NATIONAL JUDICIAL INSTITUTE

Literacy and Access to the Canadian Justice System Casebook

A GUIDE FOR JUDGES

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LITERACY AND ACCESS TO THE CANADIAN JUSTICE SYSTEM

I. INTRODUCTION

- Concern for the right to understand[1] has been reflected in several decisions by courts across Canada. The 1991 decision of the Supreme Court of Canada in ***R. v. Evans***, **[1991] 1 S.C.R. 869** emphasized that a person is not legally informed unless they have understood the information conveyed to them.

- Canadian jurisprudence, particularly since ***Evans***, has strongly supported the emphasis on understanding. The cases appear to focus on two main aspects of the justice system. One aspect is specific to the criminal justice system; namely the ability of an accused or detained person to understand the rights contained in a standard police charge. The rights most commonly affected are the right to remain silent and the right to obtain and instruct counsel.[2] The second aspect concerns accessibility to the justice system – both civil and criminal – and how literacy and one's ability to adequately represent oneself in a legal proceeding are integral considerations to the provision of Legal Aid assistance. In some cases, courts have ordered a stay of proceedings where there was evidence that a particular litigant lacked the ability to represent him/herself and would therefore be denied the right to a fair trial. Finally, in the recent decision of ***New Brunswick (Minister of Health and Community Services) v. G. (J).*** **(1999), 177 D.L.R. (4th) 124,** the Supreme Court of Canada emphasized the need for state funded counsel in child protection hearings where, as noted by the court, the litigants often have low literacy skills and the matters are complex.

II. UNDERSTANDING THE RIGHTS CONTAINED IN THE STANDARD POLICE CHARGE & ONUS ON POLICE TO FACILITATE UNDERSTANDING

General Principles:

- Essential question: Must a police officer ensure that an accused person is capable of understanding and does in fact understand his right to counsel in order for the accused to properly exercise his right within the meaning of s. 10(b) of the *Charter*?

- In order for an accused person to be informed of his rights, it is necessary that the accused be capable of understanding and appreciating the substance of the right to counsel and truly appreciating the consequences of giving up that right. ***(R. v. McAvena*** **(1987), 34 C.C.C. (3d) 461 (Sask. C.A.);** ***R. v. Michaud,*** **(1986) 45 M.V.R. 243 (Ont. Dist. Ct.))**.

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[1]Note: put another way, the right to understand implies the obligation on police officers and judges to take steps toward ensuring that rights are understood.

[2]In doing the research thus far, many of the cases concerning an accused person's ability to understand the standard police charge involve impaired driving cases. While they may not be entirely relevant for this seminar topic, their comments regarding the importance of an accused person's ability to understand the standard police charge are relevant and can be extended to situations where the accused person suffers from cognitive impairment or has low literacy skills.

- A detainee or accused person must be informed of his rights in a manner which is comprehensible to him. The mere recitation of the right to counsel is insufficient. If the right to counsel is to be meaningful, then it may be incumbent upon the police in the appropriate circumstances to go beyond a mere statement of the words of s. 10(b). ***(R. v. Dubois* (1990), 54 C.C.C. (3d) 166 (Que. C.A.) at pp. 195-96)**.

- However, in the absence of any evidence to suggest the contrary, a constitutionally sufficient understanding of the right will necessarily be inferred from a positive response to the question "do you understand?" Even where there is evidence of a less than perfect understanding, courts have held that it may nonetheless be constitutionally sufficient. ***(R. v. Roberts* (1991) 95 Nfld. & P.E.I.R. 49 (Nfld. Prov. Ct.).; *Dubois* at pp. 195-97)**

