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Understanding Justice: Criminal Courtroom Interpretation in Eighteenth-Century London and Twenty-First-Century Toronto

Comprendre la justice : l'interprétation dans les causes criminelles devant les tribunaux de Londres au XVIII^{e} siècle et de Toronto au XXI^{e} siècle

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Résumé de l'article

Cet article compare la situation de l'interprétation devant les tribunaux dans le Toronto contemporain à celle de Londres au dix-huitième siècle. À l'époque, Londres avait une population immigrante et faisait face à des défis similaires à ceux qu'affronte aujourd'hui Toronto. La commodité s'avérait le facteur le plus important régissant cette question. Le droit à un interprète est de nos jours un droit constitutionnel, ainsi qu'un droit de la *common law*. Les accusés aujourd'hui jouissent de protections plus étendues, telles que la présomption d'innocence, la loi de la preuve et le droit à un avocat. Toutefois, l'attitude inchangée des participants anglophones aux procès continue d'avoir un impact négatif sur les accusés qui ont recours à des interprètes.

Understanding Justice: Criminal Courtroom Interpretation in Eighteenth-Century London and Twenty-First-Century Toronto[1]

Karen A. Macfarlane

In a recent scathing statement, Mr. Justice Casey Hill of the Ontario Superior Court called the quality of interpretation in a Peel Region court "a critical threat to justice." A 2005 article in the *Globe & Mail* exposed how the Ontario courthouse was failing the large, multicultural community of the Greater Toronto Area by providing witnesses and defendants with unaccredited and unqualified interpreters, some of whom were not fluent in the witness's own language and were for the most part ignorant of Canadian legal terminology (Blatchford, 2005, A1). This article compares criminal courtroom interpretation in present-day Toronto with that of another city which was composed of a large immigrant population—eighteenth-century London. Comparing these two metropolitan centres helps highlight the modern issue of access to adequate interpretation. Eighteenth-century London, like Toronto, was home to peoples from all over

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the world. Tens of thousands came to the city as a refuge, for work, and to live.[2] The city faced similar difficulties to modern day immigrant cities: a multicultural population was also a multilingual population.

This paper will use both legal and social history techniques to address the issue of language and the law. It will compare the need for interpreters and their function in eighteenth-century London and modern-day Toronto. For those for whom English was not their first language, the ordeal of a trial in a strange country was exacerbated by their inability to understand and express themselves in a foreign tongue. There were no clear laws or policies to deal with trial participants ignorant of English in early modern London. *Ad hoc* measures were used. In twenty-first-century Toronto, Section 14 of the *Canadian Charter of Rights and Freedoms* protects the right of all deaf and allophone defendants to an interpreter. The most striking observation about criminal courtroom interpretation from the eighteenth to the twenty-first century is that not only do the same challenges persist, but that the attitudes of many Anglophones remain constant. The ideology and philosophy behind the criminal trial has radically changed; in the last three hundred years, the presumption of innocence, the law of evidence, and the right to legal counsel have developed to safeguard defendants. The competency of interpreters and the additional delay in court proceedings engendered by the presence of interpreters remain issues, but underneath this the basic assumptions of the Anglophone officers of the court have hindered progress. Judges, police, and lawyers continue to overestimate how much is being understood by non-native English speakers, and lack the necessary empathy for the latter's situation.

1. Eighteenth-Century London

In the seventeenth and eighteenth centuries, political, social and legal commentators drew connections between the nature of the

2 Most of the immigrants came from Europe. There are only very general figures for the influxes, but in 1700 5% of London's population was French Protestant. By mid-century there were between 5,000 to 10,000 German gentiles, and by the end of the 1790s there were probably 20,000 Jewish Londoners, mostly from Eastern Europe and speaking German, Polish, Yiddish, and Hebrew (Macfarlane, 2008, pp. 19-32).

English language and the nature of English law. Both valued common usage above established rules (Barrell, 1983, pp. 110-117). Nationalist writing about the importance and superiority of English echo in the debates about "Englishing" the laws (eg. *Gentleman's Magazine*, 1733, pp. 65-66). Law courts used Latin and Law French, which seventeenth-century reformers believed kept laymen ignorant and under the control of corrupt lawyers. In 1731, Parliament promulgated a law to hold court proceedings in English. It cited the "perils (…) and mischief" resulting from trials prosecuted in a foreign language, in this case Latin or Law French. The legislation would "protect the lives and fortunes of the subjects (…) from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language" (4 George II, c. 26). Beginning in 1733,[3] all writs, indictments, informations, verdicts, and judgements, "shall be in the English tongue and language only, and not in *Latin* or *French*, or any other tongue or language whatsoever." Like many lawyers, Sir William Blackstone was not a supporter of the legislation, and in his evaluation of the act, he stated that the law had not achieved its proposed ends, "Which purpose I fear, [has] not been answered; being apt to suspect that the people are now, after many years experience, altogether as ignorant in matters of law as before" (Blackstone, 1800, p. 322).

