

COURT FILE NO.: SCA(P) 7131/03
DATE: 20051117

ONTARIO

SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL COURT

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

AVTAR SIDHU

Appellant/Applicant

)
)
) D. King, for the Respondent
)
)
)

)
)
)
) A. Moustacalis, for the Appellant
)
)
)

) **HEARD:** June 7, 16, August 3, 6,
) December 1, 2, 20, 2004; April 26,
) 28, May 2, 3, 5, June 16, 27, 28,
) September 19, October 25, 26, 2005

REASONS FOR JUDGMENT

[On appeal from conviction by
Shilton J. on October 21, 2003]

HILL J.

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INTRODUCTION

[1] Another unreasonable delay to trial case. Here, in the Brampton courthouse where assertions of violation of s.11(b) of the *Charter* are argued daily, Mr. Sidhu's summary conviction appeal initially appeared set to simply take its unremarkable place in an apparently perpetual supply of justiciable delay-to-trial cases in this jurisdiction. That unexpectedly changed in what would become a long and twisting story.

[2] ਸੈਕਸ਼ਨ 14 ਤੁਹਾਨੂੰ ਕਿਸੇ ਵੀ ਕਾਨੂੰਨੀ ਕਾਰਵਾਈ ਵਿਚ ਦੇਭਾਸੀਆ ਪ੍ਰਾਪਤ ਕਰਨ ਦਾ ਹੱਕ ਦਿੰਦਾ ਹੈ ਜੇ ਤੁਸੀਂ ਵਰਤੀ ਜਾ ਰਹੀ ਭਾਸ਼ਾ ਨਾ ਸਮਝ ਸਕਦੇ ਹੋਵੋ ਜਾਂ ਨਾ ਬੋਲ ਸਕਦੇ ਹੋਵੋ ਜਾਂ ਜੇ ਤੁਸੀਂ ਬੋਲੇ ਹੋਵੋ।

[3] In this proceeding, the court is asked to exercise summary conviction appeal review of trial proceedings pursuant to Part XXVII of the *Criminal Code* concurrently with original jurisdiction:

- (1) to declare breaches of Mr. Sidhu's s.7 and s.14 *Charter* rights
- (2) to find an abuse of process in circumstances of alleged government non-disclosure of relevant and material facts necessary to pursue a s.11(b) *Charter* motion at trial.

FACTUAL OVERVIEW OF CRIMINAL ALLEGATIONS

[4] The prosecution alleged that the appellant and others attended a residential address in Brampton and in an altercation, principally with three persons, assaulted them by punching and kicking as well as striking with a hockey stick and the use of a knife. The complainants suffered various injuries.

CHRONOLOGY TO THE JANUARY 21, 2003 MISTRIAL

(1) Arrest to the First Day of Trial

[5] On September 5, 2001, the appellant was alone charged with three counts of assault causing bodily harm and a single count of assault all alleged to have

occurred on August 19, 2001. The appellant had been released on a promise to appear as well as an undertaking to a peace officer on August 19.

[6] At the appellant's first appearance before the Ontario Court of Justice (OCJ) on September 24, 2001, he appeared self-represented and expressed his wish for a Punjabi-speaking interpreter at his next court appearance. Mr. Sidhu indicated to the court that he would be retaining a lawyer.

[7] On his next appearance, October 15, 2001, the appellant appeared with a letter from his counsel, Mr. Bhangal, indicating he was retained and requesting a remand to November 1. Mr. Sidhu was not provided with Punjabi interpreter assistance despite his earlier request.

[8] On November 1, 2001 before the presiding justice of the peace, the prosecutor elected to proceed summarily on all counts. The court was informed that a number of other suspects had yet to be arrested. Mr. Bhangal agreed to a remand to November 26 rather than setting a trial date before the others were apprehended.

[9] On November 26, 2001, Mr. Bhangal reported to the court that he had had a resolution meeting with the Crown Attorney's office. Because the trial was expected to last longer than a day a judicial pre-trial was required by local protocol. The case was remanded to December 18 for a judicial pre-trial.

[10] On December 18, 2001, the case was pre-tried before Hawke J. In her Pretrial Conference form the judge wrote:

Defence would set a two day trial But Crown wants to join some more defendants. No 11(b) waiver. (emphasis of original)

[11] Thereafter, at an in-court appearance on December 18, McLeod J. was informed that the two additional suspects had yet to be apprehended by the police. Mr. Bhangal stated:

...I think the Crown wants an opportunity to allow the police to [e]ffect their arrest ... So I am asking, in light of the Crown's desire to have one large trial for all of them as opposed to a two-day trial just on my matter, [I am] asking for a traversal to January 28 ...

[12] Crown counsel informed the judge "we have received information that the officers will be making further arrests in this matter". In the circumstances, the case was remanded to January 28, 2002.

[13] At the January 28 appearance, Wilkie J. was told that the sought-after suspects had not been charged. There was no indication whether these individuals had been arrested. Mr. Bhargal requested another pre-trial saying that he wanted to get his “matter back on track and we will let the police do what they want to do”. The Crown agreed to a successive pre-trial. Wilkie J. stated:

We are coming up [to] six months from the date of the occurrence, so if they're not charged soon, there are [going to] be some problems.

[14] Mr. Bhargal asked for February 13 as a return date for the pre-trial to which the court and prosecutor agreed.

[15] On February 13, 2002, Rosemay J. concluded a further pre-trial noting in the Pretrial Conference form “Other individuals are yet to be charged”. Both the Crown and the defence estimated a trial of two days’ duration. At the in-court appearance, Atwood J. was advised that other suspects were yet to be charged. Crown counsel, Ms. Simitsis, spoke to the case. It is apparent from her submissions that Mr. Kingdon, the prosecutor who dealt with the case on December 18, 2001, was also at counsel table. Ms. Simitsis informed the court that the delay since December 18 “would be Crown delay”. With the 6-month summary conviction limitation period about to expire, “one last remand” was given to the Crown to see if others would be charged as co-accused. The case was remanded to February 18.

[16] On February 18, 2002, the final day of the 6-month limitation period, Blacklock J. was informed that no one else had been charged and that no joint trial would be set. The OCJ Verification Of Trial Date Provided By Trial Coordinator form listed October 30 and November 12, 2002 as the first dates available for a 2-day trial. Mr. Bhargal told the presiding judge that October “was the first available date” that the Trial Coordinator could provide. Blacklock J. remanded the case to September 19 “to be spoken to for the purpose of confirming a trial date” and fixed the trial dates of October 30 and November 12.

[17] On September 19, 2002, counsel for the appellant confirmed readiness for trial on October 30 and November 12. For undisclosed reasons, Crown counsel asked to have the confirmation hearing adjourned for one week. On the assumption that the prosecution would confirm, it was agreed that neither Mr. Bhargal nor his client would have to appear on the September 26 return date. Mr. Bhargal confirmed that his client would require a Punjabi-speaking interpreter for trial.

[18] On September 26, 2002, the prosecution confirmed that it was prepared to go to trial. Neither the Crown nor the defence checked off the box in their respective Certificates of Readiness marked “Disclosure has been completed to the best of my knowledge”.

(2) The First Day of Trial, October 30, 2002

[19] At the outset of the first day of trial, October 30, 2002, the following exchange occurred:

THE COURT: All right. Do either counsel require the interpreter be sworn?

DEFENCE COUNSEL: I recognize Mr. Dhir; I don't need him sworn, Your Honour.

CROWN COUNSEL: I don't need him sworn.

[20] The appellant pleaded not guilty to all charges.

[21] By the time the court adjourned at 4:30 p.m., the prosecution had called four witnesses including two of the complainants, Chahal and Hehar.

[22] On approximately 20 occasions during the day's proceedings the interpreter intervened at times saying he could not hear a witness or to complain that a witness was speaking too quickly. On other occasions, it seems Mr. Dhir may not have understood a witness' testimony.

[23] During examination of the first witness, Chahal, a recess and considerable argument was devoted to the following problems:

(1) *late disclosure of police notes*

Crown counsel, Ms. Griffin, during the morning's proceedings, handed defence counsel, Mr. Norris, additional disclosure in the form of a police officer's notes (Constable Sawatsky). Ms. Griffin stated: “I've just been handed it [the notes] myself”. The notes made some reference to the interview of neighbours who may have witnessed part of the alleged incident. The disclosure contained no ‘willsay’ statements from these neighbours.

(2) *subpoenaed witnesses – inadequate disclosure*

Apparently in a related theme, the prosecutor had subpoenaed two witnesses to court, Ramos and Da Silva, for whom no ‘will say’ statements had been given to the defence. Mr. Norris was provided the witnesses’ ‘willsay’ statements in court. Mr. Norris submitted that these witnesses’ names were not “on the witness list” he had been provided.

(3) *the forensic identification report*

Mr. Norris advised the court that a reference to Constable Sawatsky’s notes indicated that the appellant’s shirt seized on arrest had been submitted for forensic testing. Counsel indicated that he had no report in the disclosure materials and therefore had no idea what tests for blood or pepper spray had been conducted or the results obtained. Crown counsel submitted that any forensic report concerning blood on the appellant’s shirt would not impair defence cross-examination of Chahal. The court ruled to the contrary.

(4) *videotaped statements of other arrestees*

Mr. Norris informed Kastner J. that he recently learned that two other persons had been arrested in late September respecting the allegations before the court. Defence counsel had no disclosure of the officers’ notes regarding those arrestees nor copies of the videos of any videotaped statements taken from them. Mr. Norris acknowledged that he had been told orally that those arrested “didn’t say anything”.

[24] In the circumstances, Mr. Norris moved for a mistrial. The prosecutor resisted the application. When Ms. Griffin submitted that “an adjournment could remedy any of the disclosure issues”, the following exchange transpired:

THE COURT: Ms. Griffin, let’s start back at basics. Why is it that all of this is being done today, when this offence took place on ---the allegations on the 19th day of August, 2001, when this trial date was set on February 18th, 2002, when both sides confirmed readiness for this trial to proceed on the 19th of September, 2002? Is this not a case in which the Crown’s office communicates with the officer in charge to confirm that all disclosure has been met and all witnesses subpoenaed?

MS. GRIFFIN: I am learning of this stuff for the first time ...

THE COURT: All right. Well why didn't your vetting office then ask for Sawatsky's notes if they weren't there?

MS. GRIFFIN: Well I don't know how I can answer that, Your Honour. I---

THE COURT: All right. Well you're going to have to make some decisions now -- you're Crown counsel on this matter -- as to what you're going to proceed with, what witnesses you're going to call, and in the event that you're calling these witnesses that --- of which statements have just been taken today, what your response is to Mr. Norris's motion.

MS. GRIFFIN: Well I understand what Mr. Norris's motion is, it's not about who the Crown's calling, it's that he wants -- there have recently been parties charged in relation to this; they were charged in September -- and he wants disclosure about ----

THE COURT: September of---

MS. GRIFFIN: September 20th.

THE COURT: ---of 2002?

MS. GRIFFIN: Yes.

THE COURT: All right. Well this was confirmed before that -- the day before that. I take it that Officer Sawatsky's notes aren't from September 20th, 2002, they're from 2001?

MS. GRIFFIN: No, they're not. They're --- as I understand it there are a few different issues that are being raised. One is, as we indicated as we started, was Constable Sawatsky's notes. I don't know why they weren't in the --- in the package. They're reflected on the index. Clearly it wasn't caught by our office that the --- that the notes were not there. And ----

THE COURT: And did you ever receive a request from Mr. Bhangal or Mr. Norris for these notes?

MS. GRIFFIN: No, we did not. So those --- the officer attended today. It --- I could see in my package, on review, at that point that there were no notes, and the notes were provided to counsel as soon as they were provided to me.

THE COURT: Well of course that's your obligation to provide it, but now there's the determination as to how you're proposing to proceed with the trial.

MS. GRIFFIN: I don't understand --- as I understand his submissions, that's not the major issue he's raising at this point. He's indicating beyond that, that he wants to see the videos of these other individuals that have been charged. I understand there's nothing on those videos, but there is their physical person, if he wants to see that, but ----

THE COURT: Are there verbal utterances by the other parties that are charged, relating to this defendant?

MS. GRIFFIN: My understanding is no.

...

THE COURT: All right. Is everything now provided to Mr. Norris that the Crown intends to rely upon for this defendant?

MS. GRIFFIN: Yes.

...

MS. GRIFFIN: And with respect to --- certainly the Crown was not in --- in --- when I say 'the Crown', it was not in the package in terms of any ident. report about blood stains. All there is that the Crown is intending to rely on is a notation on --- in the officer's notes that there appeared to be blood on his shirt.

THE COURT: Well the defence is entitled to any information, whether inculpatory or exculpatory.

MS. GRIFFIN:...I agree, Your Honour. I --- I'm not saying he's not entitled to that information.

THE COURT: All right. So what is the results of the shirt being tested?

MS. GRIFFIN: That it is blood. There's no determination of whose blood; it's just that it's blood.

THE COURT: Was it sent to the Centre of Forensic Science?

MS. GRIFFIN: My understanding is no. If I can just --- as I understand it, the t-shirt was provided to Forensic Identification Services. A presumptive blood test was done on the shirt and the test indicated that the stain was made of blood. That was the extent of the test.

THE COURT: Where is the shirt?

MS. GRIFFIN: It's in property.

THE COURT: Why isn't it here?

MS. GRIFFIN: It --- it can be here; this is a two-day matter. We ----

THE COURT: Well that doesn't account for responsibility. Everything is supposed to be given prior to trial, regardless of the fact we have another day set aside.

MS. GRIFFIN: No, I understand it. You're asking about the actually physical shirt ---

THE COURT: Yes.

MS. GRIFFIN: --- are you not?

THE COURT: Mr. Norris is entitled to look at it and show it to his client. Why isn't it produced?

MS. GRIFFIN: I just learned of it, Your Honour. I can't answer that question. I don't know.

THE COURT: Where's the stain on the shirt; where is it located? The location is going to be material to the cross-examination of this witness.

MS. GRIFFIN: The notations don't tell me that, Your Honour. I'm just asking constable Sawatsky to come in.

...

MS. GRIFFIN: Yes, I'm advised that the --- it's a --- a splatter type of marking on the front and some on the back.

[25] Crown counsel undertook to have the investigating officer obtain the video statements, such as they might be, of the other arrestees. Ms. Griffin also reported to the court her belief that a further person was likely to be arrested. Kastner J. ordered an early lunch recess to allow the appellant's shirt to be brought to court, to permit Crown counsel to make inquiries about the subsequent arrests, and for Mr. Norris to take further instructions from his client.

[26] When court reconvened at 2:00 p.m., the appellant's shirt and the videotapes of the other arrestees' statements were still not at the courthouse. Ms. Griffin informed the court that the investigating officer had been under the misimpression that the Peel Regional Police Forensic Identification Services had forwarded the report regarding testing of the appellant's shirt. Mr. Norris agreed to go on with the trial reserving his right to complete his cross-examination of Chahal once disclosure was completed. With the offer of a further judicial pre-trial with one of her colleagues in order to work out any other possible problematic issues in the case, Kastner J. again recessed in order for counsel to meet with Latimer J. for a mid-trial pre-trial.

[27] In all, about one hour more was lost after the 2:00 p.m. afternoon resumption time on account of disclosure and related issues. At 4:30 p.m., after hearing further testimony, the trial was adjourned to November 12, 2002 at 10:00 a.m. for continuation. A witness who was bound over was told by the court to be present "a little bit before ten o'clock". Immediately before court recessed for the day Kastner J. stated:

We've adjourned to that date. I just want to tell both counsel that apparently -- I've looked in the book -- I also have another continuation that day marked but it is marked for two hours. I don't know how that will work, but we'll solve that that day.

(3) The Second Day of Trial, November 12, 2002

[28] Kastner J. was unable to start rehearing the *Sidhu* trial on November 12 until 2:15 p.m. apparently because of the continuation of the other matter booked for 10:00 a.m. that day.

[29] When court opened, the interpreter issue was dealt with in this manner:

THE COURT: We have the interpreter returning again. Any issues that require the swearing of the interpreter?

DEFENCE COUNSEL: No, Your Honour.

CROWN COUNSEL: No, thank you.

Mr. Dhir again appeared as the Punjabi interpreter.

[30] On November 12, a third complainant, P. Sohi, testified. About one and a half hours of evidence was heard with about nine interventions by the interpreter who seemed, at times, unable to hear the prosecutor's questions.

[31] At a point late in the afternoon, Kastner J. raised the issue of scheduling completion of the case. During this discussion, Mr. Norris informed the court that he was surprised to learn that the Crown intended to *voir dire* the voluntariness of the appellant's statement to the police. Mr. Norris reported that he had checked with Mr. Bhargal and confirmed that at a pre-trial the prosecution had represented that it was not adducing Mr. Sidhu's statement for any purpose. Defence counsel submitted that, for this reason, he had not submitted an application challenging compliance with s. 10(b) of the *Charter*. Crown counsel estimated that the statement admissibility *voir dire* would last about two hours. Both counsel seemed to agree that the case would require two further court days given the slow pace of Sohi's in-chief examination, the pending *voir dire*, the need for Punjabi interpretation for some remaining Crown witnesses, and the prospect of three witnesses being called in defence.

[32] After a recess, counsel returned to the courtroom from the OCJ Trial Coordinator's office having been provided with the earliest continuation dates of December 2 and 3, 2002. Kastner J. noted that December 3 would not be a full court day because of a "swearing-in that day". The trial was adjourned to continue on December 2, 2002 at 10:00 a.m.

(4) Path to the Mistrial

(a) Discovery of a Possible Misinterpretation Problem

[33] On November 26, 2002, it seems in a chambers application, Ms. Griffin and Mr. Norris obtained an order from Kastner J. requiring the Court Services Division to copy and release a copy of the audio-recording of the November 12 trial proceedings in *R. v. Sidhu*.

[34] On December 2, 2002, at the commencement of court, Ms. S. Jhooty was affirmed to interpret to and from the Punjabi language in these terms:

THE CLERK OF THE COURT: Please raise your right hand. Do you solemnly affirm that you understand the English language and the Punjabi language and that you shall well and truly interpret all such matters and comments as shall be required of you to the best of your skill and understanding?

THE INTERPRETER: Yes, I do so affirm.

[35] Mr. Norris then sought a brief stand-down to await the arrival of the appellant's brother-in-law so that he could converse with his client.

[36] When court reconvened, Mr. Norris stated that he had conducted several trials in which Mr. Dhir acted as the interpreter and had not encountered any problems. Counsel informed Kastner J. that, after the November 12 court day concluded, Ms. Griffin raised with him her concerns regarding Mr. Dhir's interpretation of some of the answers of her witness, Sohi. Mr. Norris reported that as a result of the prosecutor's stated concern he raised with the appellant the quality of the interpretation:

But with Mr. Sidhu, the mixed messages I was getting was no, I wasn't understanding everything but I don't want to have another trial because I can't afford it ... and after discussing it at length the conclusion that I came to was that in the circumstances I can't be certain, based on what Mr. Sidhu has said to me, that he was understanding the proceedings sufficiently. As a result of that, as uncomfortable as I am in the circumstances, I'm in a situation where I'm asking the court for a mistrial.

[37] Ms. Griffin informed Kastner J. that the Peel Crown Attorney's office wished to retain a Punjabi-speaking individual to independently examine the copy of the released tape of the proceedings to report to the court as to the accuracy of the interpretation provided on November 12. Depending on the conclusions

from the review, the Crown might agree to a mistrial being declared. Crown counsel continued:

...The information that I received was just to prompt an inquiry and it was based on what I perceived to be some difficulties in getting answers from the witness. Initially I just thought that perhaps the witness was being a little bit difficult, **but then when I had learned that there had been a previous problem with the interpreter**, that's what prompted the inquiry to ensure that it wasn't just an issue of the witness being difficult with his answers, that was there in fact an interpretation problem here. Clearly I don't speak Punjabi, **the information – the prompting I received** was not from someone who spoke Punjabi who was indicating to me that there was for sure a problem with the interpretation, but having been advised that there may be a problem I felt it was my duty to make inquiries, which is what I did. I don't have any demonstrated evidence. As I say, I have now the copy of the audio tape, but we'll have to hire someone to transcribe that. I don't have any documented evidence that there was in fact a problem with the interpretation. (emphasis added)

[38] When Ms. Griffin raised with the court the appellant's failure to alert his counsel or the court in a more timely way to perceived problems with the interpretation, Mr. Norris responded:

...to answer the Crown's concern that this was something that was only asked of Mr. Sidhu after the Crown raised the issue, I've certainly canvassed that with Mr. Sidhu and I said, you know, if there had been any problems could you not have said something, and the answer was, quite frankly and I'm speaking for Mr. Sidhu here, ["I didn't want to say anything, he's a court interpreter and I just thought I would, you know, suffer through because it wasn't certainly by any means at all times that I was not understanding. It was just certain times and ["I'm sort of paraphrasing here, but he didn't want to insult Mr. Dhir....

[39] After a brief recess, Crown counsel alerted Kastner J. that Ms. F. Masrour, the Court Services Division Interpreter Coordinator, was present in court and that it was estimated the tape review would require a one-month continuance. As a result, Kastner J. stated:

In order to properly consider the application that is being made by counsel on behalf of Mr. Sidhu it will require an independent party examining the audio tape of the first two days of trial in this matter to determine the accuracy and completeness of the interpretation. In order to ascertain whether or not there has been a possible infringement of the defendant's rights under section 14 of the *Charter* and any other remedies that may apply, I will grant the adjournment which is essentially a mutual request in light of the circumstances, although Mr. Norris presses for a mistrial on today's date. It would appear to be equitable to at least have some indication as to whether or not there has been any inaccuracy in the interpretation prior to making such determination and thus, I will put it over to sometime after the one-month time so that both counsel can have the results of the inquiry that is being made.

[40] The appellant was remanded to January 14, 2003 for the case to be spoken to with the stated expectation that the review report would be available.

(b) Confirmation of Incompetent Interpretation

(i) the interpretation review report

[41] On January 14, Ms. M. Bhandhal was sworn as the Punjabi/English interpreter. Ms. Griffin informed Kastner J. that she had just provided Mr. Norris a copy of the interpretation review report. Defence counsel had not yet fully reviewed the report. In these circumstances, the appellant was remanded to January 21, 2003 for the case to be spoken to.

[42] Ms. S. Jhooty, a certified Punjabi/English court interpreter and author of the interpretation review report (Exhibit #3 in this appeal), noted at the outset of the re-interpretation document that:

Interpreter [Mr. Dhir] has repeatedly used the word Henh--? It means either he has not understood the question or has not heard it properly.

The exhibit demonstrates that on November 12, 2002, the interpreter said “Henh?” to the witness, Sohi, on twenty-seven (27 occasions) in a thirty-six (36)-page transcript. The reviewer reported the interpreter at times leading the witness as well as incomplete *and* inaccurate interpretations throughout the one to one and a half hour proceeding.

[43] The inaccurate translations variously involved adding or dropping words asked by the questioner or with respect to the Punjabi-speaking witness’ answers. The reviewer noted that at times very different questions were translated into the Punjabi language and materially different responses reported back to the court when a Punjabi-spoken answer was translated. Here are some brief and general examples:

CROWN COUNSEL: What time was it over?

A: INTERPRETER: 10:30.

REVIEWER: 10:30, eleven.

...

CROWN COUNSEL: You didn’t know who was on the other line?

INTERPRETER: Didn't you know who was there at the time?

A: INTERPRETER: I didn't know if it was Parmjit's voice, but phone belonged to Parmjit.

REVIEWER: I - - - from that night it was Parmjit's voice, but it wasn't Parmjit's voice.

...

CROWN COUNSEL: And did you recognize the voice?

INTERPRETER: Did you recognize his voice?

...

CROWN COUNSEL: Did you ever speak to Avtar on the phone that night?

INTERPRETER: Did you speak to Avtar that day?

...

CROWN COUNSEL: You were first talking in the car and then out by the garage or - -

INTERPRETER: First you were talking in the vehicle and then near the garage door?

[44] Turning to subject matter touching more closely upon the facts of the allegations themselves, the following is a representative sampling of problematic discrepancies:

CROWN COUNSEL: And then what happened?

A: INTERPRETER: Then their car came and immediately after the car, a van came.

REVIEWER: And then there was this car came there and then went in immediately after that.

...

CROWN COUNSEL: When would you have seen him in the car?

INTERPRETER: When did you see him?

...

A.: INTERPRETER: He looks like Avtar, his colour is darker...

REVIEWER: He looks likes Avtar. He is very darker.

...

CROWN COUNSEL: Can you describe anything about him, skin colour, hair colour?

INTERPRETER: What's his skin colour?

...