R. v. Evans:

- The Supreme Court of Canada in ***Evans*** held that understanding one's rights is integral in order for one to be able to meaningfully assert his/her rights. In ***Evans***, the accused was arrested by police officers on a slimly-founded marijuana charge. Their "collateral purpose" was to obtain evidence against the accused's brother in relation to two murders. The two brothers lived together. The arresting officers knew that the accused had limited cognitive capacity. They had been cautioned to ensure that he understood the warnings given to him. However, the police questioned him in spite of his stated lack of appreciation of the *Charter* and police warnings. In the course of several interviews, the interviewing officers changed their focus from the drug offence to the murders. The investigation was overly aggressive and "dirty tricks" were employed. One of the officers lied to the accused by suggesting that his fingerprints had been found at the murder scene, and an undercover officer was placed in an adjoining cell to engage the accused in recorded conversation. The accused made requests to speak to a lawyer, but was unable to reach him. Nonetheless, the police obtained a written confession from the accused to the murders.

- The Supreme Court, in a unanimous decision, held that the accused's s. 10(b) rights had been violated and that the admission of his statements would bring the administration of justice into disrepute. McLachlin J., as she then was, stated at paras. 44 and 46:

> *A person who does not understand his or her right cannot be expected to assert it.* The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further…But where, as here, there is a positive indication that the accused does not understand his right to counsel, *the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.*

> The question is whether the circumstances here indicated that the accused did not understand his right to retain counsel. In my view, they did. Asked whether he understood his rights, he replied in the negative. The police had no reason to assume otherwise, given their knowledge of his limited mental capacity. The only question in whether this subsequent statement to his brother that he was aware of his right to counsel can be reasonably seen as indicating that the appellant, despite his initial indication to the contrary, in fact understood his right. In my view, it cannot. While the appellant had some idea – based on U.S. television – that he was allowed to speak to a lawyer, it is far from clear that the appellant understood from the outset when he was entitled to exercise his right to counsel and how he was permitted to do so. *In these circumstances, the failure of the police to make a reasonable effort to explain to the accused his right to counsel violated s. 10(b) of the Charter* [emphasis added].

- Therefore, the court emphasized a duty on the police in *special circumstances* to facilitate the accused's understanding his rights.

Cases where police are aware of a cognitive impairment:

- Courts have reached similar results in other cases where the police failed to act appropriately where they were aware of the limited cognitive capacity of the accused when reading the standard police caution.

- For example:

  - ***R. v. Messervey*** **(1991), 90 Nfld. & P.E.I.R. 305 (Nfld. Prov.Ct.)** - The evidence revealed that the officers involved were aware that the accused suffered from some cognitive impairment. Nonetheless, the officers failed to take any extra measures to clarify the standard police charge or assist him in understanding his right even after he indicated that he did not understand. The court in ***Messervey*** interpreted the remarks at paras. 44-46 of McLachlin J.'s reasons in ***Evans*** as meaning: "the Supreme Court of Canada is placing an onus on the police to further explain the accused's right to counsel where the accused advises that he does not understand his rights and where the police are aware of a mental deficiency sufficient to raise a question as to whether or not the accused understands. In my view, in those situations, the police are required to explain the accused's rights in order to facilitate his understanding of his right to counsel thus making such advice meaningful" (at para 23).

  - ***R. v. Roberts,*** **supra** - the investigating and arresting officer was aware of the accused's limited education and communication skills. The officer should have known that in light of the fact that accused was both "unsophisticated and unlearned", he was unlikely to have comprehended the police charge. Special care should have been taking during the interview process. See para. 41.

English language difficulties:

- The notion of special circumstances has also been defined to include language barriers. This includes situations where it is evident that the accused's native language is something other than English. For instance:

    - ***R. v. Michaud,* supra**– In this case, which pre-dates the decision in Evans, the court recognized that an accused person's grasp of the English language is integral in assessing whether his/her right to counsel has been violated. The court concluded at para. 29: "If the rights are read in English only, and the accused's or detainee's knowledge of the English language does not allow sufficient comprehension of the matter, those are "special circumstances" which alert the officer and oblige him to act reasonably in the circumstances." See also: ***R. v. Vanstaceghem* (1987), 36 C.C.C. (3d) 142 (Ont. C.A.); *R. v. Lukavecki,* [1992] O.J. No. 2123 (Ont. Gen. Div.) ; *R. v. Ly,* [1993] O.J. No. 268 (Ont. Ct. J.)**.