Part of the problem was that in the case of felony the legal procedure was designed to keep the defendant in ignorance. John Beattie has described prisoners as "men not used to speaking in public who suddenly found themselves thrust into the limelight before an audience in an unfamiliar setting—and who were for the most part dirty, underfed, and surely often ill" (Beattie, 1986, pp. 350-351) and therefore unable to mount any sort of coherent defence. There were few legal protections for those accused of felonies. The presumption of innocence, the use of legal counsel, and laws of evidence were developing in the later eighteenth century, but prisoners were at a severe disadvantage. Accused felons had no right to know the charge or evidence against them. John Langbein has referred to this as the "accused speaks" trial, because the purpose was to force the prisoner to explain to

3 The Gregorian new year began 25 March 1733.

the court how she or he could possibly be innocent (2003, pp. 61-66). Most defendants were, not surprisingly, unable to express themselves clearly in this setting. For non-Anglophones, the situation was more dire still.

Skilled interpreters were valued in the eighteenth century and used by the government and navy (Sainty, 1975, p. 62). Indeed, Levy Mortigem was prosecuted for posing as a government interpreter in order to "unlawfully and by false pretence" obtain money and the trust of a publican (*OBP*, 1807, (t18070114-103)). The Secretary of State appointed official interpreters to deal with official correspondence. Able interpreters were also used for diplomatic and commercial expeditions. When it came to criminal trials, however, interpreters were not viewed as valuable resources; they were the cause of delays and expense. This, combined with the English overestimation of the ability of foreigners to understand English, hindered the development of quality standards for courtroom interpretation. In proceedings involving people of social standing or with financial resources, more attention was paid to the issue of interpreters; it is therefore in these cases that the most information about eighteenth-century interpretation can be found. There were two important exceptions to this general rule: the Admiralty and the empire. The cosmopolitan nature of the navy necessitated the integration of Europeans, Asians, and Africans, and the ability to comprehend them. Overseas, when the English were themselves the minority, careful attention was paid to translation.

There were few regulations about interpreters in most English courts. There were no fixed criteria about when interpreters should be used, how many, what quality, and how much should be translated. There were guidelines for foreign commissions and there were standard oaths which interpreters had to swear before testifying which were not specific to each court. The courts of King's Bench, Chancery, Common Pleas and the Exchequer charged a 2 shilling fee for swearing interpreters for indictments and informations. One precedent was established for the function of interpreters in *du Barré* v. *Livette*. Agents of attorneys were held to hold the same position as counsel. If an interpreter was present during discussions between a client and

their attorney, then the interpreter could not testify about that conversation; Lord Kenyon concluded that the interpreter was "the organ of the attorney" (MacNally, 1802, p. 251). However, conversations between an interpreter and a prisoner were not privileged (Roscoe, 1846, p. 187).

In contrast to the civil law courts, the military and Admiralty courts had greater experience with non-Anglophones as defendants, witnesses, and even as judges at tribunals (McArthur, 1805, pp. 24-26, 330-332). There were rules about when interpreters were to be used and guidelines about their qualifications. Since many enlisted men and officers were of foreign birth, this attention is understandable. Ships often carried interpreters, or had someone on board who spoke multiple languages.[4] Some Admiralty courts had official interpreters.[5] At a 1726 trial for piracy, the judge not only appointed counsel for the prisoners and swore a captain to be their interpreter, but also made the captain available to the prisoners while the advocate prepared their defence (*The trials of five persons for piracy*, 1726, p. 28). At the trial of Viscount Sackville, the Judge Advocate instructed the interpreter to ascertain whether a French witness understood the oath and his duty as a witness, and to explain the laws of England in regard to testimony and perjury (Sackville, [1760], pp. 9-10, 141).

The guides and accounts of military courts show the greatest attention to the needs of non-Anglophones. The best and most careful reference to the role of interpreters is Lord Woodhouselee's *An essay on military law, and the practice of courts martial* (1800). He considers ignorance of English as being analogous to standing mute to a charge:

> In such case, it is necessary that a neutral person of ability and discretion, who is equally skilled in both languages, should be sworn, to interpret between the prisoner and the prosecutor

4 Eg. in 1662, the Virginia Assembly appointed two interpreters, one for the *Norwood* (*An abridgement of the laws*, 1704, p. 34).

5 Eg. the High Court of Vice Admiralty of Jamaica (Jamaica. Assembly, 1792, p. 96).

> and court. This interpreter must, in the first place, explain to him distinctly the import and substance of the charge, and deliver to the court his answer to the accusation; and during the whole course of the trial, he must translate, for the benefit of the prisoner, the import of each of the witnesses, and put such questions as the prisoner shall suggest, either in the way of cross examination of the evidence for the prosecution, or directly as exculpatory proof. (Woodhouselee, 1800, pp. 241-242)

A passage in John McArthur's guide to naval and military courts likewise includes directives that the interpreter be a "disinterested person," "skilled in his own language and that of the indictment," who must swear:

> You shall well and truly interpret and translate, in all cases in which you shall be applied to in the course of the present trial; and you shall not communicate or discover any person or persons any part of the proceedings, until the sentence to be pronounced shall have been approved by his majesty [or by the commander in chief].[6] (McArthur, 1805, p. 24)

These concerns about the quality of interpretation were not shared at the largest criminal court in England. London's Old Bailey courthouse hosted hundreds of trials involving interpreters in the long eighteenth century. It is therefore the greatest resource for analysing the role of interpreters in criminal justice and will be the focus of this paper.