A. INTERPRETER: He struck the boy who was talking on the phone here.

- REVIEWER: He just came and struck the person with the phone over here. He - - yeah. He struck with the hockey stick.
...
- A.: INTERPRETER: ...No when he struck with hockey stick immediately on getting down, no, when he struck Sunny with the hockey stick...
- REVIEWER: ...Then those people came out of the care and he knocked me down. Then he just came and he struck Harpreet. Then he struck Sunny with the hockey...
...
- A.: INTERPRETER: Avtar also punched me. Avtar was holding my arm and Ranjit Sidhu punched me.
- REVIEWER: Avtar too. Avtar was holding my arms.
...
- A.: INTERPRETER: ...I was pinned down for 10 minutes, I was punched and kicked.
- REVIEWER: ...So I was pinned down for about ten minutes and they were hitting.
...
- A.: INTERPRETER: I was pinned down on the floor at garage and possibly I was struck with a hockey stick, I did not know where, who and how.
- REVIEWER: Yah. I was pinned down on the floor, on the garage here and I was struck by the hockey there too.
...
- A.: INTERPRETER: Without saying anything they immediately pounced.
- REVIEWER: Well they just came out of the car and then they knocked us down.
...
- CROWN COUNSEL: What is it? Is it a cut, a bruise?
- INTERPRETER: How did you get hurt, did you get scratches or how?
...
- CROWN COUNSEL: And it looks like you've also got black eyes?
- INTERPRETER: Your eyes were blue too.
- A.: INTERPRETER: I was punched here and also on my face.
- REVIEWER: Yeah. I was punched here.
...

- A.: INTERPRETER: I was struck with the hockey stick by Kala, Sally was also kicking me.
- REVIEWER: I was struck by Sunny with the hockey stick and Sally was also kicking him here.
...
- A. INTERPRETER: No, I had injuries to my legs and my arms...
- REVIEWER: I had injuries to my legs and my arms, my back and face.
...
- CROWN COUNSEL: Did you see anyone else getting hit, other than the hockey stick hit to Sunny?
- INTERPRETER: Did you see anyone else being hit?
- CROWN COUNSEL: Yes, getting hit.
- INTERPRETER to WITNESS: Did you see anyone else hitting?
...
- A.: INTERPRETER: He was wearing a shirt, half sleeve shirt.
- REVIEWER: He was wearing a shirt. I think half sleeve shirt.
...
- A.: INTERPRETER: I didn't see anything with anybody else, but Parmjit was saying Sally had a knife.
- REVIEWER: I didn't see anybody else, Harpreet Sally had a knife.

(ii) mistrial declared

[45] According to the transcript of the day's proceedings, at the outset of the January 21st appearance, while Ms. Jhooty introduced herself as the Punjabi/English interpreter she was not affirmed as the court-authorized interpreter. Mr. Norris renewed his mistrial application based on his reading of the interpretation review report. The prosecution consented to a mistrial order. Kastner J. ruled:

I'm in agreement with both counsel that there are substantial and fundamental differences between the interpretation of what the witness was saying and the independent Punjabi translation of what the witness was saying and these are on material issues in terms of the sequence of the events. Under the circumstances it is appropriate that a mistrial be declared.

SCHEDULING A SECOND TRIAL

[46] Discussion then turned to rescheduling the trial. Mr. Norris estimated three days would be necessary while the prosecutor, having spoken to Ms. Griffin, predicted a trial of two days' duration as "some of the things...would not be happening on the next day". After hearing submissions, Kastner J. determined that a three-day trial should be scheduled adding "it's to be set with some priority through the trial coordinator for a judge".

[47] After a recess to permit counsel to attend at the OCJ Trial Coordinator's office, Mr. Norris informed the court that "the earliest dates that were available were June 2nd, 3rd and 4th". Counsel added:

There were a couple of earlier dates that the trial coordinator had but on one of them, neither the Crown or I was available and on one other date, I was not available but the Crown was and then it moved from there to June.

When Kastner J. reviewed the OCJ Verification Of Trial Date Provided By Trial Coordinator form she observed that one of the March, 2003 dates was available to both counsel. As to the month of March, the form read:

Dates Suggested	Crown Avail.	Def. Avail.
March 14/03	√	√
March 17/03	X	X
March 24/03	√	X
March 26/03	X	√

Mr. Norris responded that with only one date mutually available in March, 2003, "we would have been going with one day then and then bouncing to June which didn't seem to make a lot of sense". Counsel indicated that the trial was either expected to be assigned to a "*per diem* judge's schedule" or "They have some other judges coming in", an apparent reference to yet another backlog blitz in Brampton. Mr. Norris informed Kastner J. that he had related to the OCJ Trial Coordinator the court's observations of some urgency in rescheduling the trial but "that was the soonest they had for anybody".

[48] Kastner J. remanded the case to May 12, 2003 as a confirmation date and to June 2 to 4 for the trial itself. The court's endorsement added:

A Punjabi interpreter will be requested for all the dates. It is not to be Mr. Dhir.

[49] On May 12, 2003, defence and Crown counsel signed an OCJ Certificate of Readiness to commence a three-day trial on June 2, 2003.

THE UNREASONABLE DELAY TO TRIAL APPLICATION

(1) Introduction

[50] The second trial began on June 2nd with Shilton J. presiding who asked to have Ms. Jhooty affirmed at the outset as the Punjabi/English interpreter. The trial judge then instructed the interpreter in these words:

Before we start, Madam Interpreter, can you advise Mr. Sidhu that if at any time he cannot follow or does not understand what is being said, he's either to raise one of his hands in the air or stand up. I must be told immediately if there's a problem. Do you follow, sir?

MR. SIDHU: Yeah. Yes.

[51] The first order of business was a filed defence application to have the charges stayed for an alleged violation of s.11(b) of the *Charter*.

(2) Oral Testimony Regarding Prejudice

[52] The appellant, who understood and spoke "some English", testified on his own behalf on the motion providing the following evidence:

- (1) He had always been anxious to have his trial completed without delay. He told Mr. Bhangal that he didn't want his case to wait for others to be arrested. He had hoped for earlier trial dates than October 30 and November 12, 2002 but, in the witness' words, "when I couldn't get them, I thought those were okay".
- (2) Prior to October 30, he was unaware of forensic testing of his shirt or of the identity of certain witnesses subpoenaed to court on that date by the Crown.

- (3) He had to pay his lawyer for a full day on November 12 and hoped for an earlier start than the afternoon.
- (4) When the trial was not completed on November 12, the appellant asked Mr. Norris to “get the dates as soon as possible”.
- (5) On December 2, 2002, the appellant related to his counsel that “the interpretation is not good, it’s not completely satisfied”. He had formed the view “a little bit” that the interpretation was “not being properly done”. Asked why he had not said anything about these circumstances, the appellant said that:
 - (a) as to the assigned interpreter – “he is approved by the court. I can’t blame him anything” – “he works here every day and I can’t - - I didn’t want to do anything against him”
 - (b) he did not want to delay the case
 - (c) he had already borrowed money to retain counsel and was concerned about more expense and the impact on his family including the potential of losing his house
 - (d) there was already “a lot of stress on [his] brain” and tension – he had headaches and was taking Tylenol 3 tablets – his inability to concentrate led to him being moved “to a lesser position”, demoted, at his place of employment.
- (6) When asked on November 12 what he wanted done about the situation, he instructed counsel that he “did not want to put it over”. He “did not want to get another date” – he just “wanted to finish it” because of the ongoing stress and cost.
- (7) When the mistrial was declared on January 21, 2003, the appellant asked his counsel to get “dates as soon as possible”. He wanted dates earlier than June but “didn’t get them”.

[53] The defence also called the appellant's brother-in-law, A. Chahal, to testify on its ss. 11(b)/24(1) *Charter* application. Mr. Chahal informed the court that:

- (1) He had assisted in bringing two defence witnesses to court on November 12 and again on December 2, 2002. These witnesses were present on August 19, 2001 when the alleged assaults occurred.
- (2) In attempting to have the same witnesses, Surinder Singh and Mandeep Singh, attend court on June 2, 2003, and despite telling the witnesses they could be subpoenaed to court, he was told by the witnesses "they're not available to come. They said it's too long, we not remember anything now".
- (3) There had been a deterioration in the appellant's health over the course of the legal proceedings.

(3) Submissions of the Parties

[54] In submissions before Shilton J., Mr. Norris described the prosecution as "not a complicated case". There was no agreement to further delay, beyond December 18, 2001, on account of waiting for further arrests. Counsel accepted some responsibility for the disclosure problems of October 30, 2002. Mr. Norris submitted that the loss of half a day of court time on November 12, 2002 was not the fault of Mr. Sidhu. The appellant submitted that he was not responsible for the delay occasioned by the mistrial on account of incompetent interpreter services. Without challenge, counsel informed the court that he had "various and many other dates" when he was available between January 21 and June 2, 2003 to commence the appellant's second trial.

[55] In the course of his submissions, Mr. Norris made the following statement which also was not, in any way, challenged by Crown counsel:

...it's my understanding that the Crown was aware, prior to raising this issue with me, that there had been another mistrial declared as a result of Mr. Dhir's misinterpretation on another trial matter prior to this one. I certainly wasn't aware of that, prior to being told that.

This information led the trial judge to observe:

...the court mechanism or regime asks that he be the interpreter for the case...I really don't know how to characterize this, but the fact is the administration of the court asked Mr. Dhir to be there that day.

[56] There was a general lack of precision in the submissions of counsel for the Crown and the defence in their calculations of the individual periods of delay comprising the overall delay in Mr. Sidhu's case. The defence spoke of an overall delay of 21½ months while Crown counsel acknowledged a 20-month delay in her argument described as September 5, 2001 to June 2, 2003.

[57] Ms. Griffin submitted that although there had been no defence waiver, early on there had been significant acquiescence by the appellant in deferral of the setting of a trial date while other suspects were sought. Taking some responsibility for disclosure problems, Crown counsel pointed to a lack of diligence on the part of the defence in requesting further disclosure given cues in the Crown brief as to its existence. Crown counsel agreed that "this is not an overly complex case". Counsel submitted, as had Mr. Norris, that "there was no reason for either the defence or the Crown to anticipate any difficulties with the interpreter". Ms. Griffin placed particular emphasis on Mr. Sidhu failing to raise his concerns with Mr. Dhir's interpretation on October 30, 2002 and, in the end, characterized the delay occasioned by the mistrial as inherent in the process much like the illness of a presiding judge or the unavailability of a key witness for legitimate reasons.

(4) Section 11(b) Charter Ruling

[58] Both parties on this appeal expressed the view that the reasons for judgment discussing the appellant's ss. 11(b)/24(1) *Charter* application are difficult to comprehend in terms of conclusions reached, identification of the court's calculation of composite periods of delay, and the assignment of explanation or responsibility for various delays. I agree entirely with the view of experienced counsel.

[59] That said, the following summary draws from the reasons of the trial court:

(1) *the overall period of delay*

Shilton J. held that the delay of “21 and a half months” was sufficiently long to require review of the assertion of a s.11(b) *Charter* infringement.

(2) *the OCJ intake period*

There was some defence acquiescence in setting a trial date pending the arrest of other suspects. The defence was “not waiving its 11(b) rights” but did not object to “some” appearances to achieve certainty concerning additional arrests. The “Crown should have been able to decide if there would be a joint trial sooner than February the 18th, 2002 – “yet it took three and a half months for someone to make a determination”. Intake events are aspects of the inherent time requirements of a case. The intake period though “somewhat lengthy” was not in any way “exceptional”. It appears the trial court viewed the intake period as ending on February 18, 2002, the date when the trial date was set.

(3) *institutional delay to first day of trial*

The trial judge observed:

...two days were set aside, October 30th and November the 12th. This was an eight and a half month period to the first date.

...

I find the response to what presented with on February the 18th and offering these two days, which would have to be the same judge, not unreasonable.

(4) *disclosure problems on October 30, 2002*

The defence could have been more diligent in acquiring additional disclosure given certain references in the disclosure material it did have to the possibility of other materials. This observation was made in the context of the following conclusion:

The Crown, in my view, has to accept the lion’s share of the problem with the disclosure. It would appear that they certified to the court that they

were ready to proceed to trial...notwithstanding that the witness statements...were outstanding. Again, no review appears to have been conducted regarding disclosure. Whoever certified the file to be ready was either having a bad day or was less than diligent. What other conclusion can I reach.

(5) *loss of half a day of court time on November 12, 2002*

The trial judge did not directly deal with the responsibility for the lost court time on November 12 beyond saying:

When November the 12th arrived and it turned out there was only half a day, even though the estimate was that the other matter would take just two hours, the court's response was surprisingly quick, as I think all of our experience in this jurisdiction is that to receive two additional days within two or three weeks is exceptional.

(6) *delay to the second trial date*

The trial court dealt with the 4½-month delay to trial following the January 21, 2003 mistrial in this way:

As well, when the determination was finally made in January, on the 21st, that new trial dates would be required, the court's ability to offer some dates in March, in my view, is an appropriate response given the circumstances. Ultimately, because only one day in March of the ones offered were agreeable to both counsel, three consecutive days in June were selected, that is, the 2nd, 3rd and 4th. In my view, judicial resources is not an issue in this case.

(7) *the delay caused by interpreter incompetence*

Dealing with the procedure adopted by Kastner J., the trial judge observed:

...it has always been my experience that on a trial matter an interpreter is sworn or affirmed, and that often the accused, if he or she is the person utilizing the services, is advised that if there is a problem, that this should be drawn to the court's attention.

Mr. Sidhu was aware of a problem with Mr. Dhir's interpretation on October 30, 2002 "yet he chose to say nothing". The court continued:

While it is not his responsibility to provide a suitable interpreter, I do not find that I can completely ignore the fact that he failed to speak up. He knew the interpreter was there for his benefit, yet nothing is said.

The prosecution office acted in the best interests of justice to inquire into and examine the extent of the misinterpretation problem.

The trial judge concluded:

The failure of proper interpretative services in my view is clearly the major contributing factor to the state of affairs in this case. On the first day, apparently there were problems with interpretation for the applicant and on the second day, problems with the witness interpreter function.

Quite fairly, on my review of the record, a mistrial became necessary after an appropriate investigation was conducted. I find the period involved regarding the investigation and conclusion to be far from unreasonable. I find that to be an efficient utilization of resources, given the issue at hand.

(8) *prejudice to Mr. Sidhu*

Shilton J. found Mr. Chahal's testimony regarding the absentee defence witnesses and their memory loss to be unconvincing. As to Mr. Sidhu's evidence, the court stated:

Earlier I reviewed the applicant's position. Clearly this matter has gone on longer than anyone expected. I accept that it has been stressful for Mr. Sidhu. I accept that it has been more costly to him than was expected. I accept his evidence that he has experienced some health concerns as a result and it has affected his performance at work.

(9) *conclusion*

The court stated:

I have concluded that clearly while the delay is lengthy, it is not unreasonable, having regard to the unique and special circumstances outlined above. I am not satisfied on the balance of probabilities that an infringement of Section 11(b) of the *Charter* has occurred.

COMPLETION OF THE SECOND TRIAL

[60] On June 3, 2003, the prosecution witnesses, Chahal and D. Soti, testified.

[61] The following day, five further Crown witnesses testified (Ramos, Da Silva, P. Sohi, Hehar, Sawatsky). Through the final witness of the day, Const. Sawatsky, the shirt the appellant was wearing at the time of his arrest was introduced as an exhibit. The day concluded with submissions as to whether the prosecutor would be seeking to hold a *voir dire* into the admissibility of Mr. Sidhu's statement to the officer.

[62] The trial was adjourned to continue on June 5, 2003. On that date, Shilton J. was ill and adjournment of the case was presided over by Cowan J. Crown counsel reported to the court that he and Mr. Norris obtained June 16 as a date to complete the trial before Shilton J.

[63] On June 16, the court held a *voir dire* relating to the admissibility of the appellant's statement with both voluntariness and s.10(b) *Charter* compliance in issue. Shilton J. ruled that the evidence ought to be excluded after concluding Mr. Sidhu's *Charter* rights had been infringed. The prosecution case concluded with the completion of Const. Sawatsky's testimony as well as the evidence of S. Sohi. The defence called its only witness, S. Singh, to testify. Mr. Singh was one of a number of witnesses at trial who testified with the assistance of the interpreter. At the outset of Mr. Singh's testimony, the trial judge stated:

THE COURT: Just before you start, Mr. Singh, you may understand some English. I'm not sure of that. But you are here to give your evidence through the interpreter. Please listen for the question to be interpreted into Punjabi and then give your answer in Punjabi. Do you understand?

A. Yes.

THE COURT: Thank you. And the same thing for the other parties who are listening to the evidence, if they're having a problem, please stand up or raise your hand.

[64] After counsel completed their closing submissions by 4:30 p.m. on June 16, Shilton J. reserved judgment to July 3, 2003.

[65] The trial judge delivered reasons for judgment on July 3 finding the appellant guilty of assault causing bodily harm (to P. Sohi) on the basis of aiding and abetting others in the infliction of injuries; guilty of assault causing bodily

harm on two further counts (to Chahal/Hehar) on the basis of s.21(2) of the *Criminal Code* and the authority of *R. v. Vang and Chanthaboury* (1999), 132 C.C.C. (3d) 133 (Ont. C.A.); and not guilty on the charge of assault faced by the appellant.

[66] It is evident from the court's recitation of the facts that Mr. Sidhu did not possess the hockey stick or the knife at the scene of the crimes. One of the cars delivering the assailants to Mr. Sohi's front lawn belonged to the appellant. The complainant, Hehar, testified that Mr. Sidhu was not directly involved in assaulting him and, at a point, wiped the complainant's forehead and said "This should not have happened".

[67] On July 3, the court was prepared to proceed directly to a sentencing hearing. When the defence requested a pre-sentence report the sentencing hearing was adjourned to September 9, 2003.

[68] On September 9, the Crown requested, and received, an adjournment of the sentencing hearing to October 21 to investigate further information which it might then seek to tender as relevant to the fit sentencing disposition.

[69] In the October 21 sentencing hearing, the prosecutor recommended a "custodial disposition" of six months' duration. The defence introduced letters attesting to Mr. Sidhu's good character. He was a first offender. The pre-sentence report described the appellant as married with two children and stably employed. Mr. Norris submitted on Mr. Sidhu's behalf that a conditional sentence of imprisonment or, in the alternative, an intermittent sentence would be a just disposition. Counsel asked the court to consider the delay of over two years to conclude the trial as relevant to the exercise of sentencing discretion.

[70] The information gathered by Crown counsel in the 6-week adjournment of the sentencing hearing, Shilton J. described as "totally irrelevant". The trial court sentenced the appellant to six months' imprisonment to be served concurrently on the three counts together with an 18-month probationary period on specified conditions.

THE GARCHA TRIAL

[71] In April of 2004, I was assigned to preside over the case of *R. v. Garcha*, a judge-alone trial of a five-count indictment. The case, as with many similar

sexual assault cases, was a sensitive and stressful proceeding for the participants.

[72] Balwinder Garcha, the accused, required the assistance of a Punjabi interpreter. Some witnesses as well required interpretive assistance. From the outset of the trial, I made it clear that there must be continuity as to the identity of the interpreter. For the first eight days of trial (April 14-16, 19-23), Ms. S. Jhooty provided Punjabi/English interpreter assistance. When the court recessed on April 23, the court ordered that Ms. Jhooty be the interpreter provided to complete the trial on May 31 and June 1, 2004. The court's direction in writing was forwarded to the Interpreter Coordinator's Office.

[73] On May 31, court opened without the presence of any interpreter. Mr. V. Brum, an assistant to the Interpreter Coordinator, Ms. Masrour, informed the court that Ms. Jhooty had been assigned to another trial, *R. v. Gill*, the week before which was continuing into the week of May 31st. Mr. Brum acknowledged his office's receipt of this court's order respecting Ms. Jhooty and stated that the conflict that developed was "just one of those rare occasions" – "just an innocent oversight".

[74] An inquiry was immediately commenced into the circumstances of non-compliance with this court's order – an inquiry related to the court's control of its own process: see *R. v. Hossu and Stoicescu* (2002), 167 C.C.C. (3d) 344 (Ont. C.A.), at p.352.

[75] Mr. Dhir was sworn to interpret for Mr. Garcha as the court pressed its inquiries. Mr. Brum related to the court that Mr. R. Dhir was originally scheduled to interpret in the *Gill* case but the Crown Attorney's office specifically requested of Ms. Masrour that Mr. Dhir be replaced by Ms. Jhooty.

[76] Crown counsel on the *Gill* case, Mr. Kingdon, at a morning break in that trial, addressed me and confirmed that when he learned Mr. Dhir had been assigned to the *Gill* matter he was concerned. While he proclaimed to have no personal experience, counsel was aware there had "been some difficulties with Mr. Dhir's interpreting in matters of the type the *Gill* matter is; that is, sexual assaults with female complainants". Mr. Kingdon believed that because he had been late in ordering an interpreter for his case, he was not in a position to raise his concerns with Ms. Masrour. According to Mr. Kingdon, fortuitously, he received a telephone call from the Coordinator asking him if he had any concerns with the interpreter assignment. According to Mr. Kingdon:

I indicated to her that it was my understanding that our office had some issues in the past in this type of case, that I could not express any formal position on the part of the Crown office...but that if there was any way of avoiding the possibility of such issues arising in our case...that that would certainly be preferable.

I meant to leave her with the impression, that I would certainly prefer someone other than Mr. Dhir to be our interpreter. I did not request any specific interpreter nor did I request an interpreter of a specific gender.

[77] In due course, Ms. Masrour informed the court in the *Garcha* case that Mr. Kingdon some days earlier left a message for her that “they will not accept Mr. Dhir. It’s a sexual assault matter and they want Ms. Jhooty”. Ms. Masrour reported that Crown counsel said to her on the phone “In light of what the Crown’s office knows we might not want Mr. Dhir” – “We don’t want Mr. Dhir”. Ms. Masrour further stated: “...invariably, every other trial, I have the Crowns in my office telling me that they don’t want Mr. Dhir...”. The Coordinator told the court she had previously asked the Crown Attorney for Peel for “something in writing” but nothing had been forthcoming.

[78] Mr. R. Callahan, Garcha’s counsel and a senior criminal law practitioner in Brampton, described the situation as “very disturbing”. Having heard there was only one “staff” interpreter (Mr. Dhir) and two contract interpreters (Ms. Jhooty, Ms. Bhandhal) at the courthouse, he then questioned Ms. Masrour about freelance interpreters:

- Q. Now, you’ve indicated that 70 languages you require to accommodate.
- A. Seventy languages and dialects, sir, yes.
- Q. And I would gather that those 70 languages, other than Punjabi, **all of those would be a contract arrangement, would they?**
- A. **No. They are freelance interpreters. We get their names as we need them. They are freelancers; they come they do their job and they leave.**
- Q. **Are they all certified interpreters?**
- A. **Yes.**
- Q. **Did they take some sort of course?**
- A. **Yes.**
- Q. **And their competency in speaking and interpreting is they have to pass that?**
- A. **It is a very difficult exam which the Ministry of the Attorney General, 720 Bay, offers. And they have to have passed that before they go for different**

seminars. And after those seminars they will become accredited interpreters. We do not assign them to Superior Court cases at the time. They would come downstairs and do a few bail hearings and set dates. They will sit inside Superior Court room cases and Family Court rooms and then after a while, when they have gained enough experience then they would be assigned cases in Superior Court. (emphasis added)

[79] Mr. Callahan asked Ms. Masrour whether she had received complaints concerning Mr. Dhir's "interpreting abilities" to which the witness replied:

- A. Many of the judges have come to my office and expressed that. And unfortunately, **Mr. Dhir has had mistrials.** I have actually, I have brought that to the attention of Ms. Gerri Wyatt.
- Q. Well, when you spoke to Ms. Wyatt about it, did she give you any indication as to why one would allow an interpreter to continue to interpret when there had been mistrials declared because of his inability to do the job?
- A. ...she said to me that she was waiting for different justices or Mr. Saltmarsh [the Crown Attorney] to put something in writing. So based on that she would be able to act upon that. She could not have done anything unless something was in writing. (emphasis added)

[80] During re-examination by Ms. Simitsis concerning Mr. Dhir's interpreting competence, Ms. Masrour again stated: "I am aware that there have been mistrials".

[81] Ms. Masrour testified that the Peel courthouse has four to five thousand cases annually requiring Punjabi interpretation. Taking all languages into account, she described Brampton as having "the highest volume and need for interpreters" in the province.

[82] In response to questions from the court about mistrials occasioned by Mr. Dhir's interpreting difficulties, Ms. Masrour stated:

- A. I think Mr. Dhir has had, first of all, a family problem which was brought to the attention of the Crown's office about two years ago. It was a family problem and the Crown's office got to know the nature of the situation. And as a result, when we had different cases with the victims being female the Crown's office, particularly most of our female Crowns would come to my office and they would express their concern about him being there, particularly if it was a sexual assault or a family situation. **There have been a few cases that it has been indicated to me that maybe out of that kind of attitude and view that he has, or maybe out of something else, that had caused these mistrials.**

THE COURT: You passed that information on, as I understood from your prior answer, to Ms. Wyatt?