    - ***R. v. Lim* (1993), 20 C.R.R. (2d) 187 (Ont. Ct. J. (Prov. Div.))** - In this case, the arresting officer was aware at the time of the arrest that there was some form of communication problem. The court concluded: "In my view advising this accused in English that he could call a lawyer at the station and pointing out a sign at the station which the officer cannot read and where there is no evidence as to exactly what the sign may say or whether the accused is literate in that language is not sufficient compliance with the requirements of s. 10(b). In a community such as Toronto where there is a large number of Chinese speaking individuals, it does not seem to me to be an unreasonable onus to place on the police to attempt to arrange for a translator for individuals who appear to speak that language and do not speak sufficient English to understand their rights. Given the multicultural nature of our community it is not unreasonable to expect that an attempt should be made to ensure that the person is made aware of his or her rights in their native language" (at para. 8).

    - ***R. v. Shmoel,* [1998] O.J. No. 2233 (Ont. Ct. J.)** - The key issue in this case was whether the accused was advised of his right to counsel in a language that was comprehensible to him and permitted an opportunity to exercise that right in a meaningful manner. Applying the decision in ***Lim***, the court held: "It is settled law that where 'special circumstances' exist, a police officer is required to take further steps to reasonably ascertain that an accused person understands his or her constitutional right to counsel. 'Special circumstances' may arise where it is clear to the officer that an accused person's first language is not English and there is difficulty comprehending the demand for samples of breath … Other indicia of 'special circumstances' include

the following: (1) the accused's failure to respond to questions dealing with the right to counsel coupled with statements to the effect that 'I don't speak the best English'…; (2) the necessity of speaking slowly to an accused who speaks English 'a little bit' …; (3) the accused's negative response when asked if the right to counsel is understood and thereafter, the failure to provide verbal or written instruction about that right in the first language of the accused …; and (4) the failure to honour the accused's request for an interpreter or an officer or a lawyer who speaks his or her first language…" (at para. 8).

In this case, the court held that his constitutional right to counsel had been violated. The accused's actions were consistent with those one might expect of a person who has a "day-to-day" comprehension of the English language but little or no appreciation of the niceties of technical legal terms such as duty counsel. The court considered some of the special circumstances in this case to include that the accused person's first language was not English and that all the police officers who dealt with him were aware of this; failure to understand the technical wording of the breath demand and the right to counsel; and the technical nature of the charges.

- ***R. v Sundaralingam,* [2003] O.J. No. 863 (Ont. Ct. J.)** – The accused in this case spoke broken English. He asked the officers to speak slowly and repeatedly asked for an interpreter or a Tamil-speaking lawyer. He was provided with neither. The court held that the accused was not able to access counsel in any meaningful way. Therefore, the right to counsel was violated. The inability of the accused to access counsel in a meaningful way directly impacted the fairness of the trial. The court also considered the fact that Canada is a multi-cultural society with great diversity, and this diversity is recognized in a number of *Charter* protections afforded to all citizens.

- ***R. v. Oliynyk,* [2003] O.J. No. 392 (Ont. Ct. J.)** – The accused was charged with impaired driving and refusing to provide a breath sample. His cognitive ability was put in question from the outset. When the police officer advised him of his right to counsel and said, "Do you understand?" Mr. Oliynyk did not reply but rather began yelling at the police officer. Similarly, when read the standard police caution, the accused did not respond. Rather, he continued yelling at the officer in a foreign language. The court held that the police ought to have been alert to comprehension issues from the beginning and that "special circumstances" existed that required them to ascertain whether Mr. Oliynyk understood both the demand for a breath sample and his right to counsel.

