault after a trial held before Mr. Justice J.Z. Vertes sitting with a jury in Igloolik on May 7 and 8, 1996. On the jury there were ten people who were bilingual (Inuktitut/English), one unilingual Inuktitut-speaking person and one unilingual English-speaking person.

[20] The Crown appeals. The issue here is whether a new trial should be ordered in the light of uncontradicted evidence that the trial judge's opening instructions and charge to the jury were not properly translated and, it is argued, are incapable of being translated.

[21] The jury was selected in accordance with the provisions of the ***Criminal Code*** and the ***Jury Act*** in the Northwest Territories. The Crown alleges, ***inter alia***, that the trial judge's instructions to the jury, as translated into the Inuktitut language, were so confusing and misleading that they constitute a failure to properly instruct one or more members of the jury and amount to mis-direction or non-direction. At the hearing of this appeal, the Respondent conceded that fresh evidence in the form of the affidavits of Elizabeth Qulaut and Suzie Napayok-Hvatum was properly received by this Court. Both deponents listened to a tape of the charge to the jury and the translation of it at trial to Inuktitut. They were asked, in turn, to translate the Inuktitut portions of the tape into English. Ms. Napayok-Hvatum also translated the opening instructions on the tape from Inuktitut to English.

[22] Counsel agree that the translated charge and instructions to the jury contain numerous incorrect and confusing statements. The affidavits reveal that the bilingual and unilingual Inuktitut jurors were told (in Inuktitut):

- You will have to remember that all the evidences you heard personally in the court, will be your bases and how you will use those evidences you heard in the court to make your own decisions and you should not worry about what the judge said and the what the lawyers said.

- Mr. Kaunak cannot prove of his innocence. He does not have to prove anything. His prove [sic] of case will be made by the Crown.

- In order to convict the accused, before the Crown could prove his guilt, the Crown has to prove reasonable doubt.

- The word reasonable doubt means, that it is the true word. Reasonable doubt is exactly what happened. It will help to make the decision and it is true and it is beyond reasonable doubt. Prove beyond the reasonable doubt does not mean it proves that it is not a possible reasonable doubt. The Crown should not be seen as he could prove reasonable doubt. And I think that you can understand that the real evidence had been proven and the true evidence shows the reasonable doubt.

- After you had made your decisions about the evidences you have heard and you get confused of which to believe then you can only suspect about his charges and you will find him not guilty for his crimes.

- I'm sure after your discussions you will agree on one thing. You should not be concerned about the verdict, because you will not be punished.

- You will have to remember that all the evidence you heard personally in the court, will be your bases and how you will use those evidences you heard in the court to make your own decisions and you should not worry about what the judge said and what the lawyers said.

- The word reasonable doubt means that it is the true word. Reasonable doubt is exactly what happened without the aid of magic. It will help to make the decision and it is true and it is beyond reasonable doubt. Proof beyond reasonable doubt does not mean it proves beyond any reasonable doubt.

- The Crown should not be seen as having to be proving beyond reasonable doubt. And I think that you can understand that the real evidence has been presented and the true evidence proves beyond a reasonable doubt.

[23] In addition to the foregoing, Ms. Qulaut deposed that the translated concepts are not concepts that are traditionally associated with the Inuktitut language and so are very difficult to translate. For her part, Ms. Napayok-Hvatum suggested that . . . "additional or different interpreters would not have made a substantial difference, and more particularly would not necessarily have resulted in the instructions being made intelligible. This is in part due to the fact that many of the concepts and words used in the charge do not have a direct translation."

[24] Both deponents expressed the view that if there is a re-trial, all members of the jury should be required to speak and understand the English language. That is the position adopted by the Crown at the hearing of this appeal. More precisely, the Crown maintains that, because the legal concepts in the jury charge cannot be properly translated from English to Inuktitut, an order should go excluding unilingual Inuktitut speakers from the jury at a new trial. The order for a new trial, the Crown asserts, is dependent upon the ancillary order for exclusion.

Fundamental Principles

[25] The ***Charter*** confers upon an accused the right to be tried by a jury of his peers. The Supreme Court of Canada has made it clear that it is important that jurors try the right facts according to the appropriate legal principles in each case. ***R. v. Jacquard,*** (20 February, 1997), 24660 (S.C.C.), [1997] S.C.J. No. 21 (QL). The Chief Justice of Canada speaking for the Court underlined that whereas there is no requirement for perfectly instructed juries, accused individuals are entitled to properly instructed juries. He emphasized that an accused is entitled to a jury that understands how the evidence relates to the legal issues.