1.1 Need for an Interpreter

The function of interpreters in the eighteenth-century criminal trial was to facilitate the routine proceeding of the court. It was most important to ensure that sufficient material was communicated to the judge and jury so that they could render their decisions. How well prisoners, witnesses, or even prosecutors could understand or be understood was of secondary importance. In the trials where clear direction is given to the interpreter(s), two methods appear to have been employed. When the court required interpretation, it was usual for testimony to be repeated

6 The text in brackets did not apply to naval courts martial.

sentence by sentence. However, when the prisoner(s) could not understand English, it was the usual practice for the judge to instruct the interpreter to summarise the relevant evidence at the end of a witness's testimony. The need for an interpreter was based on the needs and perceptions of Englishmen and what they thought necessary for understanding and for the trial to proceed. The judge was the ultimate arbiter of what was just, and could decide whether or not interpretation was necessary. When there was no interpreter for one prosecutor, he simply could not testify at the trial (*OBP*, 1787, (t17870523-91)).

There was no fixed practice or procedure for how and when to employ interpreters. It was a more straightforward decision to secure the assistance of an interpreter when it was necessary for the court to understand a witness; "the party robbed could speak no English, and so obliged to have an Interpreter, that the Court might be sensible of his Evidence" (*OBP*, 1680, (t16800421-4)). Interpreters were often used when the quality of a witness's English, or his accent, hindered understanding (*OBP*, 1751, (t17510417-24); *OBP*, 1751, (t17510523-47)). Though Frederick Benson of Hamburg understood English very well, he "talked it not very intelligible," and so Christopher Gates repeated the testimony of the prosecutor, "sentence by sentence" for the court (*OBP*, 1751, (t17510417-24)). However, a lack of fluency in English did not automatically warrant the services of an interpreter. A Walloon prosecutor, "told his Story in scarce intelligible English," but without any apparent assistance (*OBP*, 1731, (t17310115-74)). Judges preferred that witnesses speak for themselves when possible (*A complete collection of state-trials*, 1742, p. 28).

It is difficult to assess whether foreign defendants could understand all or most of the proceedings against them. Some prisoners brought their own interpreters, but many were reliant on the court to identify the need to appoint someone to explain the events of the trial. Ignorance of English was no guarantee that an interpreter would be provided. Even though Jacob Canter, a German Jew, was represented by counsel at his trial, it was Mr. Akerman, the Newgate Prison turnkey, who informed the court that the prisoner required an interpreter. In this case, it is evident

that the trial testimony had already begun when an interpreter was appointed for the prisoner (*OBP*, 1789, (t17890603-67)).[7]

Contemporaries continually overestimated their own and other's abilities to comprehend. When a prisoner appeared to be deaf and mute, a special jury was empanelled to investigate whether the defendant was deaf "by visitation of god" or whether this was a sign of contempt. Interpreters for deaf witnesses were questioned and tested on their ability to communicate with the testifier (Eg. *OBP*, 1786, (t17860111-30); see Bacon, 1832, p. 202). No similarly direct approach was taken with foreigners. However, often prosecutors, judges, or, when present, counsel, would attempt to establish that the prisoner was indeed much more comfortable with English than they had claimed. Not surprisingly, there were conflicting reports of prisoners' abilities to communicate. The prisoner had a vested interest in appearing to be uncomfortable with the language, and the witnesses and prosecutors had equally biased reasons for overestimating the defendant's fluency in English.

The English were not the best judges of the linguistic ability of non-Anglophones. Trial testimony reveals that their willingness to accept that strangers understood English was often based on the flimsiest of evidence. Mary Sampson concluded that her prosecuter "spoke very good English, as I could understand him" (*OBP*, 1776, (t17760221-15)). In one trial, the defendant was served by a lawyer who, by cross-examination, revealed how unfounded was the prosecutor's belief that one of the suspects was only pretending to be a foreigner, "and I heard the word No, from one to the other—I will not swear it was No—it seemed to be a signification of No—I do not know whether the negative term in the French language sounds like No" (*OBP*, 1827, (t18270913-51)). These responses betray the thought process which is repeatedly apparent—the suspicion that "foreigners" are pretending ignorance of English. It also reveals English ignorance of foreign languages.

7 Testimony in John Frederic Wol-Fel's trial had also commenced when someone informed the court that 'The prisoner says that he does not understand rightly, he is a German' (*OBP*, 1794, (t17940115-1)).

Though there was great concern in the court that foreigners should not receive undue sympathy or be able to delay proceedings or claim ignorance because of a language barrier, it must be kept in mind that the ability of foreigners to understand and to make themselves understood in the course of everyday life is not a fair basis by which to assess their ability to comprehend court proceedings. Ordinary Englishmen and women struggled to make even the most rudimentary of defences without counsel: Lewis Mackely could only muster, "It goes against me; I don't know what to say for myself" (*OBP*, 1763, (t17630706-21)). Most were uneducated and in fear for their lives. In such circumstances, it was difficult for native English speakers to articulate a response; the terrifying ordeal of a trial in a foreign country in a foreign language must have exacerbated difficulties in understanding. On many occasions testimony reveals that the prisoner had been able to communicate in English, although at trial they were serviced by an interpreter (Eg. *OBP*, 1765, (t17650522-11); *OBP*, 1748, (t17480706-27)). This should not be attributed to disingenuousness. One foreign witness who appeared to be comfortably testifying in English was unable to state the time of day in English (*OBP*, 1790, (t17900416-1)).