Hearing impaired accused and sign language interpreter:

- The following cases consider the issue of the onus on police officers to ensure that an accused person with a hearing impairment understand the rights being communicated to him or her via a sign language interpreter.

    - ***R. v. Knott (1991), 32 M.V.R. (2d) 183 (S.C. Nfld. - T.D.)*** - Two of the main issues in this case were: 1) how far police must go in ensuring that a person who is hearing impaired is informed of his right to counsel?; and 2) if the sign language interpreter provided by the police has some doubts concerning whether the person detained fully understands the implications of the rights communicated, does this impose some duty upon police to do more than provide the interpreter? The court concluded that the accused person had a limited ability to sign and that he functioned at a basic comprehension level. The sign interpreter gave evidence at trial that she could not be certain how much the accused actually understood. The court, in this case, did not find an infringement of the accused's rights. However, in keeping with the presumption of understanding enunciated in ***Evans***, the court held that where a hearing impaired person accepts the qualifications of a sign language interpreter, and indicates, when informed by the interpreter of his right to counsel, the police caution, and the breathalyzer demand, that he understands what is communicated, that person is not in a position to require the police to provide the services of a more specialized interpreter in order to avoid infringing his right to counsel.

    - ***R. v. Callow,*** **[2000] A.J. No. 596 (Alta. Q.B.)** - In this case, the accused suffered from a diagnosed hearing impairment during his trial in which he was self-represented. The main issue on appeal was whether the trial judge failed to adequately assist him by providing an interpreter. The court concluded that in this case, it was unnecessary to appoint counsel. At para. 15, the court stated: "The assistance which a trial judge should provide to an unrepresented accused will depend largely on the particular circumstances in each case. In fact, on numerous occasions during the proceedings in question, the trial judge provided assistance to the appellant in understanding the nature of the proceedings, and attempted to direct his mind to relevant considerations." In this case, the court concluded that there was no evidence that any hearing difficulty the appellant might have had at the time of the trial affected his ability to hear and understand the trial judge on the day of the trial. Nonetheless, this case is instructive for its review of the cases and analysis regarding the duty of a trial judge to appoint counsel and assist an unrepresented accused.

Problems, Comments & Observations:

- The above cases are instructive because they illustrate that where an accused person makes an utterance to or in the presence of the officer who has informed the individual of his right to counsel under s. 10(b), indicating that he does not understand, there is an obligation on the instructing officer to advise him. (see: ***R. v. Parrill*** **(1998), 38 M.V.R. (3d) 7 (Nfld. S. C., C.A.)** at para. 26 where the court discussed the accused's ability to understand his right to speak with counsel in private)

    - ***Evans*** clearly makes this point. McLachlin J. stated that in most cases, it can be inferred from the circumstances that the detainee understood what he/she has been told. In such cases, the duty on police to go to further lengths to ensure understanding will be discharged when the individual responds affirmatively to the question whether the given charge is understood. (See: ***Dubois/Messervey***) Absent special circumstances such as obvious cognitive or language impairment such as in ***Lim***, police are not required to go further and facilitate understanding.

    - There is one **problem** in all of this: What happens when the circumstances are not so clear and it is not obvious that the accused person does not understand? The research contained in the program materials as well as the evidence in the reports on literacy prepared by the John Howard Society reveal that if a person has low literacy skills, he or she has likely spent much of life attempting to hide a lack of understanding. Therefore, it is doubtful that people with low literacy skills will readily admit that they cannot read or write well. It is important that the police officer, the defence lawyer and other court officials try to determine whether people accused of crimes, witnesses and jurors do in fact understand what is going on around them.

    - It appears that judges are increasingly considering the effect that an individual's ability to understand has on basic legal rights.

    - The cases demonstrate that courts are acknowledging that the low literacy skills do interfere with an accused's ability to fully understand his/her rights. Consequently, police officers and judges must make concerted efforts toward establishing awareness of literacy. Police need to be alert to the comprehension issues from the outset and the special circumstances that exist requiring them to ascertain that the accused understands both the demand and his right to counsel (***Oliynyk***, at para 31).