[26] It is also trite law that an improperly selected jury raises so great an appearance of unfairness that it cannot be excused by the curative provisions of the ***Criminal Code***. ***R. v. Barrow,*** [1987] 2 S.C.R. 694. This is consistent with the view that an improperly constituted jury is a nullity and lacks jurisdiction to render a verdict.

The Composition of a Jury in the Northwest Territories

[27] The Northwest Territories ***Jury Act*** allows unilingual aboriginal-language speaking persons to sit on juries even though they are unable to understand English or French language proceedings in court. Section 4 of the Northwest Territories ***Jury Act***, R.S.N.W.T. 1988, c. J-2 (as amended) provides:

"4. Subject to this Act, every person who

(a) has attained the age of 18 years,
(b) is a Canadian citizen or permanent resident of Canada, and
(c) is able to speak and understand an Official Language,

is qualified to serve as juror in any action or proceedings that may be tried by a jury in the Territories."

[28] And Section 4 of the Northwest Territories Official Languages Act, R.S.N.W.T. 1988, c. O-1 (as amended) provides:

"4. Chipewyan, Cree, Dogrib, English, French, Gwich'in, Inuktitut and Slavey are the Official Languages of the Territories."

[29] One can understand the geographic and cultural reasons for these legal provisions. The Northwest Territories covers a vast land area and includes a diverse group of Canadians of aboriginal descent. In *The Equitable Use of English and French Before the Courts in Canada*, (Ottawa, November 1995) at 54-55, the Commissioner of Official Languages reported that:

"The 1991 census showed a total population of 57,649. People of Aboriginal descent constitute the majority of the population (61% of the total) and are territorially concentrated in various regions. For example, the Inuit form a substantial majority in the Eastern Arctic, representing approximately 85% of that region's population. They are also by far the largest group of Aboriginal people across the Northwest Territories (approximately 63% of the native population). The territorial dominance of the Inuit is reflected in the recent agreement in principle with the federal government to divide the Northwest Territories into two regions, the Eastern Arctic to become (April 1, 1999) the new territory of Nunavut.

The Dene people are concentrated in the MacKenzie Valley,

> representing 46% of the population in the Fort Smith region, Yellowknife excluded. The non-Aboriginal population is to a great extend concentrated in Yellowknife, where it constitutes 83% of the city's population. The city of Yellowknife thus contains 56% of all non-Aboriginal people in the Northwest Territories.
>
> While English is the dominant non-Aboriginal language, there is great linguistic diversity in the Aboriginal population itself. Among the Dene people there are five spoken languages: Chipewyan, Dogrib, Gwich'in, North Slavey and South Slavey. Three Inuit languages are also spoken in the Northwest Territories: Inuktitut, Inuvialuktun and Inuinnnaqtun, as well as dialects of them. The Cree language is also present in the Aboriginal population of the Fort Smith region [footnotes omitted]."

[30] To assemble a jury in some of the sparsely-settled, remote communities in the Northwest Territories, it may be necessary to include unilingual aboriginal-language speaking persons. This is to say nothing of the important ***Charter*** aboriginal and multicultural rights those persons have to participate in the legal process, which are *not* issues before this Court.

[31] Provisions allowing unilingual aboriginal-language speaking persons to sit on juries are uncommon. For example, the jury legislation in the provinces of British Columbia, Alberta and Saskatchewan includes no similar provision. These Acts require, instead, that all jurors to be able to understand the language of the proceedings. The British Columbia ***Jury Act***, R.S.B.C. 1996, c.242 provides:

> "*Disqualification because of language difficulty*
> 4. If the language in which a trial is to be conducted is one that a person is unable to understand, speak or read, the person is disqualified from serving as a juror in the trial.
>
> *Interpreters and interpretive devices*
>
> 5. Section 4 does not apply to a person who
>
> (a) would be unable, if unaided, to see or

> hear adequately for the purpose of serving as a juror, and
>
> (b) will as a juror receive the assistance of a person or device that the court considers adequate to enable the juror to serve.