The routine probing of a prisoner's ability to speak and understand English was based on deep suspicion and prejudice. One court reporter added in his commentary, "The Prisoner had forgot to speak English, having been a Week in Newgate but learn'd Roguery enough to cook up a Newgate[8] Defence which he made by the help of an Interpreter" (*OBP*, 1717, (t17170606-7)). The shorthand taker at the Old Bailey was clearly outraged by the behaviour of the defendant Bernard Kentye Massip when a witness's testimony revealed "it appeared he was not so great a Stranger to our Language as he pretended to be" and immediately presumed that "it's possible he might flatter himself with hopes, that by such dilatory Proceedings he might tire out the Patience of the Court, and be discharged, to prevent a great deal of Trouble which must necessarily be the Consequence, if he was arraigned and convicted in such Manner as the Law directs on these Occasions" (*OBP*, 1727, (t17270517-39)). With

8 Newgate was the prison located next to the Old Bailey courthouse.

more lawyers appearing at the Old Bailey in the later eighteenth century, the interrogation of linguistic ability became more common and sophisticated. During a robbery trial, Mr. Knowlys, the counsel for the defence accused the Indian prosecutor of having colluded with his interpreter to receive the reward for a successful prosecution. He also implied that the prosecutor had been rehearsed by his interpreter (*OBP*, 1801, (t18010114-10)). Legal commentators were often quick to attach disingenuous motives to witnesses desiring the assistance of an interpreter: "A *Welch* witness who intends to give unfair testimony, always affects an ignorance of the *English* language, in consequence of which the effect of cross-examination is not only weakened by the intervention of an interpreter; but the witness has time to collect and prepare his answer" (Pothier, 1826, p. 225).

The antagonism towards interpreters can be partly explained by examining some of the early modern arguments concerning the reasons why prisoners in felony cases did not require counsel, and why lawyers were barred from presenting defences. Prisoners, if they could afford it, could consult a lawyer on points of law, but had to present their own defence and question prosecution witnesses on their own (Beattie, 1991, p. 221). Felony trials were questions of fact, not law; counsel had no place in the proceedings. The prisoner was supposed to be an informational source and his or her behaviour and ability to rebut the evidence against him or her was crucial to the decision-making of the jury and judge (Langbein, 2003, pp. 35-36). This emphasis on spoken testimony is evident in Sir Thomas Smith's sixteenth-century description of criminal proceedings:

> [they are] doone openlie in the presence of the Judges, the Justices, the enquest,
> the prisoner, and so manie as will or can come so neare as to hear it, and all
> depositions and witnesses given aloude, that all men may heare from the mouth
> of the depositors and witnesses what is saide. (Smith, 1982, p. 115)

In the early eighteenth century, William Hawkins elaborated on why it was so important for the defendant to speak for his

or herself: "the very Speech, Gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defense of others speaking for them" (Langbein, 2003, pp. 35-36).

1.2. Expedience

Interpreters caused delays and expense. When testimony had to be repeated in a different language, it necessarily lengthened trials. Professional interpreters had to be paid for their time. In court proceedings where time and cost were not especial concerns, more attention could and was paid to interpretation. Frustration with the delay of waiting for an interpreter sometimes led to witnesses simply being dismissed. At the trial of one of the regicides in 1660, the Court found a French witness's testimony inscrutable; although an interpreter was sworn in, "But it being found difficult and troublesome, the Council waved [sic] his Evidence." The witness actually protested that, "Me Lar, me can peak Englis-" only to be interrupted by the counsel, "No, no, pray sit down, we will examine other Witnesses" (5 *Howell's State Trials* 1128; *A complete collection of state-trials*, 1730, p. 357).

In matters involving people of high status, there was more consideration. This is readily apparent in the trial of Count Königsmarck and his three alleged accomplices for murder. The Count, because of his connections and money, was served by multiple interpreters, while George Borosky, the common soldier whose life was in the greatest danger, did not have a single interpreter who was fluent in his native Polish (9 *Howell's State Trials* 83). During the divorce case of the Duke and Duchess of Norfolk, the Lords deemed it fitting that the Duchess be granted her own interpreter for the foreign witnesses, and that the Duke should pay for his services. The proceedings were even adjourned until the following day (House of Lords Journal, 1700, vol.16, pp. 521-523, HL/PO/JO/10/6/4/1511). But most criminal trials did not involve defendants with such social or financial resources.

1.3. Who Were They?

In the modern courtroom, the impact of trained, professional interpreters on a trial is considerable. In her monograph on modern-day courtroom interpretation, Susan Berk-Seligson discusses how the choice of active or passive verbs; the formality of the language chosen; the interpreter's tone; and the ability to clearly make good word choices has an affect on how the testimony of a witness is received by the courtroom and jury (Berk-Seligson, 2002, *passim*). This is not an anachronistic comparison because these same concerns must have been accentuated in a courtroom where professional interpreting was not established and the defendant or witness had to rely on the linguistic capabilities of men and women who could be complete strangers to them and incompetent. Although the length of interpreted testimony was considerably shorter in the eighteenth century, the same difficulties and vagaries of interpretation must also have held sway.