A. When the judges came to see me I immediately asked them to go and see Ms. Wyatt. And when the Crowns came to me I went and I talked to Mr. Saltmarsh myself and then I asked him to relay his answer and his response to Ms. Wyatt. (emphasis added)

[83] Ms. Masrour's immediate superior, Ms. G. Wyatt, informed the court that she was aware of mistrials involving Mr. Dhir. When Ms. Wyatt indicated she wasn't sure of "the full scope of the problem" in part because she had been unable to get specifics from the judiciary or anything in writing from the Crown's office, she was asked why she hadn't ordered the relevant transcripts from the mistried cases to which she responded:

I haven't. I don't even, I don't even know that I'm aware of all. Or, I'm not sure how many there are in total.

[84] At a recess in the proceedings, counsel for Mr. Garcha, Mr. Callahan, requested a chambers meeting in the presence of Ms. Simitsis, the prosecutor in the case. Mr. Callahan conveyed to me that Mr. Garcha was experiencing difficulties with some aspects of Mr. Dhir's interpretation. I directed counsel to place his position on the record in open court. In court, Mr. Callahan stated:

I would put on the record what I indicated to you in chambers in the presence of present Crown counsel, yourself and myself.

I had asked my client before Mr. Dhir started interpreting to let me know if he had any discomfiture with it and he has indicated to me he does. And it seems to fall in line, I guess, with what Mr. Kingdon has said. I don't personally have any knowledge of that but **I have had indications in the past from clients that they've indicated that perhaps the interpretation was not, let's say, a hundred percent.**

...

My client indicates that when Ms. Jhooty was doing it she was doing it word for word. Mr. Dhir was missing words. (emphasis added)

[85] On instructions from his client, Mr. Callahan retroactively waived Punjabi interpreter assistance of the expected standard for the short time that Mr. Dhir had participated in the *Garcha* trial. For some of the proceedings of May 31, another Punjabi interpreter, Ms. M. Bhandhal, replaced Mr. Dhir and continued as well to provide interpretive assistance on June 1, 2004.

[86] On subsequent days of the *Garcha* trial, Ms. Jhooty resumed her interpretation assistance. Mr. Garcha was acquitted on all counts on October 19, 2004.

FRESH EVIDENCE – THE ENHANCED APPEAL RECORD

(1) Introduction

[87] When presiding on the *Garcha* trial I had never seen the *Sidhu* file and was unaware of its contents. When assigned and on reading the *Sidhu* appeal file for the first time about two weeks after the *Garcha* order/costs inquiry, it was at once evident that the issue of Mr. Dhir's competence as an interpreter was a central feature of the case.

[88] The original Crown/respondent's factum, para. 16, stated in part:

It is submitted the learned trial judge did not err in not treating any delay as a result of a mistrial being declared due to problems with the accuracy of the interpretation by the interpreter as systemic delay. It is submitted the problems with the interpretation was a unique or special circumstance as held by the judge or in other words an extraordinary or unforeseeable event, not part of a systemic problem. As pointed out the interpreter was well known to counsel for the Appellant, was well respected in the Courts and there was no reason to anticipate such a problem would arise. Further Appellant's assertion the Crown was alerted to the problem from another case involving the same interpreter is not supported by the transcripts... When she [Ms. Griffin] said she then learned there had been a previous problem with the interpreter it was not clear if this was from another case or from a previous witness in this case.

[89] At the outset of the *Sidhu* appeal, I explained to Mr. King and Mr. Moustacalis the coincidence of my assignment to the appeal so soon after the *Garcha* proceeding as well as summarizing the evidence discovered in the latter proceeding relevant to the interpreter function and especially Mr. Dhir and the references to his involvement in *mistrials*.

[90] Mr. King, not fully unaware of the circumstances of the *Garcha* case, instantly comprehended and agreed that his office had continuing disclosure obligations at the appeal stage: see *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (the *Martin Committee Report*, The Hon. G.A. Martin (Chair)) (1993), at pp. 206-7; *R. v. Trotta* (2004), 23 C.R. (6th) 261 (Ont. C.A.), at para. 22-9 (leave to appeal granted [2005] S.C.C.A. No. 287 (QL)).

[91] Both counsel agreed that appellant's counsel should make a formal disclosure request of the Ministry for all information and documents relevant to the government's knowledge and responses regarding Mr. Dhir's competence as an interpreter. Mr. King, I believe, described the existence of such evidence as having the potential to affect the Crown's written position on appeal that the interpretation difficulties in the *Sidhu* case were in effect a "one off" isolated problem as opposed to a systemic issue of ongoing unchecked competence concerns – "the issue in this matter is, when did the various actors know that there may be a problem with Mr. Dhir".

[92] On June 21, 2004, Mr. Moustacalis wrote to Ms. M. Gamble, Manager of Court Operations for the Court Services Division at the Peel courthouse, making specific information requests relating to Mr. Dhir's court interpretation proficiency. On July 9, 2004, Ms. J. Jones, Manager, Court Operations Ontario Court of Justice, wrote back to counsel acknowledging his correspondence to Ms. Gamble providing none of the relevant material on the stated bases that:

- (1) counsel's letter was "in the nature of a request for disclosure" which ought to be directed to the Crown Attorney's Office
- (2) the Court Services Division was prohibited by the *Freedom of Information and Protection of Privacy Act* from disclosure.

[93] Mr. King, very much to his credit, considered the circumstances to be sufficiently unsettling that the appellant ought to be permitted to pursue a fresh evidence application before this court "in the interests of justice" in order to determine, on a more complete record, whether there in fact existed institutional recklessness regarding the s.14 *Charter* right – a broader context to the *Sidhu* mistrial.

[94] Pursuant to the authority of ss. 822(1) and 683(1)(b)(d) of the *Criminal Code*, Mr. Moustacalis and Mr. King *jointly* led evidence and produced documentary exhibits relevant to the appropriate legal and constitutional characterization of both the *Sidhu* mistrial and in turn the consequential delay to trial before Shilton J. Through Ms. Lu, Counsel for the Ontario Ministry of the Attorney General Court Services Division, Mr. Dhir was provided an opportunity to address the court but declined independent counsel or representation on the appeal. On appeal, more than once, counsel were encouraged by the court to terminate the evidence production. In retrospect, exploration of the subject matter might better have been delegated to a special commissioner pursuant to

s.683(1)(e). That said, the persistence of counsel in the pursuit of justice must be commended not condemned.

[95] The following individuals figure prominently in the fresh evidence subject matter:

(1) *Forouz Masrour*

Ms. Masrour has been an interpreter since 1979. Currently, she is an accredited Farsi interpreter. Ms. Masrour has been an Ontario government employee since 1991 and the Ministry of the Attorney General Interpreter Coordinator in Brampton from 1989 onward. While Ms. Masrour's duties and authority seemed broader in scope prior to mid 2000, for some years her responsibility has been limited to booking and scheduling interpreters for the Brampton courts.

(2) *Virginio Brum*

Virginio Brum, an accredited Portuguese interpreter, acts as a scheduling assistant to Ms. Masrour.

(3) *Shamin Jhooty*

Ms. Jhooty has a masters degree in journalism and is a certified Punjabi/English court interpreter in British Columbia and Ontario. She is currently a contract interpreter in the Peel courthouse. Ms. Jhooty is also a certified translator with certification from the Canadian Translators and Interpreters Council.

(4) *Gerri Wyatt*

Ms. Wyatt was a court clerk for many years. Ms. Wyatt was the Supervisor of Court Operations from March 2001 to October 25, 2004. She was responsible for supervising the Interpreter Coordinator from March 2001 to April 6, 2004 when Jean Jones assumed the responsibility.

(5) *Gayle Laws*

Ms. Laws supervised the Interpreter Coordinator function from May of 1999 to March 2001 and then again commencing in October of 2004 taking over from D. Shelton, the acting supervisor from March to October of 2004.

(6) *Jean Jones*

Ms. Jones first joined the government on April 14, 2004 from the private business sector. She became the Manager of Court Operations for the Ontario Court of Justice. In this position she supervised the Court Support supervisor to whom the Interpreter Coordinator reported.

(7) *Marilyn Gamble*

Ms. Gamble, currently the Manager of Court Operations for the Superior Court of Justice, was, from December, 1999 to April 13, 2004, the Manager of Court Operations. The Court Support supervisor reported to her.

(8) *Chris Rutledge*

From 1985 to 1989, Mr. Rutledge was a French/English court interpreter. Currently he is a TR2 Translator employed by the Ontario Ministry of the Attorney General Court Services Corporate Planning Branch. He translates text from French to English and holds one of a handful of regionalized positions responsible for testing and training court interpreters. The Peel courthouse is within Mr. Rutledge's jurisdiction. He reports to Sandra Wain, Director Corporate Planning Branch, in the Court Services Division of the Ontario Ministry of the Attorney General.

(2) Court Interpretation

[96] The Ministry of the Attorney General *Freelance Court Interpreter's Handbook*, February, 1995 (the *Handbook*) states as a Rule of Professional Conduct that "Court interpreters shall faithfully and accurately reproduce in the target language the closest natural equivalent of the source language message, primarily in terms of meaning, and secondly in terms of style, without embellishment, omission or explanation". The *Handbook* also states:

- (1) "[The] *Charter of Rights and Freedoms* guarantees the right to the services of an interpreter for a party or a witness..." – "you are offering more than a service, you are ensuring that a *Charter* right is not violated".
- (2) "[You] must follow standard procedures and strive to maintain a high level of competence and professionalism".
- (3) With consecutive interpretation, "accuracy is essential; a summary or approximation is not good enough" – "It is essential for the judge and jury to receive as accurate an interpretation as possible..." – "you must interpret exactly what is said, nothing more, nothing less".
- (4) Whispered simultaneous interpretation, i.e. "sitting beside the accused" and interpreting for him or her alone – "accuracy is of the utmost importance when providing whispered interpretation".

[97] Chris Rutledge testified that a court interpreter requires "excellent command" of both languages, good short term memory, a broad vocabulary, and the ability to listen and speak simultaneously. Continuous, uninterrupted interpretation is necessary.

Q. And...they should be able to convey as close as possible the exact words and ideas that are used by the person in court?

A. Yes, absolutely.

Asked if the interpretation need be verbatim, the witness stated that a court interpreter must "stick as closely as possible to what is said".

[98] Simultaneous interpretation in the criminal courts occurs where the interpreter interprets from the language of trial (i.e. English) to the defendant's first language. Consecutive interpretation in a trial conducted in the English language generally occurs where the interpreter converts the witness' language to English and the questioner's words to the witness' language.

[99] Ms. Jhooty considers that when she interprets she is "doing something of great responsibility". When in a courtroom she interprets the interpreter's oath as well for the defendant's benefit – "Yes, this is a must, in my eyes". In British Columbia, according to Ms. Jhooty, there is greater formality at the outset of a proceeding using a court interpreter with the court explaining the interpreter's role, and clarifying that it is not to be a support person, as well as relating that the beneficiary of the service is entitled to expect word-for-word translation.

[100] Ms. Jhooty was very clear that court interpreting, translating, and cultural interpretation are all quite different.

[101] Ms. Jhooty was surprised when, in a case she took over from another interpreter, Ms. Masrour criticized her for providing the defendant simultaneous interpretation. Ms. Masrour felt that consecutive interpretation only should be given.

[102] Ms. Jhooty noted the range of vocabulary in the Punjabi language from rural use to bookish expressions. There are idiomatic Punjabi speech changes over time as language continues to evolve. Ms. Jhooty stated that in the profession an interpreter can become fossilized if he or she does not upgrade language skills with new words and expressions. According to the witness, it is recommended that interpreters remain in touch with their mother language through visits to the country where that language is spoken. In Ontario, unlike British Columbia, there is no regular recertification system – in Mr. Rutledge's words, "Unfortunately there hasn't been a budget for this in Ontario".

[103] Turning then to the views of court interpretation held by the Interpreter Coordinator and her supervisors.

[104] Ms. Masrour agreed that interpretation "should have...precision, impartiality, competency" – even if differences exist between interpreters "the message and the meaning should be correct". She agreed that individuals have a right to "accurate and verbatim" court interpretation.

[105] Ms. Masrour was asked her understanding of the authority for providing interpreter assistance in criminal proceedings:

- A. ...the judicial right of everyone to understand the court procedure.
- Q. ...do you have any sense as to where it is written down...?
- A. It's the Human Rights, what do they call it, the - - I know, I am, I'm aware of that...
- ...
- I cannot answer your question.

[106] Ms. Laws considered that court interpretation “is not a clear science” and that the service is adequate provided you can “step back and look at it as a whole and say for the majority of the time did they - - was the essence captured...[it's] very subjective in some ways”.

[107] Ms. Wyatt described her understanding of court interpretation in these terms:

But, my understanding of interpretation is, is that it doesn't have to be exact, that it's - - it's more of an art than a science. This is how it's been explained to me.

...

Well, part of the - - part of the coordination manual has - - umm, some of that material in it...it just states that they're to interpret to the best of their skill and ability. Umm, just the oath in itself...

Pressed further on the point, Ms. Wyatt stated that interpreters may “convey the same meaning but slightly different words” can be used.

[108] Gerri Wyatt was questioned as to her understanding of the legal basis of the obligation of the government to provide interpreter assistance:

- Q. What is your understanding of the authority for a witness or an accused person to have the assistance of an interpreter?
- A. I'm not sure what - - what Your Honour - - like, are you talking about the *Criminal Code*, sir?
- Q. No, I'm asking for your understanding of what you understand it is that compels the system to provide witnesses and accused persons interpretive assistance if they request it?
- A. Well, they have to fit under - - from the administrative capacity they're not given in civil matters. Umm, it's in criminal matters.
- Q. And I should have been more express. I meant in criminal matters.

- A. In criminal matters where they don't understand or speak the English language or if they chose to have a French language trial and participants don't speak French.
- Q. All right. And what is the authority that compels us to provide these services, your understanding?
- A. Well, there the *Criminal Code* and as well we have an Interpreter Co-ordinator's Manual that also states.

[109] Mr. Rutledge agreed with the suggestion that there is not a lot of support for freelance or fee-for-service interpreters called on an "as needed" basis from a Registry of Accredited Freelance Interpreters, certainly not the way there was 10 to 15 years ago – "when we had our own section ...there was money to be spent on things like seminars and so on, professional development, I think things were working better then".

(3) Standard Aptitude Test for Court Interpretation

[110] Chris Rutledge described one of his duties as to "test and give basic training to court interpreters" within an assigned provincial region. Mr. Rutledge, an interpreter and translator prior to 1989 when he became a TR2 responsible for interpreter accreditation, was asked in this appeal whether he was trained for the role he has been assigned:

...in terms of training to assess tests I don't believe there really was anything...there is no formal training for my position.

[111] The administered test, described more particularly below, is the Standard Aptitude Test for Court Interpretation (SAT). Mr. Rutledge informed the court that the test, with one exception, has remained virtually unchanged since 1989. A Ministry of the Attorney General of Ontario document describing the test (Exhibit #6) reads in part:

...this is an aptitude test, rather than a test of your interpreting skills...
(emphasis of original)

Mr. Rutledge testified that "we specifically avoid legal terminology in the test".

[112] Exhibit #6 describes the three-part test in these terms:

The first part of the test involves sight translation, i.e. providing an oral interpretation of a one-page document. There is one sight translation from your language into English and one from English into your other language. This requires that you be able to read both English and your other language. You are not required to provide a written translation of either test. This is a time-limited test where you are given five minutes to prepare the text and four minutes to provide an oral translation.

The second part of the test is an exercise called “shadowing”, which involves listening to a passage in English and repeating it, in English, while you listen. You then do the same exercise, listening and repeating simultaneously, in your other language. This exercise measures your ability to speak and listen at the same time.

The third part of the test is a series of memory recall exercises. You will listen to five passages, three in English and two in your other language. You are required to recall each passage in English only as accurately as possible, after you hear it.

(emphasis of original)

[113] According to Mr. Rutledge, in 1992, Part I of the test was replaced in some tests by a consecutive interpretation component with a simulated court case recording in both the source and the target languages with gaps for the candidate to repeat on tape what he or she just heard. This modification to the test relating to certain languages only arose, in Mr. Rutledge’s words, “because there was a very large percentage of people, particularly from the Indian subcontinent area of the world who spoke the language in question, but did not read it”. Therefore, in order to especially acquire more Urdu and Punjabi interpreters the test changed so that there was no requirement for the interpreter to be able to read in his or her first language. To Mr. Rutledge’s recall, the modified test now applies as well to the Somali, Croatian, Serbian and Tagalog languages.

[114] The older, unmodified SAT applies for about 40 to 45 languages. Of the 110 languages for which accredited interpreters appear in the Ontario courts there are only SAT versions for 50 to 55 languages. Accordingly, for about fifty percent of the languages for which court accreditation is obtainable, the test is limited to a vocabulary or English language proficiency test – “because we have no test in their language”. Asked why not, Mr. Rutledge identified a lack of resources – to get new tests created you have to “go begging for funds”; “in large part it comes down to budget”. Since 1994, only one new SAT has been developed for any language – the Cree language.

[115] Mr. Rutledge noted that the Court Interpretation and Translation Branch of the Ministry, created in 1985, ceased to exist by 1995 with staff members regionalized. The Branch, when it existed, regularly sent out a newsletter with

helpful information for court interpreters. With budget cuts, for a decade now, there has been no newsletter.

[116] In an ideal world, with appropriate budgetary support, Mr. Rutledge would see these elements in a proper accreditation test:

- (1) the candidate would be required to listen to language A and interpret to language B
- (2) restored to all tests should be the ability to read in both the target and source languages
- (3) lengthier tests to test a person's "ability to make a sustained effort"
- (4) testing of legal language knowledge
- (5) he has unsuccessfully asked the Ministry "to systematically check the other language of the interpreter in each test" (i.e. by sending out tapes to be evaluated).

[117] Returning to the SAT, according to Mr. Rutledge, "The vast majority of people fail the test based solely on their performance into English" – as a matter of course there is a 75 to 80% failure rate based solely on the English component of the test – "we have a terrible time getting people to pass the test". Mr. Rutledge speaks French and English. He is, accordingly, unable to ascertain the correctness of what a candidate speaks on tape in the foreign language. He attempts to listen to the speaker's fluency in that language. Asked whether this did not make a true evaluation more difficult, Mr. Rutledge replied:

Absolutely, absolutely. They are all more difficult when you don't speak the language of the person being tested. No doubt about it.

...

I would say perhaps the fact that we do not systematically have the person's other language evaluated is a flaw in our testing system.

Tapes are not systematically sent out for evaluation by a speaker of the other language – "the expense would be enormous". In fact, no tapes have been sent out in the past five years. The witness agreed that given the need would only exist to evaluate tapes of those candidates who survived the English-speaking components of the SAT his annual regional expense were tapes sent out would be in the range of \$16,000.00 (200 tapes x \$80.00 for a 3-hr. review per tape).

[118] Mr. Rutledge was examined in frank terms about how challenging the SAT really is, with counsel suggesting that if the test, described in greater detail in the evidence and exhibits, was not the equivalent of a “See Spot run” effort, it was certainly very simple with aspects left unevaluated, no true simultaneous interpretation aptitude component, and in some instances no foreign language reading component. The witness, noting the already high failure rate, replied that “if we make the test more difficult, it’s going to reduce our field of interpreters clearly”. Mr. Rutledge agreed that the quality of the population of test candidates may in part be a product of the compensation levels set for court interpreters.

[119] Mr. Rutledge recalled that his supervisor many years ago, Dorothy Marcil, was of the view that the test should be made more difficult in order to place qualified people in the courts. Mr. Rutledge dissuaded her from pursuing the matter further given the existing high failure rate – “finding a sufficient number of people to pass an even tougher test would just make it more difficult to find interpreters for the course”.

[120] A candidate who passes the SAT, also described in the evidence as the language test, attends for “a basic training workshop” with Mr. Rutledge addressing ethics, procedure, etc. The workshop lasts less than a day. There is a brief written test with ten questions selected from materials already provided the candidates. A scoring of seven correct answers on the test is necessary for accreditation and entry of the individual’s name into the Registry of Freelance Interpreters. One who fails the written test may be offered a second test with ten different questions.

[121] Within his region, Mr. Rutledge administers the SAT for all languages except American Sign Language for which equivalency accreditation of the Canadian Hearing Society is accepted by the Ministry.

[122] Mr. Rutledge testified that in the late 1980s and early 1990s, “when we were an actual section with a budget”, legal lexicons with about 200 legal terms were developed in English, French and Spanish. When a candidate passed the SAT, he or she was provided the English/French or the Spanish lexicon prior to the training seminar although there was never a test on its contents. No legal lexicons exist for other languages – “we haven’t had the budget to do that since”. There is no English/Punjabi legal lexicon. An interpreter, accredited in the English/Punjabi languages, must go away and try to create their own research of legal terms upon which they are never tested. Mr. Rutledge accepted that familiarity with legal terms is essential for a court interpreter: “legal terminology

is important, yes, absolutely”. As to the existing legal lexicons, Mr. Rutledge provided this additional information:

- (1) “we have long since run out of copies” and in his region no copies have been provided to accredited freelance interpreters for the past two or three years – there is no budget for reprinting
- (2) the existing lexicons are computerized on the Ministry intranet but unavailable to accredited freelance court interpreters
- (3) the existing legal lexicons have not been updated to take into account new legal terms, i.e. conditional sentence, new offence charges, etc.

[123] Chris Rutledge testified that no Ministry policy exists requiring that a newly accredited court interpreter be shadowed for a probationary time by a monitor speaking both of his or her languages. The witness saw expense as an impediment although it would “certainly” “help ensure the standard of competence that would be required by the courts”.

[124] Mr. Rutledge has no idea whether an accredited freelance interpreter listed in the Registry of Accredited Freelance Interpreters has been called by courthouses to interpret in the past five years. With respect to the number of complaints per week regarding freelance interpreters, Mr. Rutledge observed:

...in the last year there's been something of an explosion of it, not only in this court, but in various other courts...

...

...in the last year there seems to be more and more complaints being made...

[125] Ms. Masrour recognized the SAT as nothing more than an aptitude test. In her view, the test materials were “not pertinent to what’s happening in the courtroom”.

[126] Shamin Jhooty, a court-accredited interpreter from British Columbia who was accredited in Ontario by Mr. Rutledge in 2000, testified that someone “with a tourist level of knowledge” in English and the second language would be able to interpret the materials presented in the SAT:

This test, even if I was trying to be generous, at best is an aptitude test to see [if] somebody has a knack for maybe transferring languages.

...

It's a very simple test.

...

We don't even meet the basics to be interpreting in a courtroom after that process [the Ontario accreditation process].

[127] Ms. Jhooty testified that the Ontario accreditation system provides no confidence as to how an interpreter “would do in a real setting”. In her view, had she not had her British Columbia training she would not have had adequate training to interpret in Ontario courtrooms. The witness expressed sadness for the difficulties experienced by the Ontario graduates relating one example of a court interpreter, accredited for two years, coming to ask her, “When they say the Crown is honest, what exactly do they mean?” Ms. Jhooty was eventually able to establish that “the Crown is honest” was actually “it is the Crown’s onus”. Ms. Jhooty finds herself regularly consulted by Punjabi interpreters, working in the courts for years, particularly regarding legal terminology – these interpreters “would fail any test in legal terminology”.

[128] Ms. Jhooty acknowledged there are some first-rate experienced court interpreters in Ontario especially those trained in Europe with what she considered to be the “very superior training system” there. Ms. Masrouh considered Ms. Jhooty as an “excellent” and “exceptional” court interpreter. Unfortunately, in Ms. Jhooty’s opinion, in Ontario, she never came to feel that “interpreting is a serious business”.

[129] Ms. Jhooty’s court interpreter training in British Columbia was undertaken in a ten-month course at a community college in Vancouver. There was a “very challenging” three-hour entrance exam for the course requiring knowledge in the English and Punjabi languages. Passing the exam, she was admitted to the course which taught sight, simultaneous and consecutive interpretation skills with language laboratories, tests, role playing, mock court exercises and evaluation by teachers who spoke English and Punjabi. Students were “taught how to avoid a mistrial because of interpretation” weaknesses. After successfully completing the course, Ms. Jhooty became a certified court interpreter then appearing at all levels of court in British Columbia.

[130] Ms. Jhooty has been consulted regarding development of a certification program to be offered in the fall of 2006 for spoken language interpreters in the social, legal and health care sectors. The Ontario Ministry of Citizenship and Immigration has funded the program for the Colleges of Ontario Network for

Education and Information Niagara. The program will consist of six courses with 180 hours of instruction.

(4) Mr. Dhir – The Early History

[131] Mr. R. Dhir has been interpreting in criminal courts “since the 1970s” according to Mr. Rutledge. Prior to 1985, there was no standard testing of court interpreters. In Toronto, in 1987, Mr. Dhir was accredited by the Ontario Ministry of the Attorney General as a Punjabi/English court interpreter. At the end of 1998, Mr. Dhir was offered a contract position as a court interpreter. This was a union position. Mr. Dhir became a full-time or staff employee of the Ministry of the Attorney General in December of 2003.