The Alberta ***Jury Act***, S.A. 1982, c. J-2.1 provides:

> "5(1) The following persons may be exempted from serving as jurors:
>
> * * *
>
> (f) a person who is unable to understand, speak or read, the language in which the trial is to be conducted;
>
> * * *
>
> 11 (1) In a civil proceeding a party to the proceedings has the right to challenge 3 persons peremptorily
>
> (2) In addition to any challenges that may be under subsection (1), a party is entitled to any number of challenges for cause on the following grounds:
>
> * * *
>
> (f) the person is unable to understand, speak or read the language in which the trial is to be conducted."

[32] And the Saskatchewan ***Jury Act***, S.S. 1981, c. J-4.1 (as amended) provides:

> "4 The persons excluded from service as jurors in any civil or criminal proceeding tried by a jury in the province are:
>
> * * *

> (i) persons who are unable to understand the language in which the trial is to be conducted."

[33] The Northwest Territories ***Jury Act*** clearly imposes added demands on the criminal justice system. The Commissioner of Official Languages took notice of some of these demands in the report ***(supra)*** at pp. 60-61:

> "The issues relevant to the use of Aboriginal languages in the courts of the Northwest Territories are of a quite different order [as compared with the issues surrounding the use of the French language]. No reasonable prospect exists at the moment for providing judges or prosecutors who speak any of the Aboriginal languages fluently. *The most pressing concern is the training and availability of interpreters whose can assist a court to understand the testimony of witnesses or accused persons who speak an Aboriginal language*. Until recently, the Territorial Department of Justice maintained a Legal Interpreting Program (fully funded under the *Canada-Northwest Territories Co-operation Agreement)* who aim was to train Aboriginal-language speakers as court interpreters. Without reliable interpretation, Aboriginal people appearing before the Territorial courts face serious disadvantage. Moreover, a language barrier deepens the impression that the court system is foreign and not really an integral part of one's community. The need for the assistance of interpreters is apparent in the number of hours of interpretation logged during the fiscal year 1993-94, which ranges from 1,324 hours of Inuktitut, 366 of Dogrib, 265 of North Slavey, to 176 of Chipewyan. Cuts in funding under the Co-operation Agreement for French and Aboriginal Languages have affected this valuable program. In addition to decreased funding, responsibility for this program has been transferred to the Arctic College in Fort Smith and Iqaluit and is not longer assumed by the Territorial Department of Justice [emphasis added and footnotes omitted]."

[34] Attached to the Affidavit of Ms. Napayok-Hvatum is that described as a portion of the pamphlet authored by the Northwest Territories' Department of Justice explaining

the Legal Interpreter Training Program. The pamphlet includes the following explanatory notes:

> "The Legal Interpreting office is responsible for developing aboriginal words for legal terms. This work is demanding because it is hard to find satisfactory translations for legal words that originated from cultures so different from the aboriginal cultures.
>
> Terminology workshops are held in several communities across the Northwest Territories each year. Working in the communities is important because the legal system and legal concepts must be explained to interpreters, language specialists and elders before correct and adequate translations can be found."

The Role of the Interpreter

[35] There is a dearth of judicial pronouncement on the role played by an interpreter in assisting a **Jury**. The Supreme Court of Canada in ***R. v. Tran*** [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218 dealt with the accused's right to understand the proceedings. In doing so, Chief Justice Lamer echoed the three guiding principles identified by Graham J. Steele in his article "Court Interpreters in Canadian Criminal Law" (1992) 34 Crim. L.Q. 218. Steele writes that ***R. v. Lee Kun*** [1916] 1 K.B. 337 (C.C.A.) made it clear that the primary purpose of using interpreters is to allow the accused to understand the proceedings and to make full answer and defence. Lamer, C.J.C. in ***Tran (supra)*** at p. 229 stated:

> "For a hearing to be fair, a party who has difficulty with the language of proceedings must not only understand the proceedings, but must also be understood. In ***MacDonald [v. Montreal (City of)*** [1986] 1 S.C.R. 460], Beetz, J., for the majority, stated at p. 511:
>
> > 'It is axiomatic that everyone has a common law right to a fair hearing, including the right to be informed of the case one has to meet and the right to make full

> answer and defence. Where the defendant cannot understand the proceedings because he is unable to understand the language in which they are being conducted, or because he is deaf, the effective exercise of these rights may well impose a consequential duty upon the court to provide adequate translation. *But the right of the defendant to understand what is going on in court and to be understood is not a separate right, nor a language right, but an aspect of the right to a fair hearing [emphasis added in Tran]*.'"