Unfortunately, there is not much evidence about the identities of the eighteenth-century women and men who served as courtroom interpreters. Some witnesses brought their own interpreters to court. At other times, it appears that bystanders, jurors, and other witnesses were used. Interpreters did not have to be neutral parties. They could be family members (*OBP*, 1796, (t17961130-19)), character witnesses (*OBP*, 1743, (t17430413-52)), co-defendants, jurors, or most disturbingly, the principal witness against the person requiring their services. Mr. Lebat, a juror, interpreted the indictment for Christopher Smith, but after the jury was sworn, a Mr. Clenard undertook the task of interpreting between the court and the prisoner (*OBP*, 1743, (t17431012-16)). A juror was also sworn to interpret at Haagen Swendsen's trial (14 *Howell's State Trials* 580).

Although Lord Woodhouselee had stated in his guide to military courts that the interpreter should be a neutral party, the practice at the Old Bailey was far removed from this ideal. Frequently, one interpreter served both the prosecutor and prisoner (*OBP*, 1748, (t17480706-27)). At the 1748 trial of Mary Porter for stealing caps from her mistress and selling them to

George Mattaire, the latter served as both the principal witness against Porter and as interpreter for her mistress, Mary Quinseck (*OBP*, 1748, (t17480526-26).

Often interpreters served as character witnesses. More disturbingly, the Marquis de Paleotti's interpreter was also a witness against him. Near the end of his trial, after much abuse and protesting by the Marquis that the interpreter did not make an adequate "appearance" for him, a magistrate was induced to step in and serve the defendant (*OBP*, 1718, (t17180227-44)). There was no established rule about the impartiality of interpreters. Sir Nathaniel Johnson, who was serving as interpreter at the trial of Count Königsmarck and his alleged co-conspirators for murder, was accused by the prosecuting counsel of being "more like an advocate than an interpreter; he mingles interpreter, and witness, and advocate together, I don't know what to make of him" (9 *Howell's State Trials* 64).

There were professional interpreters who worked in London, but they were employed in translating commercial and diplomatic correspondence. There is some rare evidence of their use in criminal proceedings: in a 1798 treason trial, Elias Buzaglo testified that "I have sworn very frequently to my translations before the Lord-Mayor, and other Justices" (*OBP*, 1798, (t17980214-70)). There is much more evidence of their participation in the nineteenth century, especially after the establishment of the Metropolitan Police and its attendant bureaucracy. Towards the end of the nineteenth century it is possible to track the concern of professional interpreters and foreign embassies that adequate and accurate interpretation be provided to foreign defendants, and it was in this period that the Old Bailey, now the Central Criminal Court, hired the firm of Mssrs. Flowerdew & Co. to serve as interpreters in England's largest criminal court (MEPO 2/376).

2. Modern Canada

Legal and social developments have shaped the modern Canadian criminal trial. From the late eighteenth century, rules of hearsay and the law of evidence (Langbein, 2003, pp. 35-36),

the presumption of innocence (Beattie, 1986, p. 341; May, 2003, pp. 233-235; Smith, 2005, pp. 133-172, 191-200; Landau, 2005, pp. 173-190), and the right to defence counsel (*Prisoner's Counsel Act*, 6&7 William IV, c. 114; Beattie, 1991, p. 221; May, 1998, pp. 183-207) were established. The common law countries cite Lord Reading's 1916 judgement in *R.* v. *Lee Kun* ([1916] 1 K.B., pp. 337-345) to assert the right to an interpreter. This entitlement was enshrined as a constitutional guarantee in the *Canadian Charter of Rights and Freedoms*. This first part of the 1982 constitution also assures fundamental justice, the right to competent counsel, and the presumption of innocence. The ideal of multiculturalism is likewise protected by the Charter in Section 27 - "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada." In this climate, the expectations of the modern criminal justice system are much higher than even a century ago. Although there are constitutionally-mandated protections for prisoners, the same issues which affected interpretation in the eighteenth century remain in the twenty-first. This section will analyse how non-Anglophones are treated at trial, and what effect interpretation has on their experience of Canadian criminal justice.

Twenty-first century Toronto, like eighteenth-century London, expands and absorbs immigrants from around the world. Unlike its earlier counterpart, present-day Toronto promotes itself as a multicultural city, a concept which had no resonance three centuries ago. There is now a common law and constitutional right to an interpreter. Nevertheless, many of the same concerns and prejudices continue to influence the treatment of foreign defendants, be they judicial attitudes, time, expense, and the competency of interpreters. There is now a new concern, however, about the effect interpretation has on the course and outcome of criminal trials.

2.1. Common Law Right to Constitutional Guarantee

The common law countries draw on Lord Reading's 1916 decision in *R. v. Lee Kun* as the basis for modern principles of the right of foreign defendants to be served by an interpreter. In his landmark

decision, Lord Reading directed that when a foreign defendant "who is ignorant of the English language" appears in court:

> the evidence given at the trial must be translated. (…) If he does not understand the English language, he cannot waive compliance with the rule that the evidence must be translated; he cannot dispense with it by express or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the Court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. (…) Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law. (*R.* v. *Lee Kun*, [1916] 1 K.B., pp. 340-341)