[132] Mr. Rutledge accessed Mr. Dhir’s test results from March 27, 1987. The evaluation scores were described as “satisfactory to good”. The documentation described the candidate’s “sight to English generally accurate and well delivered but rather slow”. As to the shadowing segment of the test, the evaluation was excellent in English but “not so smooth in Punjabi”. The tester noted respecting the memory component of the test, “memory sparse” which Mr. Rutledge described as meaning “that in those memory tests he missed a lot of details”. Asked whether, in retrospect, it would have been helpful to have had Mr. Dhir’s Punjabi-speaking test tapes checked, Mr. Rutledge replied: “Yes, absolutely”.

[133] Ms. Masrour, the Interpreter Coordinator, testified to the following facts. In the spring of 1999, she was informed by staff in the Victim Witness Assistance Program (VWAP) that Mr. Dhir was “very rude with the female victims, particularly in the spousal assaults and in sexual assault cases”. As well, it was reported, “he interrupts the women causing problems” in court. She explained to those concerned “that maybe this is the way in the culture they deal with situations such as that”. The VWAP wanted female interpreters only. Ms. Masrour did not consider the complaints were *directly* a criticism of Mr. Dhir’s interpretation proficiency. Mr. Dhir was then a fee-for-service interpreter. When she brought these concerns to the attention of her supervisor, Mr. Gleason, he stated that if the concerns continued, “we might let him go”. At another point in her testimony, Ms. Masrour stated that when the VWAP complaints came in about Mr. Dhir, Mr. Gleason “was of the opinion he should be let go immediately”. Gayle Laws testified that she received no complaints as to how Mr. Dhir related to women in the courtroom. She recalled that Ms. Masrour wanted Mr. Dhir to be fired. Ms. Laws considered Ms. Masrour’s problems with Mr. Dhir to be simply “a personality issue among two staff members”.

[134] The Coordinator knew Mr. Dhir was experiencing some personal family problems. An early problem of which Ms. Masrour was directly aware, in 1998, allegedly involved an altercation between Mr. Dhir and his wife. Concerned as to his attitude toward women, she cautioned him to be “tactful” in the courtroom and informed him that she would be endeavouring to schedule certain cases with female interpreters. Mr. Dhir denied he had been rude.

[135] In her testimony, Ms. Masrour agreed that attitude or rudeness can affect the interaction between an interpreter and a witness:

I think an interpreter’s job is to create an atmosphere of ease for the witness so particularly the victim and the witness would be able to convey their message to the court as easily and as accurately as possible.

Ms. Jhooty too testified that the attitude of the court interpreter can affect the testimony a witness gives. Asked as to whether interpreter attitude “can affect...the flow of information”, Mr. Rutledge answered, “Well, certainly yes”. Although it is recognized that attitude of a court interpreter can impact on testimony, neither Ms. Masrour, nor anyone else, made any effort to determine if any court cases were affected by Mr. Dhir’s in-court attitude.

[136] In early 2000, Ms. Masrour heard that Mr. Dhir was interpreting “in a general way instead of word-for-word”. Mr. Brum had been informed that Mr. Dhir “kind of summarizes it”. Ms. Masrour could only point to an instance of Mr. Dhir interpreting in this way in a hallway out of court. She raised the allegation with Mr. Dhir but “He never accepted criticism well”.

[137] Forouz Masrour recalled that after the new Peel courthouse opened in June of 2000, Mr. Dhir was charged with assault in a domestic context. The VWAP personnel continued to complain that Mr. Dhir held a poor attitude “towards the female victims”. She kept Mr. Dhir “downstairs”, an apparent reference to the OCJ, to interpret in bail and set date proceedings as she was concerned about using him in trials. In her view, with Mr. Dhir’s personal problems, “his performance went down”. She brought these matters to Gayle Laws’ attention. When Ms. Masrour found her supervisor “wasn’t sympathetic” to the concerns about Mr. Dhir interpreting in sexual and spousal assault cases, she decided in any event not to use him in such cases – she later continued “to lie” to Ms. Wyatt but “kept [her] promise to the Victim Witness [Assistance Program] all along”. Ms. Masrour testified that in 2000 or 2001 she informed Mr. Rutledge about Mr. Dhir’s charges before the OCJ.

[138] Ms. Wyatt testified that the information from the Human Resources Branch was that Mr. Dhir was only facing a “charge” not relating to an incident in the workplace and to schedule him normally. She understood Ms. Masrour was upset with this advice. Ms. Gamble, Ms. Wyatt’s supervisor, testified that she was made aware of the VWAP concerns when Mr. Dhir was charged with assault. She did not understand there to be a “performance” issue. Ms. Gamble did not see the VWAP concerns as “a situation of consequence” and understood Ms. Wyatt told VWAP that their preferences could not be accommodated as such a “sort of selection” departing from normal scheduling would be discriminatory.

[139] From mid 2000 onward, according to Ms. Masrour, “court reporters have always criticized Mr. Dhir”, including his lack of politeness – “They didn’t think he was...a good interpreter”. The reporters spoke of his demeanour in court as rude and that he was “a bad interpreter”. Ms. Masrour testified that within two or three months after June of 2002, she informed Ms. Laws of the court reporters’ concerns.

[140] According to Ms. Masrour, when she raised with Ms. Wyatt concerns about Mr. Dhir’s use in sexual and spousal assault cases “she wasn’t sympathetic about it”. As a result, she decided on her own not to schedule him for these cases.

[141] Gerri Wyatt learned from Ms. Masrour that “at points...she would move [Mr. Dhir] when asked”. She informed Ms. Masrour, “those are decisions that should be made by me”. Ms. Wyatt acknowledged receiving information from Ms. Masrour respecting VWAP’s complaints about Mr. Dhir. Hearing nothing directly from VWAP, she told the Coordinator to schedule Mr. Dhir as usual. According to Ms. Wyatt, to limit the type of cases in which Mr. Dhir would be permitted to interpret would have affected Mr. Dhir’s hours of work, and required that fee-for-service interpreters be brought in. According to Ms. Wyatt, “I didn’t have a lot of options available to me”. She was of the view that she needed a written complaint to take further action. She felt she could not deal with many of Ms. Masrour’s issues regarding Mr. Dhir because “It’s one employee against another employee”. Although Ms. Masrour had been telling her “there are things happening”, her view was that: “Well things happening doesn’t mean there are things happening, and I needed concrete examples to follow - - follow through with”.

[142] In “maybe 2000, 2001”, and “much” before the fall of 2002, Ms. Masrour was informed by a judge that the defendant in a matter before the court raised

the issue of the quality of Mr. Dhir's interpretation. She was unaware as to whether the case mistried but she took steps to switch interpreters.

[143] Asked about the year 2002, the Coordinator estimated that Mr. Dhir interpreted every court day that year.

[144] Ms. Masrour testified:

Mr. Dhir has been doing trials and Mr. Dhir was known to me as an incompetent interpreter long before everybody else knew it and others - - my management knew about it.

[145] It was Ms. Masrour's opinion that her supervisors were less educated than she was and had "no idea about [her] department" – they "tried to rule everything with absolutely no education, no experience".

[146] Ms. Wyatt was clear in her evidence that Forouz Masrour could not hire, fire or discipline an interpreter. When asked who had such authority, she replied, "it would have fell, I guess, on – on me" although the Human Resources Branch would need to be consulted. Examined as to quality control measures for court interpreters, Ms. Wyatt gave this evidence:

Q. And as far as monitoring the quality of the interpretation service whose role was that?

A. I'm not sure what you mean by quality.

[147] Ms. Wyatt agreed that the Interpreter Coordinator, on more than one occasion, brought complaints about Mr. Dhir to her attention. According to Ms. Jhooty, "Gerri Wyatt was not approachable. Gerri was abusive. Gerri Wyatt would use very crude language to address us."

[148] At some point in 2002, a Crown counsel came to see Ms. Masrour and, on her evidence, reported:

I don't think Ravi [Dhir] interprets well. I was raised with a lot of Punjabis around me in Brampton. I know this man does not interpret well.

The prosecutor specifically heard a Punjabi-speaking complainant say "hunji" (yes) which was not repeated in English by Mr. Dhir.

[149] In the winter of 2002, Ms. Masrour heard, it is unclear whether directly or indirectly, that a Punjabi-speaking lawyer was upset that Mr. Dhir was saying

“Hey? Hey?”, “asking the witness to repeat so many times”. Ms. Masrour made no further attempts to identify the proceeding in which this occurred. Ms. Jhooty, in her evidence, described Mr. Dhir asking a lot of questions at lunches causing others to repeat themselves – “so we all thought he had a hearing problem”. In the summer of 2002, according to Ms. Masrour, she related to Ms. Wyatt her concerns about Mr. Dhir’s apparent hearing difficulties. Ms. Masrour considered that constant interruptions of a witness by a court interpreter would “not amount to a good quality interpretation and might affect the outcome of a court case”. When the Coordinator asked Mr. Dhir if he had a hearing problem, he denied that he did – “he thought he was doing his best”.

[150] When Ms. Masrour reported to Ms. Wyatt these reported problems relating to Mr. Dhir, according to the Coordinator, Ms. Wyatt said “she was not able to make any changes unless there was a document, a complaint, by either the judiciary or the Crown Attorney’s office”. Ms. Masrour felt this was an inappropriate response by Ms. Wyatt. Ms. Jhooty recalled Ms. Wyatt saying: “I don’t care which...God damn interpreter a judge wants”.

[151] Ms. Wyatt agreed that the Coordinator reported suspicions regarding Mr. Dhir’s hearing. Ms. Wyatt testified that she dismissed the concern because whenever she had spoken to Mr. Dhir “he seemed to hear okay”. Ms. Laws, asked how she would have handled the matter had she been the supervisor, stated she would have investigated a complaint of a witness being constantly interrupted by a court interpreter.

[152] Ms. Masrour believed as Coordinator she did not have authority to order transcripts or tapes of any matters in which Mr. Dhir had interpreted nor was she prepared to go up the chain of command past Ms. Wyatt because, when Gayle Laws was her supervisor, she had gone to Marilyn Gamble and was criticized by Ms. Gamble for doing so. In that case, Ms. Laws had directed Ms. Masrour to make a mid-trial replacement of a French-speaking interpreter in the *Potvin* case because he was too expensive. Believing a mid-trial change unauthorized by the trial judge to be wrong, Ms. Masrour went to Ms. Gamble but was not supported for doing so. When forced to comply, and the replacement interpreter was almost instantly discredited, Boissonneault J. refused to continue the trial until the original interpreter was re-instated.

[153] Ms. Masrour described Mr. Dhir as not being the easiest interpreter to supervise because he always considered his views to be correct – “he doesn’t get instructions easily”. The Coordinator believed Mr. Dhir had problems with female supervisors. On the evidence, the relationship between Ms. Masrour and

Mr. Dhir was a strained one for some years – he was “very difficult” to manage. Ms. Laws held one or more meetings to resolve conflicts between the two.

[154] Ms. Masrour testified that any time she “heard a serious complaint” about Mr. Dhir she brought it to her supervisor’s attention.

[155] In 2002, according to Ms. Masrour, Hawke J. asked her what was being done about Mr. Dhir to which she replied: “I said to her that it is out of my hand[s]. I have no authority to do anything”. Ms. Masrour testified “I had given up on the situation”. About five times a day, Ms. Wyatt told her she was “only a coordinator, and I should stay in my office and mind my business”.

[156] Subsequently, on Ms. Masrour’s evidence, Morten J. complained “this man is controlling my courtroom” – the interpreter, Mr. Dhir, was asking “a lot of questions for clarification when the witness was speaking”. According to Morten J., in the middle of a witness’ evidence in an OCJ trial, Mr. Dhir would repeatedly say “Hey? Hey?”, “meaning repeat, I don’t understand” causing the witness to lose her train of thought. Morten J. advised her not to schedule Mr. Dhir “for any Superior Court matter”. Ms. Masrour informed this court that she told Morten J. to speak to her supervisor:

I was advised by my supervisor not getting into any kind of conversations with the judiciary and leave it to her.

After speaking to Morten J., she immediately told Gerri Wyatt of the conversation with the judge.

[157] Ms. Wyatt described her own communication with Morten J. which “may have been in 2002”:

...[he] felt that Mr. Dhir needed to be reminded of – of how to interpret, that he wasn’t there to give dialogue or anything in between.

Ms. Wyatt testified that she then “reminded” Mr. Dhir “he was there to interpret and interpret only whatever, you know, what a witness said”.

[158] Ms. Wyatt was pressed in examination to describe her comprehension of Morten J.’s complaint:

I don’t - - I wasn’t there, so I don’t know. Umm. And I reminded him what - - how he needed to interpret.

Ms. Wyatt recalled Mr. Dhir being a bit upset, sort of offended, and responding that he understood his job and that's what he was doing.

[159] Nothing was generated in writing regarding these judicial contacts. Ms. Wyatt testified that Mr. Dhir was a contract interpreter whose contract was renewable annually unless there existed "a justification for not having renewed that person's contract" - "but the union, once again, would come into play". The witness gave this evidence:

Q. You don't have any documentation at all relating to Mr. Dhir?

A. That's correct.

On this issue, Ms. Laws testified that only if performance issues had been documented with progressive discipline and warnings could the contractual relationship be terminated.

(5) The Bhullar Mistrial

[160] Hardev Bhullar was charged with threatening death, assault with a weapon and assault. The defendant's trial was scheduled as a one-day proceeding for August 30, 2002.

[161] On August 30, the complainant, Ranjit Kaur, testified. The Punjabi/English interpreter sworn to assist the defendant and the witness was Mr. R. Dhir.

[162] During the complainant's testimony, first the prosecutor, and later counsel for Mr. Bhullar, complained to the presiding trial judge about the accuracy of the interpretation service. With the second complaint, and the witness' evidence in-chief not yet completed, Edmonstone J. stopped the trial.

[163] With a different interpreter sworn, Ms. S. Jhooty, the court heard submissions from counsel. In this hearing, Ms. Jhooty testified that Forouz Masrour was in court when Edmonstone J. adjourned the trial to November 4, 2002 and ordered the Court Services Division to release the tape of the trial proceedings for review by an independent Punjabi-speaking interpreter. This seems to be supported by the observation of the prosecutor on the record that: "I believe it is the Interpreter Coordinator's intention that Ms. Jhooty do the

translation". Ms. Jhooty testified here that Ms. Masrour instructed her not to disclose to Mr. Dhir that his August 30 interpretation was being reviewed.

[164] Ms. S. Jhooty, an accredited Punjabi/English court interpreter, undertook a re-interpretation of the August 30 court proceedings. The reviewer noted nine (9) occasions where Mr. Dhir interjected to say "Henh?" which was "in the form of a question, normally used in colloquial and cultural context for expressing something that is not understood". The reviewer noted material deficiencies in the trial interpretation record. There were, according to Ms. Jhooty, inaccuracies, judgmental translations, vital omissions, and witness clarifications and side conversations not reported to the court.

[165] The Interpreter Coordinator, F. Masrour, testified on this appeal that she became aware of the *Bhullar* mistrial in 2002 but was unable to recall when. Ms. Masrour acknowledged that someone from the Crown's office approached her for the phone number of another interpreter who might be used for a verification of an interpretation record of Mr. Dhir. She examined the review transcription of Ms. Jhooty "later on" and became alarmed noting that "there were omissions definitely" and that "the translation was bad" – "I got an opportunity to look at the transcripts there, and I realized that we have had difficulties with Mr. Dhir".

[166] Ms. Masrour, on her evidence, immediately told her supervisor, Gerri Wyatt, of the problem with Mr. Dhir once she read the Jhooty review document. According to the witness, nothing was then done by management to review any of Mr. Dhir's prior interpretations. The witness told Ms. Wyatt that Mr. Dhir should be removed from the interpretation office. Ms. Masrour informed this court that her supervisor's consistent approach was that nothing could be done "until we have a formal document":

I went to my boss, and I said, "This is bad. I think we have to do something about it." She asked me, "Who has ordered the transcript?" And I said "The Crown." She asked me, "Who paid for it?" I said, "I made sure that the Crown's Office knew that's their – their, you know, they paid for it." So, I said, "They are not happy with the result, and I can see how bad it is. And I think we have to do something about Mr. Dhir." She said, "I cannot do anything unless the Crown's Office will come forward and give me a document." And I - - - I suggested that maybe she should go and talk to Mr. Mark Saltmarsh. I usually used to do that before hand. I would talk to the Crowns too. So, I said, "Maybe you should do that." And she said, "I will definitely do that." So, I think the next day Ms. Wyatt had gone to Mr. Mark Saltmarsh and brought it up. And she said - - - she said to me that Mr. Saltmarsh has mentioned that I will give you a paper, a piece of paper, regarding that. But, she told me later that she never received anything from the Crown's Office.

[167] Asked whether she moved to have another Punjabi/English interpreter sit in a court where Mr. Dhir was interpreting, as a monitor, once aware of the *Bhullar* situation, Ms. Masrour testified that she did not as she “knew it would not make any difference in the decision of my supervisor” – in court, “nobody monitored Mr. Dhir”.

[168] Ms. Wyatt, in her testimony, agreed that “the ability to receive a proper, complete, fair, unbiased translation in court is something that affects the administration of justice”. Ms. Wyatt agreed that a judge’s order for the release of a reporter’s tape was an unusual event – it happened an average of only two or three times a year. Ms. Wyatt admitted that the order of Edmonstone J. for release of the August 30, 2002 *Bhullar* tape would have come to her desk. The witness acknowledged that a judicial order for release of a tape would “typically”... “trigger” the prospect that the context for the release was “an administration of justice issue”. Pressed further on the point, as to whether she felt any obligation as the Supervisor of Court Operations to follow up on the background of a court-ordered tape release, Ms. Wyatt changed her position to say such orders were not uncommon – she was content to simply comply with the face of the order without looking behind it. There would be no further inquiry generated in these circumstances. However, questioned by analogy to the problem of a mistranscription by a court reporter, itself raising an administration of justice problem, Ms. Wyatt provided this evidence:

Q. And secondly, that that’s something that you should know about or find out about, right?

A. Yes.

[169] Ms. Laws described a judge-ordered release of tapes as “Very uncommon” and usually raising an administration of justice issue or problem raising an obligation on a supervisor “to follow through to see what had gone wrong” and to determine what needed to be done by way of correction, remedial steps to ensure no repetition of the difficulty. In Ms. Law’s words, “I would do an investigation” and fix the problem.

[170] When questioned further about the *Bhullar* mistrial, Gerri Wyatt initially testified:

I may have listened to a tape or something in that matter or that name might have gone by me. I honestly don’t know.

...

It may have been reinterpreted, but I don’t know.

[171] The witness also acknowledged that she knew the Interpreter Coordinator's office on "a couple of cases" had supplied an interpreter to re-interpret court proceedings by going over tapes ordered released by a judge's order. She did not, however, on her evidence, know, or determine the exact nature of the problem. Ms. Wyatt acknowledged in her testimony that Ms. Masrour had told her there "were other cases" mistried involving Mr. Dhir. Ms. Wyatt testified, "They'd been eluded to, and I had asked for specific case names or whatever, and I'd never gotten anything". She never met with Masrour to prepare a written report regarding issues relevant to Mr. Dhir. Ultimately, the witness professed to have had no contemporaneous knowledge of the *Bhullar* mistrial claiming to have acquired information concerning the matter at some later point in time after she learned of the problems in the *Sidhu* trial. Ms. Gamble testified that she had no contemporaneous knowledge of the *Bhullar* mistrial.

[172] Ms. Jhooty testified that Ms. Masrour asked to be provided a copy of the interpretation review document. Ms. Jhooty informed the court that she provided Ms. Masrour a copy at the same time as defence and Crown counsel. By a letter dated November 1, 2002, Crown counsel in the *Bhullar* prosecution, Ms. Reid, wrote a letter to the defendant's counsel stating:

I received the transcripts yesterday evening and have reviewed some of the same. I am significantly concerned about the manner of interpretation and am considering asking Justice Edmonstone to declare a mistrial even though we have the transcripts. This is because interpretation of the flavour of the evidence and the demeanor of the witness will seriously be impeded by the poor translation of her words. I believe that this may have caused significant prejudice to the case for the Crown.

[173] On November 4, 2002, *eight days before the misinterpretation in the Sidhu case*, Crown and defence counsel in the *Bhullar* trial submitted that a mistrial was the only remedy in light of the scope of the misinterpretation. Edmonstone J., never having declared a mistrial in his 25-year judicial career, declared a mistrial in the *Bhullar* proceeding finding that "the sufficient discrepancies" in the interpretation accuracy would make it "inappropriate to make findings of credibility".

(6) Court Services Division Response to the Mistrials

[174] According to Ms. Masrour, Ms. Wyatt was responsible for dealing with review of Ms. Jhooty's reinterpretation of Mr. Dhir's appearance in the *Sidhu* case. Ms. Masrour recalled discussing the matter with Ms. Wyatt saying "that maybe from now on Mr. Dhir should be working downstairs at set dates and bail hearings, and he should never go back to trials". Ms. Wyatt's reported response was "we cannot do that".

[175] Ms. Laws was asked her position of how, as a supervisor, she would deal with the problem of a mistrial occasioned by misinterpretation. She responded that while it might not "be appropriate to approach the judge" concerned, she would investigate to learn the cause by "talk[ing] to the staff and...consult[ing] with the stakeholders as well". An expert would have to be consulted for an evaluation regarding major interpretation discrepancies. Ms. Laws would order a transcript of the judge's mistrial reasons and likely contact Chris Rutledge about interpreter re-testing. Ms. Laws observed that Human Resources personnel would be consulted before removing an interpreter from court "because we're talking about an employment contract, and there's a lot of liabilities on the part of the employer". The witness was of the view that she could not act on her own because of the collective agreement – "every decision I make can be grieved by the employees".

[176] Gerri Wyatt testified that she learned, probably from Ms. Masrour, that Kastner J. had declared a mistrial in the *Sidhu* case because of unacceptable court interpretation. She understood Ms. Masrour had formed the view that Mr. Dhir should be fired. According to Ms. Wyatt, "my response was I had to investigate further". She tried to speak to Kastner J. regarding the *Sidhu* matter wanting "to get a better understanding of - - of what the difficulty was". She did so only "very briefly" because the judge did not feel it appropriate to discuss the matter with her. Ms. Wyatt provided this testimony:

Q. Did she [Kastner J.] also tell you if you have any questions, you know, what you should do [is] like speak to the lawyers, get a transcript, anything like that?

A. She - - I think she told me - - I don't recall.

[177] Ms. Wyatt acknowledged seeing part of a re-interpretation by another interpreter of the *Sidhu* mistrial. She understood there had been a problem with Mr. Dhir's interpretation performance. Asked what impression she then had and what action she took, the witness stated:

It was just a piece of - - something. I don't know if it was a piece of evidence...I don't know what it was.

...

I know there may have been words that might have been different or whatever, but contextual - - I - - I can't speak in law, but if - - the way the transcript was it really didn't mean a lot to me. I'm not a lawyer.

...

My understanding is that every word doesn't have to be exact in a transcript - - in an interpretation... That isn't an exact science. That in just as in English in other languages one word can mean more than one thing or - - or have different meanings.

...

The words were different. I don't know if - - if the whole complete meaning was different. I don't - - I don't recall.

[178] Asked whether she had any idea as to whether the problem in the *Sidhu* matter might be more serious than "use of alternate phrases with the same meaning", Ms. Wyatt responded: "I don't know" and gave this evidence:

Q. ...did you have concerns at the time that Mr. Dhir may be in court interpreting improperly?

A. ...Honestly, I don't - - I don't know. No, I - - I don't know what - - I don't know that he was interpreting improperly.

Ms. Wyatt added, "I'm not an expert in interpretation". She also considered Ms. Masrour was not "an expert in interpretation" generally or with respect to the Punjabi language.

[179] Ms. Wyatt was asked by this court her understanding of the term "mistrial" to which the witness replied:

Q. It would help me if I knew what you understood the word mistrial to be just to make sure that we are all on the same screen here?

A. That the process that the person pled not guilty, and they went through a - - a trial process. And at the end of the trial the judge found there was some reason to declare a mistrial, some reason in law to declare a mistrial.

Q. And, therefore, what is the result of that, as you understand it?

A. That they would then have the right to be tried - - that there could - - there could be another trial.

Q. Do you understand that to be a common occurrence or a relatively rare occurrence?

A. It's a rare occurrence, but I mean it's one I've seen.

Q. Do you know what the test is for the judge's exercise of discretion in declaring a mistrial?

A. I'm sorry, Your Honour.

[180] Gerri Wyatt testified that she then spoke to the Crown Attorney, Mark Saltmarsh, to seek some "guidance" about Mr. Dhir but was unable to secure anything in writing from his office. Ms. Wyatt recalled speaking to the Human Resources Branch as well – "the opinion was I didn't have anything to act on".