[36] Lamer, C.J.C. also quoted liberally from the Ontario Court of Appeal's decision in ***R. v. Hertrich*** (1982), 67 C.C.C. (2d) 510 (Ont. C.A.). In one of the quoted excerpts, Martin J.A. said:

> "'*Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice* [emphasis added in ***Tran***].'" ***Tran (supra)*** at p.236 (quoting ***Hertrich (supra)*** at p.537).

Lamer, C.J.C. then explained that in ***Hertrich***:

> "an accused need not demonstrate any actual prejudice flowing from his or her exclusion from the trial i.e., that he or she was, in fact, impeded in his or her ability to make full answer and defence. Prejudice is a sufficient but not a necessary condition for a violation of the right to be present under s. 650 of the *[Criminal] Code*. For a violation of the right to be present under s. 650 to be made out, it is enough that an accused was excluded from a part of the trial which affected his or her vital interests

> [emphasis in ***Tran***]." ***Tran (supra)*** at p. 237.

[37] Lamer, C.J.C. thus announced that it was improper, in the context of an accused's right to be present at trial, for interpretation services to even raise an *appearance of unfairness*.

[38] Steele's second point is that interpreters enhance the effectiveness and efficiency of the fact-finding process and facilitate the judge or jury's understanding of the evidence. Third, and most significantly, Steele states that interpreters "demonstrate publicly that justice has been done" ***Steele, (supra)*** at p. 224.

[39] ***Tran (supra)*** revealed that an accused's s. 14 ***Charter*** right to an interpreter is also primarily concerned with preserving fairness at trial. Lamer C.J.C. said at p. 240:

> "The right of an accused person who does not understand or speak the language of the proceedings to obtain the assistance of an interpreter serves several important purposes. First and foremost, the right ensures that a person charged with a criminal offence hears the case against him or her and is given a full opportunity to answer it. Secondly, the right is one which is intimately related to our basic notions of justice, including the appearance of fairness. As such, the right to interpreter assistance touches on the very integrity of the administration of criminal justice in this country. Thirdly, the right is one which is intimately related to our society's claim to be multicultural, expressed in part through s. 27 of the Charter. The magnitude of these interests which are protected by the right of interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the Charter, and a principled application of the right."

[40] For such reasons, the Supreme Court concluded that an accused is entitled to a constitutionally protected standard of interpretation which "is one of continuity, precision, impartiality, competency and contemporaneousness." ***Tran (supra)*** at p. 256. The legal standard expected of interpreters, although not one of perfection, is understandably high. David J. Heller, "Language Bias in the Criminal Justice System" (1995) 37 Crim. L.Q. 344 at 367 (citing ***Tung v. Canada*** (Minister of Employment & Immigration) (1991), 124 N.R. 388).

[41] Heller observes that slang and dialects produce difficulties at trial, even when the interpreter is competent. He notes that these problems can be especially difficult where aboriginal languages are concerned. He states at p. 370 ***ibid.*** that:

> "Perhaps the greatest problem is one of interpreting for an accused whose language and culture do not contain words which are equivalents of our legal concepts. For example, in many aboriginal languages there is no equivalent for 'guilty'. Requests for a plea have been interpreted into, 'Did you do it?' and, 'Are you being blamed for it?' [footnotes omitted]"

[42] Concerns for fundamental fairness are at the foundation of the pronouncements of the Supreme Court of Canada in ***Tran (supra)***. A trial that deprives the accused of his fundamental right to make full answer and defence will be upset on appeal. That deprivation, ***Tran (supra)*** makes clear, flows directly from a failure to provide an accused with adequate assistance in order to enable him to comprehend the proceedings.

[43] It seems to me that no lesser standard should be applied to the trier of fact. If the Court constituted to adjudicate upon the liberty of the subject is denied the ability to comprehend the evidence and to understand the judge's instructions, the proceedings are tainted. All concerned with the administration of justice must be satisfied that the testimony of the witnesses was properly communicated to the jury and that the judge's charge to the jury, if given in a language that requires translation, was properly interpreted.