Lord Reading asserted that the contemporary practice was,

> In the case of a foreigner ignorant of the English language who is undefended no difficulty has arisen in practice. The evidence is always translated to him by an interpreter. The more difficult question arises when an accused foreigner, ignorant of the English language is defended by counsel and no application is made to the Court for the translation of the evidence. There is no rule of law to be found in the books on the subject, and as a result of inquiry which we have made since the argument, it has become clear that the practice of the Courts in this respect has varied considerably during the last fifty years. (*R.* v. *Lee Kun,* [1916] 1 K.B., p. 342)

Contemporary legal texts drew the principle that a foreign prisoner ignorant of English who is not defended by counsel must be served by an interpreter, and cannot waive this "rule". However, in the case of a foreign prisoner who does have counsel, "the judge may dispense with translation, if the prisoner or his counsel desire it, and the judge is of the opinion that the prisoner substantially understands the nature of the evidence which is going to be given" (Taylor, 1920, p. 954; Gibson, 1919, p. 228).

Lord Reading acknowledged that this standard might incur delays: "To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with the scrupulous care of the interests of the accused which has distinguished the administration of justice in our criminal Courts" (Gibson, 1919, p. 228).

Lord Reading's decision was founded on the principle that an accused has the right to be present at his or her trial: "The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings" (*R. v. Lee Kun,* [1916] 1 K.B., p. 341). Canadian courts have used Section 650 of the *Criminal Code of Canada* which affirms that a defendant "shall be present in court during the whole of his trial" to uphold the right to an interpreter. Although Lord Reading's statement has been cited throughout the common law countries as establishing this right, in this case Lord Reading ruled that even though Lee Kun had not been served by an interpreter at his trial, since Lee Kun had had an interpreter at a previous hearing where the same testimony was given, that a new trial was not in order. Lee Kun was therefore not afforded the same opportunity as an Anglophone to follow and be engaged in his own trial.

The second edition of *Wigmore on Evidence* applauded Lord Reading's "enlightened opinion" which would redress the "Injustice done from time to time, in communities thronged with aliens, through failure of the judges to insist on a supply of competent interpreters" (Wigmore, 1923, pp. 89-91). In Wigmore's discussion of the case he cites a Canadian appeal in which the majority held that there had been no substantial error when the cross-examination of one witness was not interpreted. Wigmore hailed the dissent in this decision of Graham E.J., "for a common official abuse in this country is to supply inadequate interpretation," and suggested that "if the judges could be sent to a foreign country and there haled [sic] into court for crime, and made to feel the plight of an alien accused, some improvement might take place."[9]

9 The prisoners were Italians from Calabria. The interpreter could not speak their dialect. The trial judge instructed the interpreter to tell the

This common law right became a quasi-constitutional one by Section 2(g) of the 1960 *Canadian Bill of Rights* which recognised the "right to the assistance of an interpreter" (Steele, 1992, p. 228). In 1982, Section 14 of the *Canadian Charter of Rights and Freedoms* guaranteed that "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." The Charter protects both the right of a defendant to understand his/her criminal trial and multiculturalism.[10]

2.2. Need

While the right to an interpreter is now established by precedent and by the Charter, the trial judge is still responsible for deciding if an interpreter is necessary and justified. There is no requirement that the judge inform all defendants that they have a right to an interpreter.[11] The judge can examine the witness to evaluate if there truly is a need for an interpreter, and before the decision is made to allow the use of an interpreter, the witness may be examined by counsel on his/her linguistic capabilities. Once the use of an interpreter has been granted, there should be no more interrogation of the legitimacy of the need for one (*Serrurier*, 1983, pp. 656-660). However, the early modern practice of questioning a witness's ability to understand English has persisted, as have the suspicions of Anglophones. While Anglophone mistrust of witnesses who choose or need to be examined through the medium of an interpreter remains, there have been important and enlightened rulings which protect the right to an interpreter. In

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prisoners 'a purport of the evidence which I thought necessary.' This was done for a direct examination, but the cross-examination was not interpreted at all (1 *D.L.R.* (1912), pp. 187-188; Wigmore, 1923, pp. 89-91).

10 Thorough discussions of the implications of the Charter are found in Morel, 1989, pp. 525-538 and Steele, 1992, pp. 218-251.

11 For an examination of how judicial recognition of the need for an interpreter affected proceedings in Illinois, United States of America, see Safford, 1977, pp. 15-30.

1858, the Irish Court of Criminal Appeal ruled in *R.* v. *Burke* that questioning a witness who had requested an Irish interpreter on whether he had conversed in English with two men present in the courtroom was irrelevant and inadmissible. Christian J., writing for the majority:

> when a witness who has succeeded in getting himself examined in Irish through an interpreter, and is thus gaining the advantage which arises to him from that course,—that where a witness who has done that, is proved, on some previous occasion to have spoken English, the inference is, that he is a dishonest witness, acting under a bias, and actuated by a desire to deceive the court, and if that were a necessary inference from the fact. (...) But is that a necessary inference from the fact of this witness having insisted on being examined in Irish? Are fraud and a desire to deceive necessary to explain what has taken place? And this is the point on which it seems to me the argument breaks down. I apprehend it is perfectly possible that the witness was actuated by an honest motive in wishing to be examined in Irish. He may have wished to express himself in the language which he knew best, in which he could most clearly express his thoughts. (*R.* v. *Burke* (1858); Phipson, 1892, p. 90)