[181] Ms. Wyatt testified that she was of the view that "there was nothing else she could do to get to the bottom of it". She believed there to be "a lot of animosity between Mr. Dhir and Ms. Masrour" – she met with them to resolve what she saw as "personality conflicts". Commenting on the matters brought to her attention by the Coordinator, Ms. Wyatt again conceded she had no records regarding the issues and stated:

...had I been given something concrete to do with Mr. Dhir I would have recorded something in a personnel file.. I had nothing - - I didn't have anything particular to document.

...

I felt there wasn't much I could do from a labour point of view.

Examined further on the point, Ms. Wyatt was unable to explain why she did not take further steps to protect the public in light of Kastner J.'s reasons for the *Sidhu* mistrial judgment. At one point, the witness justified her position by saying, "Because of my understanding of how the interpretation works". The witness, under questioning, conceded that "a problem that potentially affects the administration of justice" is "very important" and a "more serious issue" than a personality conflict. Ms. Wyatt was then asked whether she had ever seen Kastner J.'s reasons for mistrying the *Sidhu* case. She responded that she believed she had read the reasons:

Q. And why did you understand the mistrial was declared then?

A. I understood that there were problems with the interpretation.

[182] Asked if she ever spoke to Mr. Dhir about the *Sidhu* mistrial:

No, I didn't because my understanding was that it's - - it's not a science. It's more of an art, and in - - there was nothing to approach him about...though a judge felt that it was problematic enough to cause a new trial to be started.

Ms. Wyatt added that she never spoke to Mr. Dhir as to whether his interpretations had resulted in mistrials “because [she] didn’t think that would be appropriate”. The witness was pressed further in cross-examination as to why she didn’t discuss the *Sidhu* re-interpretation document with Mr. Dhir:

...because I didn’t know what the issue exactly was with the transcript. Not the transcript but the interpretation...I wasn’t sure from looking at what I had. Like, I didn’t know what -
- what the issue exactly was to speak with him in relation to.
...

Well maybe I didn’t understand it correctly.

After Mr. King reconfirmed that Ms. Wyatt had indeed read the Jhooty re-interpretation document in the *Sidhu* case, he inquired why the witness was of the view that such matters as a missed sentence or interpretations with different meanings did not concern her or give cause to speak to Mr. Dhir:

Because my understanding of interpretation is it didn’t have to be exact as long as the gist of what was there was there. And that’s what - - I believed was there.

[183] Ms. Wyatt was referred to three other cases originating in Peel where interpreter issues had arisen: *R. v. Khanoukaev*, [2001] O.J. No. 2031 (QL) (S.C.J.); *R. v. Lee and Wu* (2002), 170 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Hossu and Stoicescu* (2002), 167 C.C.C. (3d) 334 (Ont. C.A.). Asked about her familiarity with the cases, the witness responded:

No, Your Honour, and I’m quite - - those names aren’t familiar to me.

[184] During her first appearance in the witness stand, Ms. Wyatt was quite certain she told her supervisor, Ms. Gamble, about the *Sidhu* mistrial. When recalled as a witness, Ms. Wyatt stated: “I believe I did...I can’t...I’m almost positive I did”. The witness added:

I believe it would have been shortly thereafter and I believe I also indicated to her that I tried to speak with Justice Kastner.

Ms. Wyatt described Ms. Gamble’s reaction in these terms:

I believe she was upset. She asked me did I look into it and I said I attempted to speak to Justice Kastner.

[185] Ms. Wyatt never went to a courtroom where Mr. Dhir was interpreting nor did she have his discharge of interpretation skills monitored by another Punjabi-speaking expert.

[186] Marilyn Gamble testified that when she first learned of the *Sidhu* mistrial in June of 2004 she was surprised and asked Ms. Wyatt whether she was aware of this 2002 proceeding and received a negative reply. Ms. Wyatt's testimony is to the contrary. Ms. Gamble testified that although she would typically be informed by the supervisor reporting to her of an order for the release of a court tape, she was never informed of the judicial orders relating to Mr. Dhir's cases. Ms. Gamble did however acknowledge that in 2002 she knew Ms. Wyatt had attempted to have Kastner J. "substantiate" a matter but was unsuccessful in doing so – she put the matter down to "there was personal dislike for Mr. Dhir". Ms. Wyatt testified that she had never discussed with Marilyn Gamble any judge's dislike for Mr. Dhir.

[187] Mr. Dhir was permitted to act as a court Punjabi/English interpreter in the criminal courts for another 19½ months after the date of the *Bhullar* mistrial, November 4, 2002 until June 24, 2004 when the *Garcha* trial and *Sidhu* appeal placed additional pressure on the Court Services Division to finally manage the issue of Mr. Dhir's competence to interpret.

(7) 2004 S.C.J. Proceedings "Force the Issue"

[188] For years, and certainly into 2004, Ms. Masrour was contacted by Crown prosecutors, on average two or three times a week, to have Mr. Dhir switched from sexual or spousal assault cases: "the Crowns have always been super sensitive about his performance". The witness added, "The complaints that the Crowns make to me are extremely valid. They are the guidelines for my work". According to Ms. Masrour, Ms. Wyatt said "she didn't care which interpreter the Crown wants" – they had to accept what was provided.

[189] Ms. Wyatt testified that Ms. Masrour told her the Crowns didn't want Mr. Dhir interpreting in their cases but not why. She recalled an instruction to Ms. Masrour to have the prosecutors come to her office. None did. At this point, according to Ms. Wyatt: "I wasn't sure if there were other difficulties with Mr. Dhir as well".

[190] With developments in the *Garcha* trial and the commencement of the *Sidhu* appeal, both in June of 2004, as counsel before this court described it, the

issue of what the Court Services Division knew, or ought to have known, of Mr. Dhir's interpretation competence was forced to the surface.

[191] Mr. Rutledge testified that in circumstances of a complaint about court interpretation performance, followed by an independent evaluation confirming a skills deficit, accreditation re-testing is generally appropriate. Mr. Rutledge, while recognizing that there exists "no set protocol for dealing with these complaints", expressed the view that the interpreter in question should be withdrawn from court "immediately" pending re-testing. The *Manual*, para. 6.1, provides: "Coordinators should refer all concerns or complaints about an interpreter's skills to the staff interpreter/translator in their region". Mr. Rutledge testified that in the case of contract or full-time interpreters, such a matter would initially be dealt with at the local courthouse, as the employer, with consultation in turn with his boss at the Ministry and with the potential for retesting. In the witness' words, "inevitably it seems to come back to me" as the person responsible for accreditation.

[192] Mr. Rutledge received no contemporaneous information respecting the *Bhullar* and *Sidhu* mistrials.

[193] Only weeks after her appointment as the Court Operations Manager, Ms. Jones was confronted with issues that preceded her entry to government. Initially, in June of 2004, she received a phonecall about problems in the *Garcha* trial relating to interpretation services. Within a short time, Ms. Jones learned of the 2002 *Sidhu* mistrial through correspondence from Mr. Moustacalis dated June 21, 2004. Although not possessed of a lot "of tangible information", she immediately comprehended that a problem with Mr. Dhir's interpretation skills would, apart from raising an employee relations problem, affect the administration of justice.

[194] According to Ms. Jones, "I decided if there had been a mistrial that I should remove Mr. Dhir from courtroom procedures". Although Ms. Jones had not seen any document re-interpreting any of Mr. Dhir's prior work, she spoke to Mr. Dhir with a union representative present on June 23, 2004 informing him that he was being withdrawn from court commencing June 24. Ms. Jones told this court, "I did not want Mr. Dhir in court during the time I was investigating it, just to prevent another situation occurring". The witness stated she would have been "uncomfortable" with Mr. Dhir remaining in court – "I didn't want anything to occur that could have been prevented". Mr. Dhir was assigned to administrative duties and, in consultation with Mr. Rutledge, arrangements were made for training in "protocols" but "not in language skills" while her investigation continued.

[195] Ms. Jones directed that tapes of court proceedings with Mr. Dhir interpreting be randomly selected for an accuracy review evaluation by “an independent service”. During the summer of 2004, to test the level of competence of Mr. Dhir, three identical tapes were sent to firms in Ottawa and Mississauga. The Ottawa test results returned with an “acceptable” evaluation while the Mississauga company, a translation company favouring a verbatim approach, was “very harsh” in its criticism of the interpretation samples.

[196] Ms. Jones informed Joanne Spriet (Director, Court Operations), of the test results but did not:

- (1) relate the Mississauga test results to the Crown Attorney for Peel or the defence counsel acting for defendants in proceedings on the three sample tapes
- (2) pass the test results to a Court Services Division lawyer for examination of whether material points within the proceedings were not correctly interpreted.

[197] During her investigation, Ms. Jones came to learn that there had been a mistrial prior to the January 21, 2003 *Sidhu* mistrial. She obtained information regarding the *Bhullar* case from Ms. Masrour. In this hearing, Ms. Jones testified as to her understanding of Ms. Wyatt’s knowledge of that mistrial” “I can’t recall if it was clear that she knew about” it.

[198] Ms. Jones elected to have Mr. Dhir retested using the Ministry SAT.

[199] Chris Rutledge first learned of urgent concern about Mr. Dhir’s interpreting proficiency when he returned from vacation in late July of 2004. Informed that another interpreter’s evaluation of a piece of Mr. Dhir’s interpretation work had called into question the adequacy of his interpretation skills, Mr. Rutledge arranged for a re-testing.

[200] In August of 2004, Mr. Dhir was given the basic or Standard Aptitude Test for Court Interpretation thereby treating him the same as a test candidate who had never interpreted in the courts. While Mr. Rutledge administered the test, the Punjabi and English segments were both sent out to independent evaluators. Mr. Dhir failed both aspects of the test.

[201] In light of the re-test results, Mr. Rutledge was of the view that one could not have faith in Mr. Dhir’s ability to interpret in the courts. Mr. Dhir has not

interpreted in the courts after June 23, 2004. The witness agreed that it followed that there may be problems with other of Mr. Dhir's court interpretations as yet unidentified pre and post 2002. The witness fully expected affected parties should be notified where reason existed to believe an interpreter may not have met prevailing standards as there "Could conceivably be" wrongful convictions. It would be "reasonable" to examine other tapes. Mr. Rutledge testified that to his knowledge the Ministry had made no attempt, beyond the randomly chosen tapes sent to the external agencies, to examine other proceedings in which Mr. Dhir interpreted given the cost and manpower issues involved – "once again the issue of budget would arise".

[202] The Coordinator, when asked, agreed that the interpretation quality of Mr. Dhir's past cases could be checked – "it would be difficult but it's doable". Of course tapes would only exist for consecutive interpretation of witness' testimony not for the simultaneous interpretation provided defendants.

[203] Ms. Jones determined that nothing had been done by the Court Services Division after the two 2002 mistrials to address the issue of Mr. Dhir's competency level to interpret in the criminal courts. He was constantly scheduled for a further 18 months – "nothing was really done about that situation until the *Garcha* case this year [2004]".

(8) The s.14 Charter Right Concerns Expand

(a) The Anonymous Letter, April, 2005

[204] During the appeal, in mid April of 2005, an anonymous letter (Exhibit 'A'), identified on page 4 of the document as from "Frustrated accredited Interpreters", was covertly delivered to the SCJ Regional Senior Justice, the Crown Attorney for Peel, and various Court Services Division personnel including Ms. Masrour. Disclosure of the letter was made to Mr. King and Mr. Moustacalis by more than one route.

[205] The letter raises multiple concerns on the part of its authors concerning practices of the Interpretation Coordinator's office in the Peel courthouse including the allegation of booking unaccredited interpreters daily in all types of proceedings but mainly those in weekend and set date courts "so their lack of language skills and lack of accreditation goes unnoticed". The letter included detailed tables with dates and names of unaccredited interpreters which on their face substantiate these assertions.

[206] Exhibit 'A' further asserts that Ms. Masrour recruits new interpreters "on the spot" and omits the names of unaccredited interpreters in the daily posted interpreter list. The document asserts that fully accredited local interpreters are being excluded in preference for the use of unaccredited interpreters.

[207] While the anonymous letter and its detailed tables respecting the scheduling of unaccredited interpreters did not itself become a numbered evidentiary exhibit on appeal, its subject matter very much became a focal point for more intensive inquiries by both counsel on appeal as outlined below.

(b) M. Bhandhal

[208] According to Ms. Masrour, she met Manjeet Bhandhal in 2001 in the Peel courthouse. Ms. Bhandhal was looking for a job and asked if she could be hired as an interpreter. Needing a Punjabi-speaking interpreter for weekend bail courts, Ms. Masrour told her that "only if she accepts work on the weekends, I would definitely send her for the test". Ms. Masrour testified that she may have used Ms. Bhandhal to interpret in some weekend bail matters before she was accredited by Mr. Rutledge.

[209] Ms. Jhooty clearly recalled the occasion of Ms. Bhandhal first coming to the Peel courthouse. Ms. Masrour brought the job applicant to her saying "this lady speaks Hindi very well". She was directed by the Coordinator to take her to the Diversion Court to see if she speaks Hindi, and if so to leave her there to interpret for the remainder of the day. Ms. Jhooty testified that: "Ms. Bhandhal had declared openly in the beginning that [she had] never spoken Punjabi in my life before entering this building". Nevertheless, according to Ms. Jhooty, Ms. Masrour directed her to provide Ms. Bhandhal "enough terminology so that she can handle bails on the weekends". The witness added that because Ms. Masrour understood there was not a big demand for Hindi interpretation in the courthouse:

...so she says Ms. Bhand[h]al will have to learn to do interpretation in Punjabi, so you give her Punjabi terminology.

[210] Ms. Masrour testified that she then interpreted in weekend bail courts for about two years. Ms. Masrour also stated that Ms. Bhandhal was "gradually...introduced to the rest of the proceedings during the week". She would shadow Mr. Dhir and Ms. Jhooty on weekdays as they discharged their interpretation responsibilities.

[211] Agreed facts filed in this appeal establish the following:

A review of her invoices shows that Ms. Bhand[h]al appeared as an interpreter in criminal courts in Brampton on at least 23 days prior to taking the accreditation test on August 10th, 2001. She failed that test, but on the next day she was interpreting in criminal court in Brampton and she worked an additional 77 days before she passed her accreditation test on July 9th, 2002.

Mr. Rutledge believes that Ms. Bhandhal cannot read Punjabi.

[212] Ms. Masrour testified that despite direction from Gerri Wyatt, it seems in 2004, to split the Punjabi/English interpretation workload between Ms. Jhooty and Ms. Bhandhal, she did not do so because, in her words, “I did not accept that because I was very worried to send her [Bhandhal] to trial” – “I did that for the sake for the courts”.

[213] In her first trial, *R. v. Singh*, June 11, 2003, presided over by Wilkie J., Ms. Bhandhal was unable to correctly get through the arraignment and the plea. She was replaced by S. Mukhi, an accredited interpreter who had not been in a criminal court in two years, who alerted Wilkie J. that “it might not be in the best interests of the defendant [for him] to do the trial”. Ultimately, Ms. Jhooty was assigned to the trial.

[214] In December of 2004, a case was mistried by Ready J. related to the quality of Ms. Bhandhal’s interpretation.

[215] In a January 2005 OCJ trial, *R. v. Mann*, Mr. Mangat, a Punjabi-speaking criminal defence lawyer, secured release of a tape of Ms. Bhandal’s interpretation in that trial. Ms. Jhooty undertook an evaluation of the trial interpretation and found there to be flawed interpretations from the outset. Even taking into account that she has the advantage of playbacks, Ms. Jhooty determined that the interpretation did not meet a minimal standard – “there has to be a basic, basic accuracy level”.

[216] Mr. Bhangal, a Punjabi-speaking criminal lawyer in Peel, wrote to Ms. Jones on January 21, 2005 to indicate he had had “numerous discussions directly with Ms. Bhandhal, with regards to her inability to translate properly”. Counsel reported that in an OCJ trial, *R. v. Sohi*, Ms. Bhandhal had been unable to interpret correctly from Punjabi to English with regard to parts of the human body. Mr. Bhangal’s letter further stated:

The interpreter co-ordinator, Ms. Masrour, was present in court when I raised my concerns about the mistranslation. Also, she was present when on two occasions, Ms.

Bhand[h]al was not aware that she needed to translate the legal issues being discussed with the Court on an objection to a question being asked by the Crown.

I was offered by Ms. Masrour to have other Punjabi interpreters assist me in my trials in the future. However, my concern is not about my own trials, but rather about the administration of Justice and the injustice that can arise from such serious errors.

[217] Ms. Masrour testified that when Mr. Bhangal spoke to her about not booking Ms. Bhandhal for any of his cases she told him to speak to her supervisors. According to the Coordinator, subsequently, Ms. Laws and Ms. Jones contacted her to say Ms. Bhandhal was not to be used in any trials.

[218] Mr. Rutledge recalled that reported problems with Ms. Bhandhal's interpretation proficiency began to surface in December of 2004. An audit of two problem cases led to tapes from two different cases being sent to external evaluators. The evaluation results were negative demonstrating a skill level "below that expected of an interpreter" giving rise to further concerns about the interpreter's competence.

[219] Mr. Rutledge reported that he had Ms. Bhandhal retested in early March of 2005 and she received passing marks in Hindi and Punjabi.

[220] Since late February of 2005, Ms. Bhandhal has not been used to interpret in the courts as her contract for Punjabi/English interpretation was terminated.

(c) Use of Unaccredited Court Interpreters

(i) The Ministry Policy

[221] Para. 2.1 of the Ministry *Court Interpretation Services Manual* (as amended to April 2004) (the *Manual*) states that the "Court Services Division provides interpretation services using accredited court interpreters, except in situations described in section 2.3.1". Para. 2.2 provides:

Accredited interpreters are listed in Court Services Division's *Registry of Accredited Freelance Court Interpreters*. Coordinators must use the Registry when booking interpreters for court. The Registry is updated regularly and available electronically to every court in the province.

[222] Para. 2.3.1 read, until amendment in October of 2004:

Unaccredited interpreters may only be used in situations of extreme urgency and only for certain procedures.

...

A coordinator who has exhausted all means to find an accredited interpreter may use an unaccredited interpreter for the following types of proceedings:

- Bail court
- Setting of an adjournment
- Setting of a trial date

[223] The October amendment broadened the permissible use of unaccredited interpreters in exigent circumstances to include any type of criminal proceeding including trials:

Unaccredited interpreters may be used only in situations of extreme urgency.

[224] Ms. Laws equated the Ministry accreditation process to fulfilling the needs of the court:

Q. Was there anything particular to Brampton about making sure that interpreters who come to this building are doing the job well?

A. We're using accredited interpreters.

[225] Ms. Wyatt understood that for freelance interpreters "there's an accreditation system that they have to go through".

(ii) Witnesses Alleging Routine
Use of Unaccredited Interpreters

[226] Beyond the allegations of the anonymous letter, and the findings of Ms. Bhandhal's pre-accreditation use, Mr. King and Mr. Moustacalis produced admissible evidence of routine, not emergency, use of unaccredited interpreters.

[227] Ms. Jhooty testified that the Interpreter Coordinator did indeed use unaccredited interpreters, "maybe even trials before they take the test" and certainly in bail and assignment courts. In her view, Ms. Masrour was not qualified to decide who should become a court interpreter. As far as she could tell, Ms. Masrour had "Most interpreters...interpreting for a year or two before they" took the accreditation test:

I have seen a lot of interpreters being created out of nowhere, just some fresh person coming to court looking for work, go to court 409 for example, go do something there or just go to court 107. I know most interpreters aren't brave enough to talk about it, but few of them actually talk about it and say that is not fair. Because one of our interpreters was sent to 107 right away, our Korean interpreter. She went there. She was talking in third person. He is saying this, she is saying this. She was scolded by the lawyer. She came out, she was very, very disturbed. What did I do wrong. Then when she found out, that's not what I was supposed to be doing. She says, oh, somebody should have told me how to do it.

[228] Ms. Jhooty testified that these unaccredited interpreters are not monitored in any way. The unaccredited interpreters used by Ms. Masrour, in her view, are interpreting “without basics” – they often don't have language skills in their own language let alone English – “I would think most of the trials would be inadequate interpretation or just simply lack of accuracy”. According to Ms. Jhooty, the unaccredited interpreters “are very, very vulnerable” – “it is a matter of control” by Ms. Masrour who has said to these persons “but for me, you would never be an interpreter”.

[229] When Ms. Jhooty's attention was drawn to para. 2.3.1. of the *Manual* with its “extreme” urgency limitation, she stated: “I did not know there was such a policy in Ontario”.

[230] Ms. Jhooty indicated that in her own case after taking the test, but while awaiting her test results, she was permitted to do a couple of in-court assignments.

[231] Ms. Cecilia Arce's evidence, supported by dated invoices, is that she acted as a Spanish interpreter for Ms. Masrour, without Ministry accreditation, from 1994 to 1997 until the Coordinator came to her in 1997 and said:

You've been interpreting every day even in trials so I need you to get accredited because I can get into trouble. I am going to send you to Chris Rutledge to test you.

Ms. Arce then took and passed the SAT accreditation.

(iii) The Interpreter Coordinator Testifies that
Unaccredited Interpreters Not Used in Trials

[232] Early in her testimony, Ms. Masrour described her duties as booking “interpreters from the roster of accredited interpreters who have been accredited

by the Ministry of the Attorney General”. Ms. Masrour testified that the “guiding principle” is that:

...at no time a non-accredited interpreter has ever appeared in any trial, so basically all the trials and invoices of the interpreters will attest to that. All the trials will always have the benefit of an accredited interpreter. (emphasis added)

This theme was repeated elsewhere in the Coordinator’s evidence:

Q. Am I correct then, from what you have just told us that for trials you only use accredited interpreters?

A. **Either we provide nobody or interpreters who are accredited, that’s all.**

...

...so basically, these people weren’t interpreting anything *per se* and had it been for any trial or anything which would have caused concern, I would definitely have taken other measures...

...

None of these people have done any trial. It has always been the court work outside of - - the paperwork and either bail on the weekend or Diversion or 409 court which is traffic appeal court.

...

None of these interpreters have done trials.

...

I have never subjected any person in the trial with [a] non-accredited interpreter.

...

I have not sent anybody for a trial who has not been accredited.

...

No, I do not admit that. Consciously and knowingly I have never done that. **I’ve never assigned a non-accredited interpreter on a trial purposefully, no.**

...

...but I never assign purposefully a non-accredited interpreter for a trial. (emphasis added)

[233] Ms. Masrour testified in respect of two interpreters, Zybulko and Nejati, that because they were unaccredited, “that’s why I made sure that I wouldn’t use them for trials”. Examined on a scheduling sheet of September 20, 2004 showing Ms. Zybulko as the Polish interpreter for the trial of *R. v. Zawitkowski*, Ms. Masrour’s response was “I don’t know if the trial happened”. Initially questioned about the *Ryback* murder case, Ms. Masrour professed to have no

recall of assigning Ms. Zywuiko to that prosecution. Subsequently, the witness was forced to acknowledge that she had used Ms. Zywuiko to interpret in the *Ryback* murder trial. On June 16, 2003, Ms. Masrour personally addressed the presiding trial judge, Thomas J., as to her intentions to provide a replacement Polish interpreter in the case:

THE COURT: So have you got a - - - a first-rate interpreter for tomorrow or not?

INTERPRETER CO-ORDINATOR: I did my best and I got somebody here, yes, tomorrow.

THE COURT: Ah. Somebody, you mean the - - -

INTERPRETER CO-ORDINATOR: **They are all first-rate; they are all accredited** - - -

THE COURT: Oh well - - -

INTERPRETER CO-ORDINATOR: - - - **by the Ministry of the Attorney General.**
(emphasis added)

On June 17, 2003, Ms. Zywuiko was assigned to the *Ryback* trial replacing the interpreter who commenced the day's proceedings.

[234] Pressed in examination with the suggestion she had used unaccredited interpreters in trials, Ms. Masrour stated that at times such interpreters may have been assigned to trials the OCJ Trial Coordinator had, in advance, told her would *not* proceed. The witness stated she had instructed unaccredited interpreters to alert her if they ever found themselves in a situation where they might be compelled to interpret trial proceedings. Asked again as to whether a "few" unaccredited interpreters may have "slipped" onto trials, the Coordinator finally stated, "I don't know". Toward the conclusion of her testimony, the Coordinator acknowledged it was "possible" this had occurred.

[235] A review of invoices filed by non-accredited freelance interpreters covering the 4 year and 4 month time period April 1, 2001 to July 31, 2005 (the Invoice Review, Exhibit #28), establishes that unaccredited interpreters did act in trial matters although the only confirmed jury trial case is *R. v. Ryback*.

(iv) The Interpreter Coordinator Office's
Use of Unaccredited Interpreters
in Non-Trial Proceedings

[236] Para. 2.3.1 of the *Manual* reads:

A coordinator regularly experiencing a shortage of accredited interpreters should notify the staff interpreter/translator in their region to arrange for further recruiting and testing.