    - As stated earlier in the materials, a more systematic approach is required to assess the literacy of potential accused persons and subsequently a viable approach to ensuring that the rights and dignity of such individuals are recognized and respected.

- Absent special circumstances indicating that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious cognitive impairment, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution. It is important that the standard caution given to detainees be as instructive and clear as possible. ***(R. v. Ramsoondar* (2001), 14 M.V.R. (4th) 33 (Ont. Ct. J.)** at para 34)

- There is an ever-growing need to develop assurances such as the roadside literacy test (mentioned in the seminar materials) and other quick tests for determining levels of literacy that can assist police officers and judges in dealing with individuals with low literacy skills. Any measure that can assess, at the earliest possible point in the criminal process, the literacy level of an accused is integral to the proper functioning of the system.

III. ACCESSIBILITY AND LITERACY – ACCESS TO LEGAL AID FUNDING AND APPLICATIONS FOR STAY OF PROCEEDINGS

Introduction:

- As a general rule, there is no constitutional right to be provided with state funded counsel. It is for the court to determine whether the particular accused could not receive a fair trial without counsel. ***(R. v. Rowbotham* et al. (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Keating* (1997), 159 N.S.R. (2d) 357 (N.S.C.A.))**

- These cases often arise out of situations where a litigant cannot afford counsel and has been denied Legal Aid assistance. Courts have recognized that where a trial judge is satisfied that an accused person lacks the means to employ counsel and that counsel is necessary to ensure a fair trial for the accused, a stay of proceedings until funded counsel is provided is an appropriate remedy under s. 24(1) of the *Charter* where the prosecution insists on proceeding with the trial in breach of the accused's *Charter* right to a fair trial. (***Rowbotham***, at p. 70)

- A trial judge has the authority to enter a conditional stay of proceedings until counsel is appointed for an accused in circumstances where the accused has been denied legal aid, cannot afford private counsel and where representation is necessary to ensure a fair trial.

Role of Trial Judge:

- The duty of a trial judge is first and foremost to ensure the fairness of the trial. This task is made significantly more difficulty where an accused person or litigant appears unrepresented or self-represented.

- In ***R. v. McGibbon*** **(1988), 45 C.C.C. (3d) 334 (Ont. C.A.)** at p. 347, the Court of Appeal for Ontario held that where an accused person is unrepresented by counsel, the trial judge may provide reasonable assistance to the accused in the presentation of evidence, putting any defences before the court and guiding the accused in such a way that his or her defence is brought out with its full force and effect. How far a trial judge should go in assisting an accused must of necessity be a matter of discretion.

- This view has been adopted and applied in numerous cases across Canada. The following are examples of the application of the reasons in ***McGibbon***, as well as additional comments about the role of trial judges when faced with an unrepresented/self-represented party. For instance:

  - ***R. v. Romanowicz,*** **[1998] O.J. No. 12 (Ont. Gen. Div.)** - The court held that where the accused appears unrepresented by counsel, "throughout the trial, the court is obliged to assist the accused in presenting his or her defence. This delicate task must be undertaken without compromising the court's impartiality. The duty to ensure a fair hearing will require various types of assistance as the proceedings progress. This may involve re-instruction regarding proceedings explained at the outset of the trial or such as may arise as the trial unfolds. In rendering assistance to the accused, the court is obliged to take into account the totality of the circumstances including the sophistication of the accused, the gravity of the offence charged, the nature of the defence, and the complexity of the issues at hand" (at para. 34).

  - ***R. v. Callow,*** **supra** - The court reviewed the principles set out in ***Rowbotham, McGibbon*** and ***R. v. Rain*** **(1998), 130 C.C.C. (3d) 167 (Alta. C.A.)** The assistance that a trial judge should provide to an unrepresented accused will depend largely on the particular circumstances of each case.