Remedy & Conclusion

[44] At the hearing of this appeal, counsel for the Respondent did not contend that the failure to provide adequate translation services deprives the Crown of a new trial if that were otherwise the proper remedy. No one suggested that reasonable diligence on the part of the Crown could have earlier disclosed that which is now revealed on this record to be an inability to properly translate legal concepts from English to Inuktitut. It is clear that no one involved in the conduct of the trial realized that there was a problem. It emerged apparent only after the trial when the complainant wrote to complain about the quality of translation, and subsequent investigation revealed that her concerns were well-founded. It follows that there is no evidentiary foundation upon which to conclude that the Crown is guilty of laches or neglect. Crown conduct does not, on this record, deprive the Crown of a new trial if, absent other considerations, that were the appropriate remedy.

[45] Justice L'Heureux-Dubé explained for the majority in ***R. v. Power*** [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1 at 12, that s. 686 of the ***Criminal Code*** confers no discretion on a court of appeal other than the general discretion to dismiss or allow an appeal, and to prevent an abuse of the court's process. L'Heureux-Dubé J. stated the following at pp. 13 and 19-20 of the majority judgment:

> "In holding that under s. 686(4) of the *Code* an appellate court is entitled to consider whether the Crown has acted unreasonably, my colleague invites the courts of appeal to invade the exclusive domain of the Crown and to interfere with prosecutorial discretion, as well as to foster rulings based on pure speculation as to what might have happened had the prosecution chosen a different path. This, in my view, is not only impermissible and contrary to the rule of law but also contrary to the interest in a good and efficient administration of justice.
>
> For these reasons, *I am of the view that s. 686(4) of the* ***Criminal Code*** *does not confer a Court of Appeal any discretion, however limited, beyond the general power to control its process in case of abuse*.
>
> [emphasis added].
>
> * * *
>
> My colleague's invitation to the Court of Appeal to interfere with prosecutorial discretion, absent abuse of process, goes against the grain of doctrine and jurisprudence. It also carries with it the dangers that have been outlined above. In my view, there is neither a need nor a justification for an interpretation of s. 686(4) of the ***Criminal Code*** which extends the discretion of the courts in this manner. As Goodridge C.J.N. underlined, the wording of s. 686(4) of the ***Criminal Code*** does not warrant such an interpretation, particularly in view of our court's decision in ***Welch v. The King*** (1950), 97 C.C.C. 177, [1950] 3 D.L.R. 641, [1950] S.C.R. 412 (S.C.C.). Principle and policy dictate against it, and the case-law does not favour it.
>
> For these reasons, *I conclude that courts of appeal possess no residual discretion under s. 686(4)."*

[emphasis added]

[46] Section 686(8) of the ***Criminal Code*** provides that where a Court of Appeal exercises any of the powers conferred by s. 686(4), "it may make any order, in addition, that justice requires." Section 686(8) confers wide powers on an appellate court. As Ritchie, J. said for the majority in ***Elliott v. R. (No. 2)*** (1977) 38 C.C.C. (2d) 177 at 204 (S.C.C.):

> "In my view, when Parliament authorized the Court of Appeal, in the exercise of its power, to order a new trial, to "make any order, in addition, which justice requires" it must be taken as having authorized that Court under those circumstances to make *any additional order* which the ends of justice require whether the order for a new trial is dependent upon the additional order or not. I do not think that the wide powers conferred on the Court of Appeal by s. 613(8) are to be narrowly construed but rather that they are designed to ensure that the requirements of the ends of justice are met, and are to be liberally construed in light of that overriding consideration."
>
> [emphasis in original].

[47] In the case at bar, the Crown Appellant expressly prayed for a new trial and, in the interests of justice, an additional order directing that unilingual Inuktitut speakers be barred from sitting on the jury. The Crown's position is clear and unequivocal. Crown counsel stated that because legal concepts could not properly be translated from English to Inuktitut, the Crown had concluded that no new trial could be effectively conducted absent the special relief prayed for in reliance upon s. 686(8). The Crown made it abundantly clear that the exclusion order was a condition precedent to the conduct of a proper second trial. Justice, the Crown argued, required that unilingual Inuktitut speakers be excluded.