[237] Mr. Rutledge testified that Ms. Masrour had only reported to him chronic difficulties securing accredited Cantonese and Mandarin interpretation. Aside from that, in the witness' words, "It has been a while since I have been called by this courthouse saying we need more interpreters in such and such a language". He had received no call from Ms. Masrour or Mr. Brum for a least a half a year prior to his May 3, 2005 testimony in this appeal. There had been no discussion with the Coordinator about advertising in newspapers for additional accredited court interpreters.

[238] Chris Rutledge testified it would be "contrary to the policy" to have an unaccredited interpreter working "regularly", for example for a year, "if there were any accredited people available" except perhaps in the instance of "a specific emergency" involving a "terribly obscure" language. Mr. Rutledge was certain that in the area servicing the Peel courthouse there were more than enough accredited Polish and Spanish interpreters. Indeed, the witness noted "we have lots and lots of Spanish" interpreters from 1994 onward with the most available interpreters in that language – there would be no reason to have an unaccredited Spanish interpreter working regularly. It would be quite "irregular" for an unaccredited Polish interpreter to be used "on a regular basis" in the Peel courthouse. Mr. Rutledge stated that in the two years preceding his 2005 testimony in this case he had received no information about difficulties accessing accredited Polish interpreters. Mr. Rutledge stated that there were a "reasonable" number of accredited Vietnamese interpreters in the Mississauga area. There is "a fairly good supply of Farsi interpreters" and Brampton "is covered" for Hungarian interpreters.

[239] Mr. Rutledge testified that an Interpretation Coordinator pressed to use an unaccredited interpreter in circumstances of extreme urgency should always elect to use an unaccredited interpreter who has not taken the SAT not one who has failed that accreditation test.

[240] Mr. Rutledge noted that an Interpreter Coordinator is to exhaust a search for “local” accredited interpreters. In the Registry of Freelance Interpreters, with each accredited interpreter assigned a “headquarters”, priority is given to those local interpreters. The Coordinator can move a search outside Peel when necessary within a reasonable search area. Mileage and meal expenses then arise. In rare cases, for example in lieu of bringing an accredited interpreter from Ottawa to Peel, the Coordinator could use a local private sector interpreter agency. Mr. Rutledge related to the court that some Coordinators have reported to him that “they have been told to not use people outside their headquarters if at all possible to save mileage”.

[241] Ms. Masrour testified that at times she seeks accredited interpreters from Toronto – “my first choice is always to have an accredited interpreter”. According to the witness, she would “have to challenge management to get people from out of town”. On occasion, she has used unaccredited interpreters, in her words, “using them very discreetly and in situations such, as, you know, very urgent”. Ms. Masrour admitted that she had recruited interpreters to watch various proceedings, and:

Sometimes they do set a date or something on the weekend which is very minimal and then go for the test. So, they would be familiarized with the stress of the court.

[242] In the Coordinator’s office, there is no computerized scheduling; it is all done manually. The Coordinator recalled occasional use of unaccredited interpreters for weekend bail hearings and outside of court, for example, when a document such as a probation order had to be interpreted for a defendant.

[243] When the Coordinator was seriously pressed in examination, she finally acknowledged widespread use of at least a handful of local and “available” unaccredited interpreters who had interpreted in the Brampton courts for a number of years. She knew these individuals (for example, Ardekani (Spanish), Zywulko (Polish), Nejati (Farsi), Nguyen (Vietnamese), Szakos (Hungarian)) did “not have papers as far as the Ministry is concerned”. She believed most of these persons were accredited by the Immigration and Refugee Board or had acted as cultural interpreters trained to be sensitive in spousal and sexual assault cases. Ms. Masrour fully knew she was using interpreters not only unaccredited by the Ministry *but also individuals who had failed the SAT accreditation process*. In Ms. Masrour’s personal view, “there are many, many good interpreters who are not accredited and who have even - - were not able to pass the test”. Speaking to the Ministry SAT process, the Coordinator stated, “For me that paper

only means that that interpreter could only pass that kind of test”. Ms. Masrour gave this evidence:

- Q. ...if you can't pass the test given by Mr. Rutledge then a person is not going to perform very well in court at all, right?
- A. I don't agree with that.

In contrast, in a different part of her evidence, Ms. Masrour stated:

But interpreters when they pass the test of becoming an interpreter - - accreditation test, I don't care where they came from...when they pass the test, they pass the test.

[244] Ironically, earlier in her evidence, Ms. Masrour stated that Immigration and Refugee Board interpreters “Wouldn't know how to interpret because they have focused on that particular part of the immigration law and on all those things”. Ms. Masrour described her understanding of the interpreter certification test of the Board to be a written test without the pressure of someone like Mr. Rutledge standing by watching which can cause nervousness. Despite acknowledging the courtroom pressures of trial participants and members of the public watching an interpreter work, the Board test, in Ms. Masrour's view:

...did not have the stress and the panic which our test would create in anybody who is a little nervous.

...

It's more intellectual, writing, **translating** rather than...the time sensitive issues and the fact that somebody is waiting and listening to you. (emphasis added)

[245] Ms. Masrour further acknowledged that she did not alert Ms. Laws or Ms. Wyatt to her prevalent use of unaccredited interpreters. When she was ill for a time in 2004, Mr. Brum “just carried the system the way it was”. The Coordinator informed this court that when she encountered shortages of accredited interpreters, she used unaccredited interpreters rather than delay the courts.

[246] Questioned as to whether she used Cecilia Arce, a Spanish interpreter, in any proceedings prior to her 1997 accreditation by the Ministry, Ms. Masrour replied “never” and “there was no way she would have done any trials before” accreditation. Deep into intensive cross-examination, Ms. Masrour said “I cannot recall” when requested concerning her possible use of Ms. Arce's pre-accreditation services.

[247] Ms. Masrour testified that she had let it be known to Gayle Laws that she required access to more accredited interpreters in the Polish, Tamil, Mandarin, and Cantonese languages. However, when it was suggested to the witness that Mr. Rutledge had only been contacted regarding Cantonese and Mandarin interpreters, Ms. Masrour replied: "Correct". Later, in a separate day's testimony, Ms. Masrour described a shortage in Peel of accredited Tamil, Filipino, Cantonese, French, Polish, Mandarin, Tagalog and Creole interpreters. The witness claimed to have sent e-mails to Mr. Rutledge regarding these shortages before correcting herself to say that the communications had been directed to Gayle Laws. Ms. Masrour admitted in her evidence she never contacted Chris Rutledge to complain about any shortage of Spanish interpreters. Her solution was to use Ms. Ardekani "until the issue would be resolved about interpreters who are on contract and if they could work more".

[248] The Coordinator acknowledged as "an error in judgment" her decision to routinely use unaccredited interpreters for weekend bails – with those bail courts she had felt "that there would not be anyone who would create problems". She did not spend much time on the weekend bookings, in her words, "because I felt it was a waste of time" and:

On the weekends for me, just to be very honest with you, it was a game for me, so I didn't even put things in a book, so it has not been logged.

[249] Asked why she felt it more acceptable to use unaccredited interpreters in bail courts, Ms. Masrour replied:

...any individual...has the right to have the best service possible.
...

And that best service possible in the perfect world would come from an accredited interpreter and I understand that.

[250] Confronted with Table B in Exhibit "A", the anonymous letter of April, 2005, setting out specific dates when specific unaccredited interpreters had been scheduled from April, 2004 to February, 2005, she noted the detail and stated "probably this is correct" and "I think the person who has done the letter is an accurate person as far as the numbers are concerned". Having committed to the position in her evidence that she had used unaccredited interpreters only for weekend bails, it was pointed out to Ms. Masrour that of the 89 days documented in the relevant table of unaccredited interpreter use only one day was in fact a weekend day:

I have difficulty with that Your Honour. If there are week days I have difficulty with that.

[251] Para. 2.3.1 of the *Manual* obliges a Coordinator, before turning to unaccredited interpreter assistance, to record efforts to acquire an accredited interpreter:

Coordinators should first exhaust the list of local interpreters in the Registry who could reasonably be expected to make it to court at the time required. The effort to reach an accredited interpreter must be carefully documented.

Ms. Masrour testified that her office had not consistently followed the set policy prior to December of 2004.

[252] Exhibit #28, the Invoice Review document, states that, for years, *in addition to trials*:

Unaccredited interpreters dealt with all types of proceedings, including:

- a. Ontario Court of Justice and Superior Court of Justice assignment court;
- b. contested bail hearings and consent releases;
- c. guilty plea and sentencing proceedings at both levels of court;
- ...

The use of unaccredited interpreters for guilty pleas and trials happened at a time when the Ministry of the Attorney General's policy on the use of unaccredited interpreters allowed for their use only in bail court and on set-date proceedings.

(emphasis added)

[253] The Invoice Review establishes, among other things, that in a period of less than four and a half years, on a total of 2670 days, the Interpreter Coordinator used ten unaccredited interpreters who had *failed* the SAT accreditation test anywhere from one to four times. Tables 1 and 2 of Exhibit #28, read as follows:

Table 1: Number of days in court for freelance unaccredited interpreters who failed the Ministry of the Attorney General accreditation test

Name	Year(s) failed	Language(s) interpreted	2001 *	2002	2003	2004	2005 *	Total
Diana Zywuiko	2005 (twice)	Polish	78	173	185	230	40	706
Agnes Wong	2000, 2003	Cantonese and Mandarin	50	226	237	25	0	538
Anita Ardekani	2002	Spanish	90	119	125	141	16	491
Mitra Nejati	1998	Farsi	90	101	71	120	20	402

Ravi Thamboosamy	1989, 1991, 1993	Tamil	10	8	82	85	0	185
Mary Szakos	1999	Hungarian	16	45	41	38	8	148
Ho Young Yoon	1998	Korean	79	0	0	0	0	79
Bharti Ondhia	1992	Gujarati	9	5	23	19	12	68
Luan Pham	1999, 2003, 2004 (twice)	Vietnamese	0	14	16	13	0	43
Nedzmi Aliovski	1996	Albanian	1	5	4	0	0	10
Totals			423	696	786	671	96	2670

*Totals for 2001 cover invoices from April 1st, 2001 to December 31st, 2001. Totals for 2005 cover invoices from January 1st, 2005 to the end of July, 2005.

Table 2: Number of days in court for freelance unaccredited interpreters who had not taken the Ministry of the Attorney General accreditation test

Name	Language(s) interpreted	2001*	2002	2003	2004	2005*	Total
Alex Barning	Twi, Bengali	42	42	46	30	27	187
Prem Chima	Gujarati, Punjabi, Hindi	0	0	0	5	12	17
Joo-Yong Chong	Korean	0	23	6	1	0	30
Marinos Georgato	Greek	4	7	1	0	0	12
Bharati Ghatalia	Gujarati	15	27	10	0	0	52
Bernadette Isaacs	Sinhalese	0	0	2	1	7	10
Mila Kanev	Russian	7	0	20	16	1	44
Marlene Klopfer	German	2	33	12	0	0	47
Eugenia Loga	Romanian	0	0	15	0	0	15
Vuthy Oung	Cambodian	0	11	3	0	0	14
Pobeola Piskaceva-Ristic	Serbian, Croatian, Bosnian, Macedonian	17	4	23	19	3	66
Razuan Rimniceanu	Romanian	0	10	2	0	0	12
Ky Somsy	Laotian	0	5	9	3	0	17
James Szakos	Hungarian	3	8	6	0	0	17
Binod Thapa	Nepali	0	0	5	7	4	16
Elizabeth Vago	Spanish	0	11	0	2	0	13
Maria Vanaudenaerde	Dutch	7	0	2	1	0	10
W.J. Zywuiko	Polish	1	7	5	0	0	13
Totals		98	188	167	85	54	592

*Totals for 2001 cover invoices from April 1st, 2001 to December 31st, 2001. Totals for 2005 cover invoices from January 1st, 2005 to the end of July, 2005.

(v) 2005 – More of the Same

[254] It appears that in the aftermath of the revelations of the summer of 2004 already described, Ms. Laws confronted the Coordinator in December of 2004 with a number of management concerns.

[255] Ms. Masrour admitted that at about the beginning of 2005 she acknowledged to Ms. Laws her routine use of unaccredited interpreters on weekends – “I told her the truth”. She was directed to discontinue the use of all unaccredited interpreters and to follow the *Manual* policies. The Coordinator testified she has since complied: “Now everybody on the weekend is an accredited interpreter”. Describing her new approach, Ms. Masrour testified, “But my basis is if an interpreter is accredited, that is how I - - I go by the book”. The Coordinator testified that, concerned in earlier years never to delay a court on account of interpreter unavailability, her current policy is to have an accredited interpreter even if it means no interpreter is present when a case is called.

[256] Although Ms. Masrour repeatedly referred to reform of the system after her December, 2004 meeting with Ms. Laws, Tables A and B of the Invoice Review reveal, *in 2005*, not only 54 instances of use of unaccredited interpreters but also 96 instances of use of unaccredited interpreters who *failed* the Ministry’s SAT accreditation process.

(d) Additional Non-compliance with the
Ministry Court Interpretation Services Manual

(i) Disclosure of Use of Unaccredited Interpreter

[257] Para. 2.3.1 of the original and revised *Manual* directed that:

If an accredited interpreter cannot be found in time for a court date, the coordinator should seek assistance from the staff translator/interpreter **and notify the judge, the Crown and defence counsel of the situation.** (emphasis added)

[258] Mr. Rutledge confirmed the importance of this policy during his testimony.

[259] Ms. Masrour testified that prior to 2005 she never followed this mandatory policy and at no time informed the OCJ Local Administrative Justice

or Local Administrative Justice of the Peace or anyone else in courtrooms in which unaccredited interpreters appeared of the presence of such an interpreter:

...it was a mistake, error in judgment. I have changed the situation ever since.

[260] On June 17, 2003, in the murder case of *R. v. Ryback*, Ms. Zywuiko was assigned as the Polish interpreter on the case presided over by Thomas J. In her testimony, Ms. Masrour testified:

I sent Diana Zywuiko in and just - - they wanted to adjourn to another day. So, I mentioned this is a non-accredited interpreter...and Justice Thomas said I want this woman.

A review of the *Ryback* transcript shows that the trial judge was never apprised of the interpreter's unaccredited status and, as is evident from the transcribed excerpt noted at para. 233 *supra*, would have been led to quite the opposite conclusion.

[261] When examined further by counsel, with Ms. Masrour able to see that counsel had the *Ryback* transcript in court, the witness claimed not to remember whether she told Thomas J. that Ms. Zywuiko was an unaccredited court interpreter.

[262] Ms. Masrour described her conversion to compliance with Ministry policy:

However, **I started this practice again as of Christmas**, as soon as the...complaint was forwarded to Gayle Laws, then after that **any time that we are dealing with non-accredited interpreters, I make a point to go to the courtroom and I explain that to the Crown and there have been many duty counsel...I am actually sharing it with everyone concerned as of this Christmas [2004].**

...

I always explain to the court, loudly and the last time I did that was last Tuesday again... These are only bail courts or set-date courts, never in any other court.

...

[since December 2004] every single time I make a point to do that.

...

...from this Christmas [2004] on even for the bail hearings if I have non-accredited interpreters for even consent bails, I immediately tell the court and this has been our practice for the last six months.

...

...it is my practice and Mr. Brum does the same.

(emphasis added)

[263] After this testimony, and the continuing investigation by Mr. King, it was discovered, on a random selection of 26 *transcripts* in which unaccredited interpreters appeared between January 1 and July 31, 2005 that in *no* case were the court or the parties informed that the court interpreter was unaccredited.

(ii) Use of Two Interpreters

[264] Section 3.3 of the Ministry *Court Interpretation Services Manual* reads:

Assigning Two Interpreters

As a general rule, two interpreters should be assigned to a case in any of the following circumstances:

- The matter is scheduled to last more than two days, and interpretation is continuous
- The matter requires simultaneous interpretation of lengthy and complex matters (such as lawyer's submissions) for three or more hours
- Visual language interpretation is required for more than two hours
- The interpreter assigned to the case indicates the need for another interpreter

[265] Ms. Masrour testified that the use of interpreters has *not* been the practice for trials in Peel lasting longer than two days. However, whenever “any interpreter says that she or he needs help, the help is immediately sought”. The witness stated that “although this might be costly” she is prepared “to fight with management” or her supervisor for approval to incur the additional expense. According to Ms. Masrour, “I have never practiced this [assigning two interpreters] unless it was asked of me”. She has not been inclined to follow “the normal rules” of the *Manual* on this issue.

[266] Mr. Rutledge testified that for trials lasting more than a few hours there should be two interpreters relieving one another every 30 to 60 minutes because of the degree of concentration required in continuous interpretations whether simultaneous interpretation for an accused or consecutive interpretation for a lengthy, multiple-witness proceeding ongoing all day.

[267] Ms. Jhooty noted that United Nations and other simultaneous interpreters spell each other off in a working environment to avoid exhaustion – “ideally two interpreters would be booked who would switch every 30 minutes,

because it is an hazardous activity to us” – “because simultaneous interpretation involves shallow breathing”.

[268] Ms. Jhooty testified “we end up working in whatever conditions are available to us and we just keep doing it”.

**(9) The Loss of Court Time on
November 12, 2002 in the *Sidhu* Trial**

[269] As summarized above at para. 27-8, Kastner J.’s court was double-booked on November 12, 2002 depriving the *Sidhu* trial of the 10:00 a.m. to 1:00 p.m. hours originally assigned.

[270] Examination of additional court documents filed on appeal establishes that the conflict arose as a result of the scheduling of *R. v. Pooran Kussian*, a case of assault, criminal harassment and threatening death. Kussian’s first OCJ court appearance was January 21, 2002 over four and a half months *after* *Sidhu* first came before the courts.

[271] On February 18, 2000, Blacklock J. set the *Sidhu* case as a two-day trial for October 30 and November 12, 2002. A month later, March 19, 2002, the *Kussian* case was scheduled as a one-day trial for September 23, 2002. When the *Kussian* trial did not finish before Kastner J. on that date, it was remanded, inexplicably, for completion to November 12, 2002 for at least a two-hour continuance thereby creating the conflicting overbooking. With OCJ trial scheduling effectively removed from the hands of individual judges to the OCJ Trial Coordinator as described by Durno J. in *R. v. Spajic*, [2003] O.J. No. 2791 (QL) (S.C.J.), it is apparent that the Trial Coordinator, for whatever reasons, sacrificed timely completion of the older case (*Sidhu*) in preference for the *Kussian* matter.

(10) Additional Prejudice Evidence

[272] In addition to the significant fees for these appellate proceedings, Mr. *Sidhu* was required to pay his trial counsel an additional \$10,000.00 to complete his OCJ trial on account of the mistrial before Kastner J.

ANALYSIS

(1) The Section 14 Charter Right

(a) Introduction

[273] Section 14 of the *Charter* reproduced in the Punjabi language at para. 2 *supra*, provides:

A party or a 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.

[274] As the constitutional right to the assistance of an interpreter lies at the heart of the appeal and the originating notices of application before the court, understanding the contours of this guarantee is a sensible start-point.

(b) The Constitutional Underpinnings for Interpreter Assistance

[275] The right to the assistance of an interpreter constitutes a fundamental right already recognized at common law, now protected by s.14 of the *Charter* – the right to a fair trial including the ability to make full answer and defence: *The Queen v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.), at pp. 232-7; *Re Roy et al. and Hackett et al.* (1987), 62 O.R. (2d) 365 (C.A.), at pp. 373-6. “It is long-settled that a competent translation is fundamental to a full and fair hearing”: *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000). The question of adherence to the guarantee of qualified interpreter assistance “is no trivial issue, for it goes to the essence of a defendant’s right to a fair trial”: *United States v. Ko*, 722 A.2d 830, 834 (D.C. Cir. 1998).

[276] In the United States, various circuit courts have held that the right to a competent interpreter amounts to a constitutionally protected guarantee “where a defendant’s inability to communicate in English interferes with the defendant’s Sixth Amendment right to confrontation or the defendant’s Fifth Amendment due process right or his right to testify on his own behalf”: *United States v. Si*, 333 F.3d 1041, 1042-3 (9th Cir. 2004); *United States v. Carrion*, 488 F.2d 12, 14-5 (1st Cir. 1973) (*cert. denied*, 416 U.S. 907 (1974)); *United States ex rel Negron v. State of New York*, 434 F.2d 386, 389-91 (2^d Cir. 1970); V.E. Hench, “What Kind

of Hearing? Some Thoughts on Due Process for the Non-English Speaking Criminal Defendant” (1999), T. Marshall L. Rev. 251, at pp. 263-274.

[277] Fundamental fairness and equal access to the courts for linguistic minorities demands purposeful interpretation of the s.14 *Charter* right. “The right to a fair trial is universal and cannot be greater for members of official languages than for persons speaking other languages”: *The Queen v. Beaulac* (1999), 134 C.C.C. (3d) 481 (S.C.C.), at para. 41. While “the right to interpreter assistance is to create a level and fair playing field, not to provide some individuals with more rights than others”, a “multicultural society can only be preserved and fostered if those who speak languages other than English and French are given” full access to the justice system: *The Queen v. Tran, supra*, at pp. 239-41.

[278] Complementing the s. 14 *Charter* right is the constitutional mandate to provide more than mere lip service to s.27 of the *Charter* “which mandates that the *Charter* be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”: *The Queen v. Tran, supra*, at pp. 239-40. In the United States, it has been observed that: “Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores”: *United States v. Si, supra*, at p. 1042; *United States v. Negron, supra*, at p. 390.

[279] Implicated in the constitutional guarantee of the assistance of an interpreter are a number of significant factors inherent in real and substantive access to justice:

- (1) Denial of interpreter assistance constructively denies the defendant’s constitutional, statutory and common law right to be present in every respect at his or her trial and to understand and answer the case to meet and to comprehend all proceedings which affect his or her vital interests:

...the accused, by reason of being deprived of the assistance of the interpreter, was not present for that part of the proceedings... We are of the view he was no more present than if he were unconscious as the result of a heart attack or stroke, and was effectively denied any meaningful presence as if he had been physically removed from the courtroom during that part of the proceedings.

(*R. v. Petrovic* (1984), 13 C.C.C. (3d) 416 (Ont. C.A.), at p. 424)

See also: *The Queen v. Tran, supra*, at pp. 229-30, 236, 239-40.

- (2) For a hearing to be fair, a party who does not understand the language of the proceeding must himself or herself be understood: *Tran v. The Queen*, *supra*, at p. 229.
- (3) Exclusion of the accused in whole or in part from a criminal proceeding on account of non-compliance with the full protection of s.14 of the *Charter* compromises the appearance of fairness of the proceedings leaving the accused with a justifiable sense of injustice and diminishing respect for the administration of justice: *The Queen v. Tran*, *supra*, at pp. 236-7, 240.
- (4) An accused, denied the assistance of the standard of interpretation necessary for a fair trial, “can scarcely be said to stand on the same footing or in an equal position with respect to the application of the criminal law as others who are subject to its process”: *R. v. Reale* (1974), 13 C.C.C. (2d) 345 (Ont. C.A.), at pp. 348-9 (aff’d (1974), 22 C.C.C. (2d) 571 (S.C.C.), at pp. 572-3).
- (5) Denial of competent assistance of an interpreter affects “the integrity of the fact-finding process, and the potency of the adversary system”: *United States v. Negron*, *supra*, at p. 389.
- (6) Interpreter assistance provides a defendant “sufficient presentability to consult with his [or her] lawyer with a reasonable degree of rational understanding”: *United States v. Cirrincione*, 780 F.2d 620, 633 (7th Cir. 1985); *United States v. Johnson*, 248 F.3d 655, 661 (7th Cir. 2001); *The Queen v. Tran*, *supra*, at p. 261.
- (7) Section 14 *Charter* adherence gives the ability to “testify in a responsive manner go[ing] to the very “fairness” of the trial”: *R. v. Cheba*, [1993] S.J. No. 17 (QL) (C.A.), at para. 3.

**(c) The Constitutionally Guaranteed
Standard of Court Interpretation**

[280] Section 14 of the *Charter* “guarantees the right to interpreter assistance without qualification”: *The Queen v. Tran, supra*, at p.254. The constitution does not itself describe the constitutionally guaranteed minimal standard of interpretation assistance from an interpreter. “[B]asic fairness” requires that the objective be linguistic understanding of the proceedings. The level of understanding will “necessarily be high” and, as noted in *Tran* at p. 240, should strive to provide the beneficiary of the assistance the degree of comprehension he or she would enjoy if able to understand and communicate in one of the country’s official languages.

[281] The “basic” standard requires that the interpretation include an acceptable level of continuity, precision, impartiality, competency and contemporaneity – a significant “deficiency” or material departure in any of these features in the course of proceedings advancing the case or affecting “a vital interest” of the accused, without any need for prejudice assessment, threatens violation of the s. 14 *Charter* right: *The Queen v. Tran, supra*, at pp. 242, 253-4.