  - ***R. v. B.K.S.*** **(1998), 104 B.C.A.C. 149 (B.C.C.A.)** - The court stated at para. 26: "A trial judge has an obligation to ensure that an accused receives a fair trial. When faced with an unrepresented accused, the trial judge should, within reason, assist the accused in the conduct of his defence and guide him through the trial process so that his defence is effectively brought out. Just how far a trial judge should go in doing so is necessarily a matter of discretion."

  - ***R. v. Moghaddam,*** **[2002] B.C.J. No. 2564 (B.C.S.C.)** - The court reviewed the principles in ***BKS*** and ***Parton***. In this case, the unrepresented accused argued, on appeal, that he did not receive a fair trial because the trial judge failed to: a) assist him by explaining the nature of the trial process and the elements of the offences

for which he was charged; b) adequately explain the meaning of calling evidence and reasons for doing so; and c) assist him by explaining the purpose, scope and nature of cross-examination.

- See also: ***R. v. Tran*** **(2001), 55 O.R. (3d) 161 (Ont. C.A.);** ***R. v. Fok*** **(2000), 275 A.R. 381 (Alta. Q.B.);** ***R. v. Parton,*** **[1994] B.C.J. No. 2098 (B.C.S.C.);** and ***R. v. Peter Paul*** **(2002), 207 N.S.R. (2d) 378 (N.S. Prov.Ct.)**.

- While these principles emerged out of cases involving unrepresented/self-represented persons, the same approach can be taken by trial judges faced with litigants with low literacy skills. Moreover, it becomes imperative that the trial judge consider the impact of low literacy skills on the impact of the proceeding and whether it is necessary to order state funded counsel in order to ensure a fair trial.

- The Court of Appeal for Ontario in ***Rowbotham*** established a three-part test for determining when an application for state funded counsel will be granted. The applicant must demonstrate the following:

  1) He/she is without financial means to employ counsel;

  2) Legal Aid funding has been refused; and

  3) His/her case is *sufficiently complex* to warrant the appointment of counsel, taking into consideration the *capacity of the accused* to comprehend the issues before the court.

- It is the third part of the test that is relevant to our discussion regarding literacy and accessibility to the justice system. The third step explicitly contemplates the capacity of an accused person to understand the process and issues before the court. Where an individual is not capable, then counsel must be provided in order to ensure his/her right to a fair trial.

- For example:

  - ***R. v. Taylor*** **(1996), 150 N.S.R. (2d) 97 (N.S. S.C.)** - The main issue to be decided in this case was when is an accused entitled to have state funded legal defence? The court held that an accused must be unable to represent himself or herself because of the complexity of the case or as a result of a personal attribute such as illiteracy. "If an accused is incapable, by reason of the complexity of the case or because the person lacks the ability to meaningfully participate in the trial unless represented by legal counsel, then the accused should not be forced to proceed to trial without counsel. To force such an accused to proceed in that case would serve to deprive an accused of the right to fundamental justice" (at para. 11).

- ***R. v. Wilson*** **(1997), 121 C.C.C. (3d) 92 (N.S.C.A.)** - The court held that a determination about the seriousness and complexity of the case and whether an accused is capable of representing him/herself must include, *at a minimum*, an inquiry into: (a) the personal abilities of the accused such as her educational and employment background and whether she is able to read, understand the language, and make herself understood; (b) the complexities of the evidence and the law on which the Crown proposes to reply and, (c) whether there are likely to be any complicated trial procedures such as a voir dire.

- ***R. v. Baderstscher,*** **[1996] O.J. No. 4528 (Ont. C.J.)** – The court held, at para. 14: "A young accused with limited education, limited ability to understand and to express himself, and little or no experience with the criminal process may not be able to have a fair trial without counsel even for the charges lacking in factual or legal complexity. … an accused in a different situation with respect to those criteria could be able to have a fair trial without the assistance of counsel. The essential issue is whether in all the circumstances of the particular accused and the particular case before the court representation by counsel is essential to a fair trial."