Despite this thoughtful decision, assigning disingenuous motives to witnesses who use interpreters continues. More than a century later, in a civil trial in Ottawa, the judge based part of his assessment of the plaintiffs' credibility on his appraisal of their need for a French interpreter "I shall not comment on the evidence. Mr. and Mrs. Serrurier are both French speaking and gave evidence through an interpreter, although it was my observation that Mr. Serrurier had more than a passing knowledge of English. He answered on occasions before the interpreter had the question asked" (*Serrurier*, 1983, p. 657). The Ontario Court of Appeals granted the plaintiffs' appeal of the judge's decision, and Grange J.A. delivered the opinion that:

> There is no doubt that the male plaintiff's first language was French. There is not a shred of evidence that he gave his evidence in that language for any other reason than that he was more comfortable in it. That he sometimes understood questions before they were translated (…) is in no way evidence of improper motive in testifying in French. The trial judge did

> not say that he had reached that conclusion but the implication is there and I cannot be sure that it did not colour his whole approach to a very important—indeed decisive—issue, namely, the credibility of the plaintiff (...). (*Serrurier*, 1983, p. 659)

In *Roy* v. *Hackett*, an Ontario Divisional Court judge concluded that the Constitution does not place limitations on the right to an interpreter, and that to allow "a discussion of the witness's or party's knowledge of the language in which the proceedings are taking place under the pretext of testing his credibility" would make "the very exercise of the right guaranteed by the Charter illusory and examination on the exercise of this right is in my view clearly 'vexatious and oppressive'" (*Roy v. Hackett*, 1987, p. 419). However, the Ontario Court of Appeal concluded that in this arbitration hearing the questioning of the witness's English skills had not impugned his credibility (*ibid.*, p. 424). Despite these rulings, Anglophone officers of the court continue to believe that there are deceptive or dishonest pretexts for requests for interpreters. In his study on language bias in the criminal justice system, David J. Heller found that all the interpreters and lawyers he questioned believed that Metropolitan Toronto judges were extra-cautious and that interpreters were always furnished when asked for. Many of those he interviewed felt that some defendants might have wanted an interpreter to "hide behind" instead of out of genuine need (Heller, 1995, p. 362).

2.3. Standards

The quality of interpretation was the subject of the Supreme Court of Canada's 1994 decision in *R.* v. *Tran*. This important judgement assessed whether "the failure to provide the accused with full and contemporaneous translation of all the evidence at trial" constituted a breach of his "right to an interpreter" (*R.* v. *Tran*, 1994, p. 16). The Court set out how to determine if there had been a violation of the s. 14 guarantee of the Charter: "it must be clear that the accused was actually in need of interpreter assistance—i.e., that he or she did not understand or speak the language being used in court" (*R.* v. *Tran*, 1994, p. 31).

At his trial for sexual assault, Tran's court-appointed interpreter was asked to testify about the defendant's weight at the time of the alleged attack. Contrary to the Court's and defence counsel's instructions, the interpreter spoke in English, and only summarised his own evidence at the end of his direct examination and after his cross-examination. There is no report that a subsequent conversation between the interpreter and the trial judge was even conveyed to the accused. The Supreme Court felt that,

> the first step in the analysis will be to determine whether there was in fact a departure from the general standard of **continuous, precise, impartial, competent and contemporaneous interpretation** guaranteed by s. 14 of the *Charter*. In my view, there is no doubt that the interpretation of the proceedings in which Mr. Nguyen was involved as a witness fell well below what it should have been. (...)[Author's emphasis] (*R.* v. *Tran*, 1994, p. 49)

This sets a high standard, and harkens back to the eighteenth-century prescriptives in the military court guides by Lord Woodhouselee and John McArthur. The judgement in *R.* v. *Tran* also linked the right to an interpreter to the modern notion of cultural inclusiveness:

> 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 to interpreter assistance favours a purposive and liberal interpretation of the right under s. 14 of the Charter, and a principled application of the right. (*R.* v. *Tran*, 1994, pp. 29-30)

2.4. Effect on Trial

The seminal work on the effects of interpretation on the modern courtroom is Susan Berk-Seligson's *The Bilingual Courtroom* (Berk-Seligson, 2002). She experimented with interpretation before mock jurors and used 1982-83 tape-recordings of 114 hours of judicial proceedings to analyse the effects of Spanish-English interpretation in the United States. She had interpreters listen to the tapes and create their own transcripts, and compared the results with what had actually transpired in the courtroom. Beyond the basic concerns about the competence of courtroom interpreters, she argues that there are a host of issues and biases in play. Well-trained interpreters still affect the course of judicial proceedings.

Modern guides to criminal trials and studies of interpretation demonstrate that direct communication is still greatly prized. Interpreters are seen as obtrusive figures in the courtroom. Judges and attorneys often address questions to the interpreter instead of directly to the witness. This same behaviour was evident in the long eighteenth century. Berk-Seligson supports the above-described concerns that interpreters lessen the strength of cross-examination: "the interpreter unwittingly usurps some of the power of the interrogating attorney" (Berk-Seligson, 2002, p. 96). Grange J.A. of the Ontario Court of Appeals wrote in a 1983 decision that "It is, of course, a bastion of our system of jurisprudence that a witness be subject to cross-examination. Cross-examination becomes more difficult, and often less effective, when each question and answer must be interpreted. It is for that reason that a discretion is given to trial judges whether or not to permit the employment of an interpreter" (*Serrurier*, 1983, p. 657). Interpreters also interrupt attorneys, which can adversely affect how those lawyers are viewed by jurors (Berk-Seligson, 2002, p. 195).