[282] The “*Tran*” criteria may be summarized as follows:

- (1) Continuous interpretation contemplates that gaps or breaks “are not to be encouraged or allowed” (pp. 246-7).
- (2) Precision requires “the interpretation must be, as close as can be, word-for-word and idea-for-idea” not simply summaries. Recognizing that language interpretation is an “inherently human behaviour” and that, on occasion, there exist language-to-language impediments to exact transference of meaning, the interpreter must nevertheless strive for precision. Summaries or distillations are not acceptable (pp. 247-8, 259).
- (3) Impartial interpretation requires “that interpretation, particularly in a criminal context, should be objective and unbiased” (p. 248).
- (4) There is “a right to competent interpretation” although there exist “no universally acceptable standards for assessing competency”. Swearing of the interpreter’s oath and judicial

inquiry into interpreter qualifications facilitate this aspect of the s.14 *Charter* right (pp. 248-9).

- (5) Contemporaneous interpretation is essential. “[A]lthough consecutive interpretation effectively doubles the time necessary to complete the proceedings, it offers a number of advantages over simultaneous interpretation” (pp. 249-50).

[283] The “constitutionally guaranteed standard of interpretation must be high and allowable departures from that standard limited”: *The Queen v. Tran, supra*, at p. 250. That said, the standard that must be met in interpretation is not “perfection”: *The Queen v. Tran, supra*, at pp. 247-8; *R. v. R.(A.L.)* (2000), 141 C.C.C. (3d) 151 (Man. C.A.), at p. 156. In all American courts, the “right to an interpreter means a right to a competent interpreter”: *State v. Teshome*, 94 P.3d 1004, 1007 (Wash. C.A. 2004).

[284] The “underlying principle protected by s.14 is that of linguistic understanding and...the level of understanding protected is high”: *R. v. Johal* (2001), 155 C.C.C. (3d) 449 (B.C.C.A.), at para. 14. A criminal defendant is entitled to “understand the precise nature of the testimony against him” or her: *United States v. Negron, supra*, at pp. 389-90.

[285] It is recognized that “an incorrect or incomplete translation is the functional equivalent of no translation” – the proceedings must be “competently translated into a language [the subject] can understand”: *Perez-Lastor v. INS, supra*, at p. 778.

[286] Accuracy is of course itself a measure of competence and precision. At pp. 240-1, 246, 250-1 of the *Tran* decision, the court specifically cited the American standard: “Word for word translation” of everything an English-speaking defendant would be privy to hear is the “general standard” for court interpretation (unless literal interpretation is impossible or would distort meaning) although “minor variations from this standard will not necessarily contravene a defendant’s constitutional rights”: *United States v. Bell*, 267 F.3d 454, 464 (5th Cir. 2004); *United States v. Joshi*, 896 F.2d 1303, 1311 (11th Cir. 1992) (*cert. denied*, 498 U.S. 986 (1990)); *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990) (“interpreters should...strive to translate exactly what is said...[without] “embellishing” or “summarizing””); *United States v. Huang*, 960 F.2d 1128, 1135-6 (2^d Cir. 1992); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1985) (*cert. denied*, 479 U.S. 937 (1986)); *Perez-Lastor v. INS, supra*, at p. 779; D.J. Heller,

“Language Bias In The Criminal Justice System” (1995), 37 C.L.Q. 344, at p. 373 (“court interpreters are expected to interpret verbatim what a speaker has said”).

[287] “The reason for this rule is evident. Word for word translation best ensures that the quality of the translation does not fall below [a] constitutionally permissible threshold”: *United States v. Joshi, supra*, at p. 1309; *United States v. Johnson, supra*, at p. 661. Further, a very real danger of sub-standard interpretation, seen in the American cases, is that bilingual jurors themselves able to speak the source and target languages, despite judicial direction to accept only the official interpretation as evidence, may not be disposed to do so: *United States v. Perez*, 658 F.2d 654, 662-3 (9th Cir. 1981).

[288] A “defendant in a criminal proceeding is denied due process when...the accuracy and scope of a translation at a hearing or trial is subject to grave doubt” (*United States v. Cirrincione, supra*, at p. 634) or, in the words of the *Tran* decision at p. 250, “the question should always be whether there is a possibility that the accused may not have understood a part of the proceedings” by virtue of non-compliance with the minimally guaranteed standard inherent in the s.14 Charter right.

[289] Where “effective translation of the proceedings by a competent and impartial interpreter” is denied, there is “a serious possibility of grave injustice”: *United States v. Ko, supra*, at p. 834 – for example, an “adverse credibility finding result from a faulty translation” – i.e. credibility determination based on “perceived inconsistencies” that “may have been simply the product of a language barrier”: *Perez-Lastor v. INS, supra*, at p. 781; D.J. Heller, “Language Bias In The Criminal Justice System”, *supra*, at pp. 369-70.

[290] Quite correctly, in *State v. Teshome, supra*, at pp. 1007-8, the court stated:

...we do not accept the implication that an appellate court should find an interpreter's performance incompetent only when the interpreting was egregiously poor. Interpreters are provided to non-English speakers to secure their rights in legal proceedings. Thus, the standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor.

[291] The ultimate issue is whether deficits in the assistance of a qualified interpreter “made the trial fundamentally unfair”: *United States v. Bell, supra*, at p. 463; *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991); *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980).

**(d) Meeting Constitutional Standards
in the Courtroom**

[292] A court interpreter is an “officer of the court”: *The Queen v. Tran, supra*, at pp. 259-60. While “[t]he interpreter is usually calm and professional and so the English interpretation heard by the judge is done in a calm, non-contentious manner” (*R. v. Davis* (1995), 98 C.C.C. (3d) 98 (Alta. C.A.), at p. 106), court interpretation is an “extremely subtle and exacting” function: D.J. Heller, “Language Bias In The Criminal Justice System”, *supra*, at p. 379.

[293] A court interpreter is effectively an expert requiring “special skills” in both languages in which he or she performs “and training in the field of interpreting” – “skills not readily transferable to other vocations”: *Truong v. British Columbia* (1999), 178 D.L.R. (4th) 644 (B.C.C.A.), at para. 42. “Simultaneous interpretation [requiring instantaneous arrival at a target language equivalent] is a complex and demanding task for which court interpreters, unlike conference interpreters, are seldom trained”: *The Queen v. Tran, supra*, at p. 249. As well, court interpretation requires “substantial familiarity” with the legal system itself: The Honourable L.W. Davis et al., “The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation” (2004), 7 Harv. Latino L. Rev. 1, at p. 14.

[294] “Accurate interpretation...between one language and another is difficult, even in a social or relaxed setting” and court interpretation “is a highly specialized, and particularly demanding, form of interpreting”: P.W. Griffin, “Beyond *State v. Diaz*: How to Interpret “Access to Justice” for Non-English Speaking Defendants?” (2002), 5 Del. L. Rev. 131, at pp. 132-3.

[295] Credibility findings may be made more difficult where a witness testifies through an interpreter: The Honourable J. Sopinka et al., *The Law of Evidence in Canada* (2d) (Toronto: Butterworths, 1999), at § 16.25; *R. v. Le*, [1998] A.J. No. 263 (QL) (C.A.), at para. 27; *R. v. K.(J.)*, [1997] O.J. No. 1559 (QL) (Gen. Div.), at para. 68. Ideally, a presiding trial judge should be as well positioned to assess a witness’ demeanour whether or not he or she is testifying with the assistance of an interpreter but practically the “filter” of an interpreter tends to compromise the ability to do so with the “delay and absence of simultaneous body language to the spoken word, in addition to the inevitable rewording and interpretation of meaning inherent in translation”: *R. v. Davis, supra*, at p. 105. Accordingly, the role of interpretation “is yet another dimension to be considered by a trial judge when assessing demeanour”: *R. v. Davis, supra*, at p. 106.

[296] Linguistic barriers to credibility assessment are reduced as “Ideally, interpreters are supposed to enunciate, in the language of the court [the target language], the way the client sounds in the source language” including hesitations, tone and integral non-verbal aspects of the communication: D.J. Heller, “Language Bias In The Criminal Justice System”, *supra*, at pp. 371-3. “The interpreter has an obligation to convey every aspect of the witness’s testimony, not only words but also paralinguistic elements such as pauses, false starts, and tone of voice”: F.P. Salimbene, “Court Interpreters: Standards of Practice and Standards for Training” (1997), 6 Cornell J.L. & Pub. Pol’y 645, at p. 651 quoting with approval R.D. Gonzalez et al., *Fundamentals of Court Interpretation: Theory, Policy & Practice* 296 (1991), at p. 480.

[297] “As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood”: *The Queen v. Tran*, *supra*, at p. 241. Because a court interpreter is an officer of the court, the presiding justice, on the inherent authority to control the court’s processes, and the statutory authority of s.78 of the *Courts of Justice Act*, determines whether the proffered interpreter will be permitted to act in the proceeding.

[298] There is no constitutional right to an accredited interpreter – there is however a right to a competent interpreter. Accordingly, the essential issue is not whether the court interpreter has been “formally trained” but whether the interpreter is “qualified” to proficiently discharge the duties of providing continuous, precise, impartial, competent and contemporaneous interpretation: *R. v. R.(A.L.)*, *supra*, at pp. 155-6. Where the court is presented with an accredited interpreter, the interpreter is presumptively qualified having met the objectively set external standards of a presumptively valid certification process.

[299] The purpose of using *certified* interpreters is “to insure the quality of interpretations” – “Implicit in [the qualification] requirement is the notion that the interpreter should be competent to render accurate translations”: *United States v. Villegas*, 899 F.2d 1324, 1348 (2^d Cir. 1990) (*cert. denied* 111 S. Ct. 535 (1990)); *United States v. Huang*, *supra*, at p. 1135. A criminal defendant has the right “to a “qualified” interpreter who will render accurate translations”: *Flores v. United States*, 698 A.2d 474, 480 (D.C. Cir. 1997). It is improper to diminish the constitutional right to a fair trial by reducing the standard of fairness to meet limits on the availability of an official court interpreter: *Flores v. United States*, *supra*, at p. 479. Undoubtedly, “[t]he use of courtroom interpreters involves a balancing of the defendant’s constitutional rights to confrontation and due process against the public’s interest in the economical administration of criminal law”: *United*

States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980) (*cert. denied*, 450 U.S. 944). However, on the subject of the government providing competent court interpreters, “[c]osts alone do not override constitutional rights... If the government cannot afford to provide due process to those it prosecutes, it must forego prosecution”: *United States v. Mosquera*, 816 F. Supp. 168 (N.Y. Dist. Ct. 1993).

[300] In *United States v. Gonzales*, 339 F.3d 725 (8th Cir. 2003), the appeal court reviewed a trial record relating to an illicit drug conspiracy. At Gonzales’ trial in the Southern District of Iowa, unbeknownst to the participants at the outset of the trial, three Spanish interpreters were used none of whom were certified interpreters. The trial court in that jurisdiction, it seems without disclosure, often relied on uncertified court staff members for trial interpretation – in the words of the reviewing court at p. 727: “An examination of the district court’s method of appointing interpreters suggests a pattern of failing to utilize certified interpreters”. On appeal, Gonzales complained that the trial court violated the *Court Interpreters Act*, 28 U.S.C. § 1827 (d) (1) by failing to appoint a certified interpreter or to determine whether a certified interpreter was reasonably available before appointing uncertified interpreters for the trial proceeding. The brief of the Iowa Civil Liberties Union established that the Southern District of Iowa court utilized uncertified interpreters in “almost 90% of all proceedings in 2001”. The national average of use of uncertified interpreters was just over 10%. In contrast, the neighbouring District of Nebraska, “rather than proceed with unqualified interpreters”, imported certified interpreters from out of state or utilized the “remote interpretation” option of the Administrative Office of the United States Courts Judiciary’s Telephone Interpreting Program. At page 728, the court stated:

Adherence to the requirements of the *Act* is not optional. However, in the present case the district court disregarded its legal obligation to provide qualified interpreters for Gonzales. The court’s decision to use uncertified interpreters is troubling... When district courts...decline to follow the unambiguous language of the *Court Interpreters Act*, the rights of non-native English speaking criminal defendants may be impermissibly jeopardized. (emphasis added)

[301] In the United States, the *Court Interpreters Act*, 28 U.S.C. § 1827 underscores “the importance of ensuring the highest quality translations for non-English speaking defendants” through the use of certified or otherwise qualified interpreters: *United States v. Joshi, supra*, at p. 1309. In Ontario, in the absence of statutory guidance, the Ministry of the Attorney General Court Services Division has been assigned the trust that the constitutionally guaranteed standard of court interpretation will be achieved through the court interpreters it

provides to courtrooms. 28 U.S.C. § 1827 provides that the presiding judicial officer “shall utilize the services of the most available certified interpreter, *or when no certified interpreter is reasonably available, as determined by the judicial officer, the services of an otherwise competent interpreter*” (emphasis added).

[302] Federal Rule of Evidence Rule 604 requires that a court interpreter be qualified as an expert under Federal Rule of Evidence Rule 702 – qualified to interpret by “knowledge, experience, training and education”. Certification under the *Court Interpretation Act* for all intents and purposes satisfies the expert qualification. In the absence of a certified interpreter, the question as to whether an “otherwise qualified interpreter” (as defined in § 7-9 of the *Interim Court Interpreter Regulations* to the *Court Interpreters Act of 1988* as amended) is before the court ordinarily follows judicial inquiry and on-the-record qualification.

[303] Turning to examples of state codes, D.C. Code § 31-2704 provides that “Before appointing an interpreter, an appointing authority shall make a preliminary determination that the interpreter is able to accurately communicate” with the person to be afforded assistance: see *United States v. Ko, supra*, at p. 835; *State v. Teshome, supra*, at pp. 1006-7 (re similar wording of RCW 2.43.030(2) in Washington State).

[304] By virtue of the *Court Interpreters Act*, 28 U.S.C. § 1827, at the federal level, the Director of the Administrative Office of the United States Courts is responsible for prescribing, determining and certifying the qualifications of those who serve as certified interpreters and for providing guidelines to the courts for the selection of “otherwise qualified interpreters” in judicial proceedings instituted by the United States and “The Director shall certify interpreters on the results of criterion-referenced performance examinations”. “Certified interpreters are those who have passed intensive language and performance examinations administered by the federal courts”: C.E. Crooker, “An Interpreter Checklist”, June 1998 *The Champion* (National Assoc’n of Criminal Defence Lawyers).

[305] With the establishment of the Consortium for State Court Interpreter Certification in 1995, a nationwide program to advance court interpreter proficiency testing, real attempts have been made at the state level to “raise the bar” for interpreters’ standards: P.W. Griffin, “Beyond *State v. Diaz*: How to Interpret “Access to Justice” for Non-English Speaking Defendants?”, *supra*, at pp. 131-2, 138.

[306] In various American jurisdictions, court interpreter instruction has even achieved the standing of university degree status with lesser “sequenced”

programs generally ranging “in length from 150 to 210 hours, roughly the equivalent of fifteen to twenty-one credits” of continuing education: F.P. Salimbene, “Court Interpreters: Standards of Practice and Standards for Training”, *supra*, at pp. 662-4. Interpreter “education is fundamentally a program to train individuals in utilizing communication skills in a manner consistent with the duty owed by interpreters to the court”: F.P. Salimbene, “Court Interpreters: Standards of Practice and Standards for Training”, *supra*, at p. 659.

[307] In her article, “Beyond *State v. Diaz*: How to Interpret “Access to Justice” for Non-English Speaking Defendants?”, *supra*, at p. 139, P.W. Griffin reports an average successful passing rate of 10.2% for Spanish language interpreters in Delaware where a court interpreter certificate program exists – not significantly different from the experience of other courts:

n23 Passing rates from other jurisdictions include California (8.4% for testing from 1998-1999 and 2000-2001), Idaho (12% for 1997-2001), Maryland (18.5% average for 2000 and 2001), New Jersey (9.95% for journeyman and master levels as of September 30, 2001), New Mexico (10% in 2001), North Carolina (23.45% rate for 2000-2001), Oregon (approximately 20%), Virginia (18.36% for annual testing from 1995-2001), Washington (11.6% as of 1995), and federal courts (3.6% as of 1995). The overall passing rate for states which have administered the Consortium’s Spanish interpreter examination since 1995 is 20.8%. Stephanie Scarce, Press Release, Foreign Language Services Project, North Carolina Administrative Office of the Courts.

[308] “Where there is a legitimate reason to doubt the competency of a particular interpreter, a court would be well advised to conduct an inquiry into the interpreter’s qualifications”: *The Queen v. Tran*, *supra*, at p. 249.

[309] David J. Heller in his article “Language Bias In The Criminal Justice System”, *supra*, at pp. 368-9, 376, 380-2, makes these points primarily respecting the Ontario courts:

- (1) There is minimal testing and effectively an absence of training requirements for accredited interpreters. There exists a need for more and specialized interpreter training. Budget cuts have impacted on training – “Most interpreters reported that, for the most part, they learned their profession ‘on the job’”.
- (2) Most counsel act under the belief that court-provided interpreters are competent.
- (3) There exists no systemic testing of the competency of court-room interpretation.

- (4) The Ontario interpreter accreditation test, undefined by legislative standards, is a short and simplistic test.
- (5) Sometimes the Ontario Ministry of the Attorney General uses unaccredited interpreters – “There is a wide variation in competency of interpreters”.
- (6) The “courts have no systematic means of recognizing poor interpretation”.

[310] In addition, where the court accepts, *after inquiry*, the assistance of an uncertified court interpreter, the court may order only consecutive interpretation and entertain an application for the opportunity to seek a corollary order for taperecording: *United States v. Huang, supra*, at p. 1132 (“Now, the difficulty I have is that the defendants were not aware, as the court was not aware, that this man was not a certified interpreter. And, accordingly, the court did not give them the opportunity to ask for electronic monitoring or anything else, to check on this man’s interpretations, and so that any corrections could be made for the record.”); D.J. Heller, “Language Bias In The Criminal Justice System”, *supra*, at p. 382 (“Recording the interpretation would also enable routine testing of the quality of the interpreter’s work”...“This would enable the accused, where appropriate, to demonstrate interpreter inaccuracy on appeal”). “[A]lthough consecutive interpretation effectively doubles the time necessary to complete the proceedings” it is to be preferred:

Consecutive interpretation...has the advantage of allowing the accused to react at the appropriate time, such as when making objections. It also makes **it easier to assess on the spot the accuracy of the interpretation**, something rendered more difficult when one has to listen to the original language *and* its translation at the same time, as would be the case with simultaneous interpretation.

All of these factors suggest that consecutive interpretation is the better practice as compared to simultaneous interpretation. (emphasis added)

(*Tran v. The Queen, supra*, at pp. 249-50)

(e) **Section 14 and the
Brampton Court System**

(i) Overview

[311] The Peel courthouse serves a constituency of over 1,100,000 persons including a daily transient population of tens of thousands using the Pearson International Airport. The courthouse is the second largest in the Province of Ontario and, with the jurisdiction's multi-cultural demographics, is the highest user of interpreters in Ontario. Constitutional recognition of this jurisdiction's multilinguistic character through court interpreter assistance is itself tied to issues of delay as trials with interpretation components inevitably prolong the proceeding: Sopinka et al., *The Law of Evidence in Canada, supra*, at § 16.23.

[312] Overarching context for the interpreter issues examined in this case, not fully explored, are budgetary restraints and concerns that freelance interpreters would become unionized contract employees and potentially classified employees.

[313] Counsel on this appeal submitted, and the record supports, the candid credibility of the principal witnesses Jhooty, Rutledge and Jones.

(ii) The Accreditation Test

[314] Given the limits of its mandate, the court had no expert evidence respecting the functional adequacy of the provincial accreditation test. Nevertheless, on the record here, the language test and the accompanying seminar or workshop with its "7 out of 10" test fail to evoke any real confidence in the accreditation process in light of the following:

- (1) Mr. Rutledge noted that as a staff interpreter/translator he had no training respecting the administration of court interpreter certification tests.
- (2) For approximately half the languages interpreted in the Ontario courts, there are no proficiency tests beyond an English vocabulary test. No attempt is made to evaluate the candidate's fluency in the second language. In over a decade, no tests have been developed for these languages.

- (3) For languages with the two-language accreditation tests, although the courts, and the *Manual*, require simultaneous interpretation the test contains no simultaneous interpretation component. No training is provided in such interpretation.
- (4) The tester, Mr. Rutledge, speaks two languages, English and French. For audio-taped parts of the accreditation test in other languages, there is no evaluation. The tapes are not sent out to be audited by speakers of the non-English language.
- (5) For a number of languages, the accreditation test does not require the ability to read in the second language other than English.
- (6) The accreditation test is little more than an aptitude test of sorts, described by Ms. Jhooty as presenting “tourist level” difficulty in English and the second language. Legal terminology is not tested and, except in three languages, there is no legal lexicon available. The SAT and follow-up workshop provide no skills-based training or practice of court interpreting.
- (7) The accreditation test has not been made any more difficult out of a concern that a higher failure rate would result. The criticism here is that a court interpretation certification test ought not to be “dumbed down” to a level falling short of a reasonably structured competency test either out of cost concerns or simply in order to turn out a certain quota of interpreters labelled “accredited”.
- (8) Based on Ms. Jhooty’s testimony regarding the British Columbia and European training and the proposed program funded by the Ontario Ministry of Citizenship and Immigration, as well as the information regarding the American court interpreter training, the Ontario process of a few hours’ duration comparatively seems woefully inadequate.
- (9) The provincial testing system accredited Mr. Dhir whose incompetent interpretation has resulted in mistrials – an individual unable to subsequently pass the accreditation test.

Ms. Bhandhal failed the same test and then passed but was herself involved in mistrials. With her work independently evaluated as substandard, she again passed the accreditation test suggesting the inadequacy of the test and the attendant lack of training make the accreditation label a shaky indicator of interpreter proficiency reliability.

- (10) According to Mr. Rutledge, complaints about interpreter performance have increased across the Province with something of an “explosion” in this regard in the past year. There was no evidence before the court as to whether the complaints have been audited to determine whether a pattern exists suggesting systemic testing/training deficits.
- (11) There is an absence of probationary monitoring of newly accredited court interpreters, no re-certification regime nor continuing education requirements.

(iii) Mr. Dhir

[315] The pre-2002 history involving Mr. Dhir was marked by concerns regarding his attitude toward women and the prospects of a hearing problem. However, nothing of remedial significance was done to test, monitor or document his court interpretation skills proficiency. Although not an institutionalized office policy, individual prosecutors prevailed upon the Interpreter Coordinator to not assign Mr. Dhir to certain types of cases.

[316] While Ms. Masrour had no idea that the interpreter assistance obligation was constitutionally based, I am satisfied she brought to Ms. Wyatt’s attention, in a timely fashion, reported and observed concerns respecting Mr. Dhir’s interpreting. Apparently the coordinator position had been reduced to a mere scheduling function.

[317] Ms. Wyatt’s testimony was, at times, unreliable and unbelievable as she endeavoured to explain the discharge of her management duties in the court interpretation field. The witness’ answers were often confused and frequently demonstrated a shallow understanding of key issues. She adopted a defensive

posture as she sought, unconvincingly, to explain away obvious shortcomings in her conduct.

[318] On the evidence, it is somewhat of a coin toss as to whether Ms. Wyatt knew less about court interpreting or employee supervision and the management of issues with the potential to affect the administration of justice. She too was unfamiliar with s.14 of the *Charter*.

[319] Ms. Wyatt believed interpretation to be some type of art-form capturing “the gist” of what was said in court while Ms. Laws was of the view that court interpretation was essentially a question of whether, “for the majority of the time”, “the essence” was captured. The supervisors demonstrated little insight into the constitutional significance of the access to justice issue at hand.

[320] I am satisfied on the evidence that Ms. Masrour and Ms. Wyatt had contemporaneous knowledge of the *Bhullar* mistrial. On the evidence accepted by the court, Ms. Masrour was present in court on August 30, 2002 when it was arranged that Ms. Jhooty would undertake a re-interpretation of evidence in the *Bhullar* case. The judicial order for the tape release went to Ms. Wyatt. Ms. Jhooty gave the re-interpretation to Ms. Masrour when counsel received the review document in early November, 2002. Ms. Masrour immediately provided Ms. Wyatt the review document. Ms. Wyatt took no preventative steps to have Mr. Dhir retested or removed from court. Nothing was documented. Ms. Wyatt did not even speak to Mr. Dhir about the mistrials. Her long-standing policy of awaiting a written complaint, rather than undertaking investigatory and other proactive steps to head off the potential for a miscarriage of justice, makes virtually no sense.

[321] One cannot disagree with the observation in the Crown’s Supplementary Factum on this appeal:

The only logical conclusion to draw from the evidence is that a mistrial due to improper interpretation was inevitable, given the practices of the Interpreter Coordinator’s Office in this courthouse.

[322] Unremoved from court, Mr. Dhir’s continued availability led to the *Sidhu* mistrial within days of the *Bhullar* mistrial. Ms. Gamble, at least aware in 2002 that Kastner J. had been asked by Ms. Wyatt to “substantiate” a matter, took no follow up inquiry of the Court Support supervisor. Ms. Wyatt failed to brief Ms. Gamble as to the Dhir incompetence issues.