- ***Re White and the Queen*** **(1976), 32 C.C.C. (2d) 478 (Alta. S.C. T.D.)** - Although this case came before the decision in ***Rowbotham***, the Alberta Superior Court set out some of the considerations for determining whether counsel is necessary. These included: the formal education of the applicant, language skills, and the complexity of the case (p. 478).

- ***R. v. Black Pine Enterprises Ltd.,*** **2001 B.C.S.C. 1849** - The court held that in considering the seriousness and complexity of the matter, "the court must have a mind to the duty of the trial judge to assist an unrepresented litigant. The court must consider the applicant and the applicant's ability to represent himself or herself" (at para. 7).

- ***Canada (Attorney General) v. Seifert,*** **2003 B.C.S.C. 398** - The court applied the complexity and ability test. Evidence was led that, among other things, the accused was "effectively illiterate" and had the equivalent of a grade three or four education and did not have a conceptual ability to understand the proceedings. The court concluded that given the accused's "interrupted education, limited literacy and limited English vocabulary, he would likely require the assistance of counsel."

- ***R. v. Lalo*** **(1998), 173 N.S.R. (2d) 149 (N.S.S.C.)** - The court applied the analysis in ***Wilson*** by first considering the accused's ability to represent himself. In doing so, the Crown considered his education, employment and community work in great detail. At para. 28, the court set out the following relevant factors for assessing the personal abilities of an accused:

1) Educational background – including such things as the level and nature of the accused's education and the means by which the courses were evaluated, for example, by examination, research papers or essays;

2) Employment background –including the duties of the accused in his or her employment and level of responsibility; and

3) The ability of the accused to read, understand the language and be understood. This can best be satisfied by the trial judge's assessment of the accused as he or she testifies.

Family Law - Child Protection Proceedings:

- As illustrated by the cases above, ***Rowbotham*** and ***Rain*** have significantly broadened the scope for when state funded counsel can be ordered. Another area in which this has impacted considerably is in child protection hearings.

- In ***G.(J).,*** the Supreme Court of Canada considered, for the first time, the issue of whether indigent parents have a constitutional right to state-funded counsel when a government seeks a judicial order suspending such parents' custody of their children. Applying the three considerations in ***Rowbotham***, the court concluded that the New Brunswick government was under a constitutional obligation to provide counsel in order to ensure a fair hearing consistent with s. 7 of the *Charter*. Whether counsel will be required depends upon the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent. If counsel is not provided, then a trial judge has the power to order the government to provide state funded counsel under s. 24(1) of the *Charter.*[3]

- At para. 86, Lamer C.J. (as he then was), writing for the majority, held that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's s. 7 rights. Rather, the seriousness and complexity of a hearing and the capacity if the parent will vary from case to case. Regarding the capacity of the parent, Lamer C.J. wrote: "Some parents may be well educated, familiar with the legal system, and possess above-average communication skills and the composure to advice effectively in an emotional setting. At the other extreme, some parents may have little education and difficulty communicating, particularly in a court of law. It is unfortunately the case that this is true of a disproportionate number of parents involved in child custody proceedings, who often are members of the least advantaged groups in society. The more serious and complex the proceedings, the more likely it will be that the parent will need to possess exceptional capacities for there to be a fair hearing if the parent is unrepresented."

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[3]Note: The Taylor case appears to be the leading case on the matter. The only other cases dealing with child protection hearings/family law matters only mention literacy in passing when considering a parents' ability to care for a child or future employment opportunities when considering maintenance issues. Literacy is not mentioned explicitly as an issue as it is in the other areas described above.

- In a concurring judgment, L'Heureux-Dubé J. held that in considering this third factor, "the focus should be on the parent's education level, linguistic abilities, facility in communicating, age and similar indicators" (at para. 124). Taking into account all of these factors, it is likely that the situations in which counsel will be required will be frequent.