[48] The majority opinion relies, in part, upon the proposition that the affidavits fall short of establishing that it would be impossible to provide proper translation services. But the content and thrust of the affidavits are, with respect, not the issue in this appeal. The critical consideration is that the position of the Crown is that an order for a new trial is dependent upon the additional order for exclusion of unilingual Inuktitut speakers from the jury. In seeking the remedy of a new trial, the Crown asserts that no new trial conducted before a jury composed of even one unilingual Inuktitut speaker can result in a verdict untainted by precisely the same flaw that precipitated this appeal. In other

words, the Crown maintains that unless the Court is prepared to order the exclusion of unilingual Inuktitut speakers from the jury array and from the jury, the result of a new trial would be the same — a verdict fatally tainted by significantly deficient translation.

[49] I do not pre-suppose the impossibility of making understandable to persons who speak only the Inuktitut language the judge's charge to a jury in a criminal case. I am inclined to agree with the majority that translation services can likely be made effective so as to properly conduct a criminal trial. The difficulty in **this** case is that the Crown says that the goal is unattainable. The Crown's posture, in my opinion, dictates the result in **this** case.

[50] It is trite law that "the Court is not in any way bound to accept the Crown's view of (the) evidence nor the Crown submission of law based upon the Crown's view of that evidence" (***Skogman and The Queen***, 13 C.C.C. (3d) 161 at p. 172). Indeed, the Court has a duty to independently assess the record. But that is not to say that in determining the proper disposition to be made of an appeal, the Court should overlook the effect of the position taken by the Crown in the appellate process, re: ***Skogman (supra)*** at p. 175. That position is relevant to the response of the Court to the issue at bar.

[51] For reasons that follow, I am not prepared to accede to the Crown's prayer for an order that would exclude unilingual Inuktitut speakers from the jury at a second trial. But it is important to remember that the Crown's position, in reliance upon s. 686(8), is that the justice of the case requires such an order. It seems to me that if the exclusion of unilingual Inuktitut speakers is denied, so must the prayer for a new trial. The position adopted by the Crown is determinative of the result. If justice can only be achieved by barring unilingual Inuktitut speakers from the jury, the refusal to make such an order, condemns a second trial to the same fate as the first. Appellate courts must decline to grant a remedy which the Appellant asserts would be ineffective.

[52] The Respondent has already been placed in jeopardy. If a new trial were held, a jury would again have to be selected in accordance with the provisions of the ***Jury Act***. Persons who speak and understand an aboriginal language, but who do not speak and understand either English or French, would be qualified to serve as jurors. An array would have to be summoned in accordance with Section 4 of the ***Act***. It would then be quite improper for Crown counsel to employ his challenges to systematically exclude unilingual Inuktitut speakers. Yet, if selected, the Crown's position is that such persons would be unable to follow the proceedings because of the inability to properly translate the testimony and the judge's instructions from English to Inuktitut. A new trial will only produce a verdict tainted by the same defect that precipitated this appeal. It is no answer to say that the "luck of the draw" will perhaps yield an English-speaking jury. The

accused is entitled to be tried by a jury of his peers. And the Legislature has said that Inuktitut is an official language in the Northwest Territories. It would be nothing less than a judicial charade to summon a jury at random from the population knowing full well that certain legally qualified prospective jurors would, the Crown maintains, be unable to properly serve. And there would be no point in conducting a trial before a jury that included one or more unilingual Inuktitut speakers when proper translation services are required but, the Crown insists, are not available. The Crown has the responsibility of providing adequate translation services. The Crown says it cannot discharge its duty. The Crown must be taken at its word. A new trial, it seems to me, would be futile. And jury selection in these circumstances would be a sham. It would be an abuse of process. The prejudice to the integrity of the justice system is irremediable.

[53] The Crown asked this Court to order that the accused be tried by an English-speaking jury. I decline to make such an order. It seems to me that the Court, absent ***Charter*** considerations, should defer to the legislative choice set out in section 4 of the Northwest Territories ***Jury Act***. The legislative choice, the Crown contends, is unworkable. But the legislative choice goes directly to the composition and, as a consequence, the jurisdiction of the Court. I express no opinion whatsoever on the constitutionality of other legislative choices that may be available. I leave that question to another day.

[54] For these reasons, I would dismiss the appeal.

JUDGMENT DATED at YELLOWKNIFE, THE NORTHWEST TERRITORIES
this day of
A.D. 1997

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BERGER, J.A.