Beyond the adequacy of interpretation, there still exist certain negative assumptions about witnesses who speak through interpreters. Susan Berk-Seligson has quite powerfully demonstrated that body language, word choice, the formality of the language, the use of hesitators, and a myriad of factors

influence people's perceptions of witnesses. In an examination of shoplifting trials, David J. Heller found that criminal defendants who used interpreters were about twice as likely to receive a harsh sentence (Heller, 1995, pp. 352-354). Heller also found that while defence attorneys would not agree that courts were biased against defendants using an interpreter, they did think that employing one was a tough decision.

When David J. Heller interviewed interpreters in Metropolitan Toronto courthouses for his 1995 study, he found that they were "generally very highly educated" (Heller, 1995, pp. 359). However, the requirements to be a courtroom interpreter are far from stringent, and do not even include familiarity with legal terminology. Recently Mr. Justice Casey Hill of the Ontario Superior Court released a stinging judgement lambasting the state of interpretation at the courthouse in one of the most multicultural communities in Canada. Indeed, the Brampton courthouse leads the province in the use of interpreters, but from 2001 to early 2005, unaccredited interpreters worked 2,670 days. Also, Mr. Justice Hill reported that once a Hindi interpreter was actually called to assist a Punjabi-speaking defendant. He thus fears that while judges can detect grossly incompetent interpretation, "it is statistically inevitable that there exist as-yet undiscovered miscarriages of justice" (Blatchford, 2005, A1).

Conclusion

In the eighteenth century, there were few protections for alleged felons. The focus of this "accused speaks" trial was the testimony of the defendants themselves, and their ability to offer adequate explanations to negate the evidence presented against them. While this surely placed prisoners at a remarkable disadvantage, non-Anglophones had a double handicap: not only did they lack fluency in English, but they encountered the suspicions engendered by Englishmen's lack of empathy for their situation. The criminal trial has evolved into an adversarial contest between trained lawyers, and legal safeguards have been established to protect those accused of crimes. However, value is still placed on direct communication and being able to judge a witness's credibility, both of which are hindered by the intervention of an

interpreter. This intrusion of an intermediary into the process remains an at times damaging hindrance.

In the twentieth century, the *Canadian Charter of Rights and Freedoms* enshrined the entitlement to courtroom interpretation in Canada. There is now a constitutional guarantee and common law precedents which protect twenty-first century non-Anglophone defendants. However, these safeguards are only effective if there is someone who recognises that the accused needs an interpreter, or has suffered on account of Anglophone prejudices, or has not fully understood the proceedings against him/her. Qualified interpreters are essential, but judges and attorneys must be aware of the special considerations their use creates. The situation at the Brampton courthouse reveals that non-Anglophone defendants are still at the mercy of Anglophone members of the court to ensure that they are indeed "present in court during the whole of [their] trial" and able to participate in their own defence (*Criminal Code of Canada*, section 650).

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THE TRIALS OF FIVE PERSONS FOR PIRACY, felony and robbery, who were found guilty and condemned, at a Court of Admiralty for the trial of piracies, felonies and robberies, committed on the high seas, held at the court-house in Boston (...) (1726). Boston, Printed by T. Fleet, for S. Gerrish, at the lower end of Cornhill.

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ABSTRACT: Understanding Justice: Criminal Courtroom Interpretation in Eighteenth-Century London and Twenty-First-Century Toronto — This paper compares criminal courtroom interpretation in present-day Toronto with eighteenth-century London. Eighteenth-century London, like Toronto, was home to a large immigrant population, and faced similar challenges. This article argues that expedience was the most important factor in shaping eighteenth-century criminal courtroom interpretation. The right to an interpreter is now a constitutional and common law right. Modern defendants enjoy greater protections, such as the developments of the presumption of innocence, the law of evidence, and the right to legal counsel. However, the attitudes of many Anglophone trial participants remain unchanged and negatively affect defendants who use interpreters.

RÉSUMÉ : Comprendre la justice : l'interprétation dans les causes criminelles devant les tribunaux de Londres au XVIII^e^ siècle et de Toronto au XXI^e^ siècle — Cet article compare la situation de l'interprétation devant les tribunaux dans le Toronto contemporain à celle de Londres au dix-huitième siècle. À l'époque, Londres avait une population immigrante et faisait face à des défis similaires à ceux qu'affronte aujourd'hui Toronto. La commodité s'avérait le facteur le plus important régissant cette question. Le droit à un interprète est de nos jours un droit

constitutionnel, ainsi qu'un droit de la *common law*. Les accusés aujourd'hui jouissent de protections plus étendues, telles que la présomption d'innocence, la loi de la preuve et le droit à un avocat. Toutefois, l'attitude inchangée des participants anglophones aux procès continue d'avoir un impact négatif sur les accusés qui ont recours à des interprètes.

Keywords: criminal law, history of interpretation, right to interpreter, quality of interpretation, London.

Mots-clés : droit criminel, histoire de l'interprétation, le droit à un interprète, la qualité de l'interprétation, Londres.

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