- See the following articles by D.A. Rollie Thompson: "Rules and Rulelessness in Family Law: Recent Developments (June 2000) 18 C.F.L.Q. 25-97, at pp. 90-94; Annotation to New Brunswick (Minister of Health and Community Services) v. G. (J.), (Dec. 1999) 50 R.F.L. (4th) 74-82; and "A Practicing Lawyer's Field Guide to the Self-Represented" (Jan. 2002) 19 C.F.L.Q. 529-46.

Access to justice system not just a financial issue:

- These cases are important because they provide an illustration of how literacy awareness can be addressed through the ***Rowbotham*** test.

- More specifically, ***Taylor*** is significant because it stresses that accessibility to the justice system is not simply a test about or inquiring into the financial means of a particular accused person, but rather the ability of an accused person to answer the charge against him. The court held at para. 17: "this assessment is not to be based on any means test but rather upon the ability to answer the charge. This must take into account such things as literacy and communications skills and the complexity of the trial. In longer or more complex trials an accused may be entitled to funded representation even though that person does not fall within Legal Aid guidelines." Similarly, at para 20, the court concludes: "Courts must not routinely require the state to fund legal defence based solely on the fact that an accused is indigent or that there is a possibility of incarceration if convicted. The test must be whether an accused is capable of answering the charge with sufficient skill so that the accused will not be deprived of their liberty without being afforded fundamental justice."

- Similarly, the Supreme Court of Canada decision in ***G.(J).***, applying the three-part test in ***Rowbotham***, has expanded the necessity of state funded counsel to child protection cases. As recognized by the Supreme Court and academics, such cases often involve parties with low literacy skills and complex legal issues with significant consequences.

- At the end of the day, the determination of whether representation by counsel is essential to a fair trial must be made on a case-by-case consideration. For instance, it is possible that an accused who is university educated with numerous previous offences would not be appointed a lawyer, while an accused with low literacy skills may obtain one even if charged with the same offence. (see Rain at p. 9)

CONCLUSIONS

- There is no doubt that literacy awareness is integral in ensuring access to and fairness in the Canadian justice system. Regardless of the area of law, police officers, trial judges, court staff and other justice officials must take a proactive approach and alert themselves to issues of literacy. This is imperative not only to ensure that an accused person or litigant receives a fair trial or understands his or her *Charter* rights, but also to ensure that individuals understand their obligations to the court and comply with these obligations.

- The cases make it clear that trial judges should ensure that accused persons can read and are able to understand questions and give appropriate answers when unrepresented (***Lalo,*** at para. 28).

- Trial judges, police officers and other court officers must take steps to confirm that an individual understands the process. This includes ensuring that an individual understands the terms of his or her probation, custody or child support order or other similar court order. It is always possible that an individual subject to a court order may not have the literacy skills necessary to comply. Similarly, court administrators must be proactive in facilitating the completion of written applications necessary to file a complaint with the court.

- As the discussion above has suggested, proactive measures must go beyond a simple inquiry into an individual's literacy skills as one is unlikely to openly admit to having low literacy skills. The earlier this can be identified in the justice process, the more able trial judges will be able to facilitate a fair hearing and the administration of justice. These cases represent a positive step toward awareness of literacy and its impact on accessibility in the justice system.

- Early identification is also helpful in cases where a trial judge can make recommendations that an accused person, for instance, receives literacy training as part of their rehabilitation. Correctional staff and probation services must continue to work with inmates and accused persons to ensure that those with low literacy skills receive the training they need to improve these skills.[4]

[4]For instance, Correctional Services Canada developed Adult Basic Education, a literacy training program, in 1986-87. This objective of this program is achieve functional literacy. On admission to a federal institution, inmates are asked to take an achievement test to assess language (which includes reading and writing) and mathematics skills. See: **www.csc-scc.gc.ca**

LITERACY AND ACCESS TO THE CANADIAN JUSTICE SYSTEM

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