[323] Management ignored or abandoned constitutional and access to justice values unreasonably discounting the seriousness of the concerns involving Mr. Dhir's interpretation competency on the basis of a unidimensional labour relations focus. In the result, a critical threat to justice was reduced to the bother of a perceived, or real, personality conflict between Mr. Dhir and Ms. Masrour.

[324] Then, charged with the knowledge of Mr. Dhir's involvement in two mistrials, again Ms. Wyatt simply permitted his continued in-court scheduling without regard to the objectively existing risk of a miscarriage of justice including wrongful convictions.

[325] The Court Services Division only moved to confront the competence issue of its classified, union employee when compelled to do so by the circumstances of the *Garcha* trial and the *Sidhu* appeal. Ms. Jones, new to the Division, took a refreshingly different business approach to protect the administration of justice. While Mr. Dhir was removed from court, was re-tested, and some of his earlier interpreting work externally evaluated, the Court Services Division did, however, not expand the past proceedings tape monitoring or notify the profession of the now-exposed problem of the realistic prospect of other material misinterpretations by Mr. Dhir.

(iv) Unaccredited Interpreters

[326] The Interpreter Coordinator proved to be a defensive and argumentative witness. She was cautioned more than once that she was a witness not an advocate.

[327] At times, Ms. Masrour would simply provide the court an answer which best suited her purposes of the moment. For example, in the *Garcha* case, she described the interpreter accreditation test as a "very difficult exam" while in this appeal she described the test as an aptitude test with little relevance to the courtroom and essentially irrelevant to interpreter competency considering the failed unaccredited interpreters she scheduled. Acknowledging the stresses and pressures of the courtroom, inexplicably she voiced a preference for a written translation-like test with no stress component. At first claiming the irrelevance of the Immigration and Refugee Board interpreter test, she later professed to praise it.

[328] Ms. Masrour routinely failed to comply with Ministry policy, for example, regarding documentation of attempts to schedule accredited interpreters, and,

the scheduling of two interpreters. In the latter instance, departure from policy was driven by budget concerns at the expense of quality interpretation services.

[329] Ms. Masrour misled the court with her repeated assertions that unaccredited interpreters were never scheduled for trials. The evidence is to the contrary. For reasons known only to her, she viewed weekend bail scheduling as a game. The Interpreter Coordinator, and her assistant, Mr. Brum, for reasons or motivations which are not entirely clear, routinely scheduled unaccredited interpreters. This state of affairs was only partially admitted by Ms. Masrour under the pressures of intensive cross-examination. Accepting Mr. Rutledge's evidence as I do, the Peel courthouse reported to him next to no shortages of accredited interpreters. The Registry has a substantial inventory of accredited interpreters. This is Peel with Canada's sixth and thirteenth largest cities (Mississauga, Brampton), with GTA access, not a remote court location where different issues arise.

[330] For years, Judges and lawyers have justifiably assumed that competent, accredited interpreters were placed in Brampton's criminal courtrooms. Ms. Masrour scheduled unaccredited interpreters into courtrooms before they became accredited. Ms. Masrour and Mr. Brum have routinely scheduled unaccredited interpreters in the criminal courts who have failed the accreditation test one or more times. Ms. Masrour's testimony as to why these individuals were scheduled and should be uncritically accepted as competent interpreters was entirely unconvincing. By having failed an accreditation test, an interpreter would be presumptively incompetent. Failing the Ontario test, would seem to provide a guarantee of incompetence. It was not for the Coordinator or her staff to conclusively determine the competence of interpreters unaccredited by the Ministry without disclosure to the court and the parties that such individuals were being used in the courts.

[331] Regularly scheduling unaccredited and untested interpreters, even into 2005, Ms. Masrour and Mr. Brum routinely failed to notify the presiding justice and the parties of their status as well. The routine non-disclosure of interpreters' unaccredited status has deprived the courts and litigants of the opportunity to *voir dire* the qualifications of interpreters to participate in the proceedings. Acting under the misconception that accredited interpreters were appearing, the trial participants were denied the critical step of determining whether an unaccredited interpreter was skilled or unskilled. The Coordinator falsely claimed that, in 2005, courts were always notified of the use of unaccredited interpreters.

[332] The Criminal Law Division, in this appeal, accurately submitted that Court Services Division management overseeing the Interpreter Coordinator function ought to have been aware of the widespread non-compliance with Ministry policy, for example, those with supervisory responsibilities:

...could have found out by...auditing the operation of the Interpreter Coordinator's Office. A simple comparison of the names of the interpreters filing invoices against the ministry's list of accredited interpreters would have also exposed the improper practices of the office.

The judiciary, the Crown Attorney's Office, the defence bar and accused persons are all dependant on the Interpreter Coordinator's Office to supply accredited interpreters for court matters. For many cases, this did not happen.

...

Given the number of years over which the Interpreter Coordinator's Office blatantly ignored ministry policies, the people who oversaw that office ought to have seen what was going on and intervened.

(v) Conclusion

[333] There can be no doubt that there are dedicated and highly competent court interpreters in Peel and elsewhere in the Province of Ontario. Unfortunately, with diminished confidence in the accreditation process, and the now-documented widespread and undisclosed use of unaccredited court interpreters in this jurisdiction, it has become difficult to determine who these professionals are.

[334] The reckless indifference of the Court Services Division to the s.14 *Charter* right led to the *Sidhu* mistrial. It is statistically inevitable that there exist as yet undiscovered miscarriages of justice.

[335] Turning to procedural conclusions flowing from the record in this appeal:

- (1) A presiding judicial officer is not compelled, without independent inquiry, to accept the services of whatever court interpreter is assigned to the courtroom (para. 297, *supra*)
- (2) The Court Services Division is obliged to solicit the services of an accredited interpreter and, only in circumstances of "extreme urgency", may the government seek to provide an unaccredited interpreter (paras. 222-3, *supra*).

- (3) Ordinarily, an accreditation or certification would be considered a badge of competence reducing the need for much or any further inquiry. That may or may not be so respecting accredited court interpreters depending on one's view of the stature of the interpreter accreditation test in Ontario, and the particular interpreter's experience and training. Despite the court interpreter's accredited status, the court has a discretion to conduct a qualification inquiry or *voir dire* (paras. 110-130, 221-3, 297-9, 306, 308-9, 314, *supra*).
- (4) Where the court is satisfied that extreme urgency exists, and an unaccredited interpreter is assigned to the courtroom, the Court Services Division is required to notify the presiding justice and the lawyers or any self-represented litigant. The court would undoubtedly exercise discretion to determine the interpreter's qualifications and suitability to assist in the proceeding (paras. 257, 297-8, 301, 307-9, *supra*).
- (5) Administered to any interpreter should be the interpreter's oath or affirmation (paras. 361-4, *supra*).
- (6) The oath or affirmation should as well be interpreted for the beneficiary of the interpreter assistance (para. 99, *supra*).
- (7) Drawing on the factors in *Tran* inherent in a constitutional standard of court interpretation, the court may at the outset, and certainly for a defendant's trial should, provide description of the level of assistance the recipient of the assistance is entitled to expect (paras. 99, 281-7, *supra*).
- (8) The court should fix upon a system with the beneficiary of the interpreter assistance to permit that person to let the court know if there arises any difficulty with the interpretation or otherwise understanding the proceedings (paras. 50, 351, 355, *supra*).
- (9) The court, on its own motion, or on application by a party, may require the court interpreter to provide audible, *consecutive* interpretation only, not simultaneous interpretation, so that all services of the interpreter are tape-recorded and available as a permanent record (paras. 282(5), 310, *supra*).

- (10) On occasion, the s.14 *Charter* right can only be honoured with the services of two court interpreters (paras. 264, 266-267, *supra*).
- (11) A self-represented litigant cannot waive the protection of s.14 of the *Charter*. A defendant, represented by counsel, may expressly waive the right. The court maintains an overriding discretion to reject the waiver (paras. 349-359, *infra*).

(2) The Section 11(b) *Charter* Right Appeal

[336] The burden of persuasion at trial fell upon Mr. Sidhu to establish, on a balance of probabilities, an infringement of his s.11(b) *Charter* right. Having failed in that objective, the appellant is now obliged to show demonstrable error in the trial court's reasoning and/or that properly admissible fresh evidence would have affected the result of the unreasonable delay-to-trial ruling. In the result, Mr. Sidhu succeeds upon both bases.

[337] In assessing the overall delay, the appropriate start-point is the date on which the information is sworn: *The Queen v. Morin* (1992), 71 C.C.C. (3d) 1 (S.C.C.), at p. 13. The termination point for s.11(b) purposes is "the end of the trial" which includes sentencing: *The Queen v. Kalanj* (1989), 48 C.C.C. (3d) 459 (S.C.C.), at p. 469; *R. v. Qureshi et al.* (2004), 190 C.C.C. (3d) 453 (Ont. C.A.), at p. 458.

[338] In assessing the reasonableness of the overall delay to trial, the following factors must be considered:

- (1) the length of the delay
- (2) waiver of time periods
- (3) the reasons for the delay, including:
 - (a) inherent time requirements of the case
 - (b) actions of the accused
 - (c) actions of the Crown
 - (d) limits on institutional resources'
 - (e) other reasons for the delay
- (4) prejudice to the accused

(5) other reasons for the delay.

[339] The total delay is 25½ months from September 5, 2001 (date information sworn) to October 21, 2003 (sentencing). The trial, estimated to be a two-day proceeding, was described by trial counsel as “not a complicated case” (defence) and as “not an overly complex case” (Crown). The trial judge, as of the date of the s.11(b) *Charter* motion, stated that the delay had been 21½ months. The actual delay was then three days less than 21 months. In these circumstances, quite properly, the delay to trial has been seen as deserving of constitutional scrutiny.

[340] Neither before the trial judge nor before this court did the Crown submit that the appellant had waived any constituent part of the overall delay. Shilton J. found that no such waiver existed.

[341] Turning to the reasons for the delay. The trial court seems to have considered what it described as the “lengthy”, but not “exceptional”, intake period to end on February 18, 2002. That is about 5½ months after the September 5, 2001 swearing of the information.

[342] An intake period, neutral in s.11(b) terms, is an inherent time requirement of a criminal case entering the court system. Commonplace are short, front-end remands for counsel to be retained, the discharge of disclosure obligations, judicial interim release proceedings, and the like.

[343] During the early appearances, Mr. Bhangal frequently spoke more than the prosecutor as to discussions or understandings about additional remands. This is undoubtedly because he was the common denominator during the appearances more knowledgeable than the assigned prosecutor of the day. Accepting, as I do, the trial judge’s findings of fact, that the defence did not object to “some” OCJ appearances and that “some” defence acquiescence existed in setting the trial date, the trial court nevertheless erred in failing to apportion some responsibility to the Crown for some of the delay prior to February 18, 2002.

[344] The trial court correctly, in my view, found as a fact that the prosecution ought to have made a decision on the joint trial issue sooner than it did. The Crown never offered any meaningful information in the OCJ remand appearances to explain the excessive delay in apprehending other suspects. The trial judge appears to have overlooked the events of December 18, 2001, over 3 months after the information had been sworn. On that date, as expressly

noted by Hawke J., the defence indicated there was to be no waiver of the s.11(b) right from that point onward. Indeed, in the February 13, 2002 appearance, the Crown expressly acknowledged that the post December 18, 2001 delay “would be Crown delay”. Accordingly, that concession ought to have been taken into account by the trial court.

[345] On February 13, 2002, the court set October 30 and November 12, 2002 as the earliest trial dates available for a two-day trial thereby recognizing nearly 9 months of institutional or systemic delay. In *R. v. Meisner* (2003), 38 M.V.R. (4th) 271 (S.C.J.), aff'd (2004), 7 M.V.R. (5th) 1 (Ont. C.A.), at p. 301, I observed:

Calibration of tolerable institutional delay is possible within the advisory guidelines. In the *Sharma* case, where the institutional delay was calculated to be “approximately nine months”, with only “nominal prejudice” inferred by the court, no s. 11(b) *Charter* violation was found. In *Sharma*, at 194, Sopinka J. stated:

This case originated in the Provincial Court in the District of Peel. The situation in Peel was fully canvassed by this court in *Askov*. While the situation has improved since the *Askov* decision, the district **continues to experience institutional delays due to limited resources. Given the fact that Peel has experienced these delays for a longer period of time and, therefore, has had more time to address the problem, I would apply the lower range of the guidelines for institutional delay.** In *Morin* I stated that this guideline should be in the range of eight to 10 months for Provincial Court, subject to deviations by reason of the presence or absence of prejudice.

...

Given that the government has had well over a decade of experience in dealing with trial delay in Peel, the amount of constitutionally tolerable institutional delay for a trial in the Ontario Court of Justice should be about 8 months with such delay generally not exceeding about 9 months. (emphasis added)

[346] Accordingly, as found by Shilton J., the institutional delay here was not itself unreasonable. That said, and recognizing the guidelines for such delay are not judicially created limitation periods, the institutional delay was toward the outside limit of what is acceptable in Peel.

[347] When the October 30 and November 12, 2002 court days proved insufficient to complete the trial, the system responded with signal expedition to provide dates about three weeks later, December 2 and 3, 2002. This short delay, however, should be roughly assessed proportionately between the defence, the Crown and the court for the following reasons. The better part of two hours of court time was lost on October 30 with toing and froing about disclosure issues. Mr. Norris accepted some responsibility on behalf of the

defence before Shilton J. and the trial judge found as a fact that the defence could have been more diligent in accessing disclosure. Kastner J. on October 30, 2001, and Shilton J. in his ruling, were both of the view that the prosecution bore the major responsibility for late disclosure. The loss of a half day of court time on November 12 is not the responsibility of either party but the product of the court system, it seems through the trial coordinator, improperly overbooking the court day.

[348] Crown counsel at trial, Ms. Griffin, appropriately disclosed her suspicions of incompetent interpretation to the defence and was instrumental in having Kastner J. release the tape of the November 12, 2002 proceedings. She also apparently found out, as she informed the trial judge, that “there had been a previous problem with the interpreter”. Although a colleague in Ms., Griffin’s office had only days before appeared in the *Bhullar* mistrial, the record is unclear as to whether that is the “problem” she had in mind or some attitudinal or other incident involving Mr. Dhir in another case. Much later, before Shilton J., Mr. Norris stated his belief that there had been a pre-*Sidhu* mistrial based “on what he had been told” although he seemed unaware of the circumstances of the prior incident.

[349] Where a trial judge is on notice at any point during trial, even at the conclusion of testimony, that s.14 *Charter* requirements have not been met he or she must intervene: *R. v. Cheba, supra*, at para. 3. This may arise when the issue is raised by the parties “or through obvious circumstances”: *United States v. Tapia, supra*, at p. 1209; *United States v. Johnson, supra*, at p. 661.

[350] In some cases, the court may not, on its own, be able to identify departure from the constitutionally mandated standard for court interpretation. A “defendant may not remain silent...and thereafter claim error” in the court interpretation – “A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation”: *United States v. Joshi, supra*, at pp. 1307, 1310; *United States v. Mata*, 1999 U.S. App. Lexis 14033 (4th Cir. 1999), at pp. 6-8; *The Queen v. Tran, supra*, at pp. 243-4; *R. v. Tsang* (1985), 27 C.C.C. (3d) 365 (B.C.C.A.), at p. 372.

[351] Even a defendant represented by counsel may not be fully knowledgeable of the scope of his s.14 *Charter* protection. Where a failure to instantly seek corrective action is not “part of [the defendant’s] trial strategy”, review is not, however, automatically excluded: *United States v. Negron, supra*, at p. 390; *United States v. Urena*, 27 F.3d 1487, 1491-2 (10th Cir. 1994).

[352] The s.14 *Charter* right cannot be waived by a self-represented accused; where represented by counsel, waiver is possible where counsel “expresses a wish to dispense with the service *and* the judge is of the opinion that the accused substantially understands the nature of the evidence which is going to be given against him or her” (emphasis of original): *The Queen v. Tran, supra*, at p.230.

[353] The threshold for waiver of the s.14 *Charter* right “will be very high” with judicial inquiry, interpreted for the accused, including these features to ensure the accused “personally understood the scope of his [or her] right to interpreter assistance and what he [or she] was giving up”:

- (1) full knowledge of the rights the interpreter assistance guarantee was enacted to protect
- (2) the effect or consequences waiver would have on those rights
- (3) clear and unequivocal waiver personally by the accused.

(*The Queen v. Tran, supra*, at pp. 255-6, 263). The court maintains a discretion at all times to reject a waiver even when the constituent elements of a valid waiver are present.

[354] The threshold for waiver for the s.14 *Charter* right “is very high” and “cannot be waived by the defendant’s counsel” alone: *R. v. Johal, supra*, at para. 26; *United States v. Osuna*, 189 F.3d 1289, 1294 (10th Cir. 1999); *United States v. Tapia, supra*, at p. 1209. The court itself has a duty to ensure “injustice is not done” by an accused purporting to give up the full protection of s.14 of the *Charter* simply to save time, to avoid inconvenience or where he or she is “careless in exercising” the right: *The Queen v. Tran, supra*, at p. 231.

[355] While it is expected that defence counsel, as an officer of the court, will adequately address with his or her client the need for an interpreter, the constitutionally minimum standard of interpretation to be afforded, and the necessity to speak up if that standard is not attained, there is no *mandatory* requirement for the court to itself instruct an accused respecting such matters:

Importantly, neither the language of s. 14 of the *Charter* nor the legal-historical underpinnings of the right require courts to inform all accused appearing before them of the existence of the right to interpreter assistance. Similarly, courts are not obliged to inquire, as a matter of course, into every accused's capacity to understand the language used in the proceedings. At the same time, however, there is no absolute requirement on an accused that the right be formally asserted or invoked as a pre-condition to enjoying it.

This is because courts have an independent responsibility to ensure that their proceedings are fair and in accordance with the principles of natural justice and, therefore, to protect an accused's right to interpreter assistance, irrespective of whether the right has actually been formally asserted. (*The Queen v. Tran, supra*, at p. 243)

[356] Gross instances of interpreter summaries, confusion and hesitation are easily identified. Subtle deficiencies, missing words and inaccurate interpretations, even few in number passing under the radar screen, risk wrongful conviction. One must be cautious before asserting that an interpreter-assisted defendant ought to have detected and complained about an interpreter skills deficiency. Where the defendant is a non-English speaker, he or she is unable to determine whether the words interpreted into his or her mother language are a true reflection of what the English speakers in the courtroom are saying. Seemingly rough or puzzling interpretations in the defendant's own language may, at times, be perceived as simply naturally occurring difficulties in language transference not error or performance deficits. Where a witness' testimony is a third language, not English or the accused's own language, again, the defendant has no reference point for evaluating the quality of the interpretation.

[357] Experience shows that in Brampton with English/Punjabi-speaking lawyers, and in many, many reported American cases with English/Spanish-speaking counsel, it is the bilingual counsel, not the accused, who frequently discovers the interpretation deficiencies.

[358] A non-English speaker may well have experienced language difference as "a source of division" eliciting "a response from others" including "distance and alienation...[r]eactions...all too often result[ing] from...racial hostility": *Hernandez v. New York*, 500 U.S. 352, 371 (1991). An accused with this experience, feeling ever so fortunate to have a support-like person in the courtroom speaking his or her language at whatever level, will often be reticent to challenge the court system to assert personal language rights.

[359] The Crown bears the burden of establishing "a valid and effective waiver of the right which accounts for the lapse in (or lack of) interpretation shown to have occurred": *The Queen v. Tran, supra*, at p. 242.

[360] In light of the entire appellate record, including the fresh evidence which the Crown co-produced and agreed to be admissible, quite properly, Mr. King did not suggest that Mr. Sidhu had waived or otherwise acquiesced in any constitutionally significant way, in the receipt of substandard interpretation. This was, in the circumstances, an appropriate concession. While sitting back and failing to raise a timely objection to the quality of interpretation services will

generally defeat a subsequent attempt to assert s.14 shortcomings, the facts of an individual case must be scrutinized. In this instance, the following are material features of the examination:

- (1) On September 24, 2001, at his first court appearance, Mr. Sidhu appeared self-represented. His noticeable language difficulties led the court to question him as to his language of preference. However, no Punjabi interpreter was paged to assist the appellant.
- (2) Although, on September 24, Mr. Sidhu specifically asked for Punjabi/English interpretive assistance at his next court appearance, on that next appearance, October 15, 2001, no interpreter was provided.
- (3) On October 30, 2002, the first day of trial, the English-speaking participants, both counsel and Kastner J., decided Mr. Dhir need not be sworn. Again, on November 12, 2002, Mr. Dhir was not sworn.
- (4) The Court Services Division, responsible for discharging the government's constitutional obligations under s.14 of the *Charter*, provided an interpreter whose interpreting proficiency it knew, or reasonably ought to have known, fell below constitutional standards.
- (5) Not only was the interpreter's oath not interpreted for Mr. Sidhu but the trial court issued no independent instruction to the appellant regarding the role of the interpreter, the standard of interpretation he was entitled to expect or the mechanism for apprising the court if difficulties arose in fully understanding the proceedings.
- (6) In these circumstances, not surprisingly, the appellant did not wish to insult Mr. Dhir – "he's a court interpreter"; "he is approved by the court. I can't blame him anything...he works here every day...".
- (7) The appellant, who had privately retained counsel by borrowing money to defend the charges, "wasn't understanding everything" in his trial but, believing he might

have a “sufficient” comprehension, and unable to carry the expense of starting the trial over, risked partial presence only at his own trial.

[361] Counsel on this appeal reported their experience that not infrequently court interpreters are not sworn or affirmed in OCJ proceedings where recognized by participants in the courtroom. Of course, the accused, if he or she is the intended beneficiary of the assistance, does not then have the content of the oath/affirmation relating to the expected standard of interpretation. In *R. v. Khanoukaev*, [2001] O.J. No. 2031 (QL) (S.C.J.), at para. 22, a case in which the interpreter was not sworn to discharge his constitutional duties, the court stated:

An interpreter must be sworn by taking the interpreter's oath before beginning to interpret the proceedings: *Tran v. The Queen* (1994), 92 C.C.C. (3d) 218 (S.C.C.), at pp. 248-9; *Regina v. Haskins*, [1995] A.J. No. 930 (C.A.) at para. 2-4.

[362] In *R. v. Nguyen*, [2005] B.C.J. No. 892 (QL)(C.A.), at para. 18, the court stated:

Counsel in this Court accepted that the requirement that an interpreter be sworn before performing his or her duties is a practice that has been in existence in our court system since time out of mind... Both counsel agreed that in these circumstances the oath is a safeguard meant to ensure that an interpreter will faithfully interpret the proceedings so that the accused may be truly said to be present for his or her preliminary hearing or trial.

[363] In *R. v. Hilts*, [1984] O.J. No. 434 (QL) (H.C.J.), at para. 10, 17, and 20, Henry J. observed:

There can be no doubt that the practice of long standing has been to swear the interpreter. As I see it, this has become a requirement amounting to a right so far as the accused is concerned on two grounds - first, the interpreter may be viewed as in the same category as an expert witness appointed or accepted by the Court and so should be sworn; second, it is a safeguard that is part of the accused's right to a fair trial, including the right to make full answer and defence.

...

Wigmore at p. 409 says:

It may be added that an interpreter, ... is a kind of witness, and must be sworn.

...

...it was the right of the accused and defence counsel to require that the interpreter be sworn.

[364] “Custom and tradition for time immemorial has always been that an interpreter must be sworn so that the Court can rely not only as to his competency and accuracy, but also to ensure that the interpreter “shall well and truly interpret”” for the beneficiary of the interpretive assistance: *R. v. L.(L.)*, [1986] O.J. No. 1954 (QL) (Dist. Ct.), at p. 7; *R. v. Unterreiner* (1980), 51 C.C.C. (2d) 373 (Ont. Co. Ct.), at pp. 378-9.

[365] Both counsel on this appeal, in interpreting the s.11(b) *Charter* ruling, correctly in my view, submitted that Shilton J. treated the mistrial occasioned by the incompetent interpretation as an inherent aspect of the process with the consequential delay not weighted in the s.11(b) calculus as government responsibility. While that finding may itself have been unreasonable in light of the evidence before Shilton J., such as it was, that there had been some prior problem with Mr. Dhir’s performance, the issue has been eclipsed by the fresh evidence in this appeal which both parties agree to be admissible. To the time of the Anonymous Letter of April, 2005, Mr. King maintained that the 6-month delay between the mistrial and the start up of the second *Sidhu* trial was not Crown or government responsibility but simply a delay “due to one person in the system...Gerri Wyatt, not properly performing her duties”. In October of 2005, after further enhancement of the appellate record, acting in its quasi-judicial role, the Criminal Law Division had seen enough. At the conclusion of the hearing and production of the fresh evidence on this appeal, Mr. King submitted that “the Respondent concedes on this appeal that the delay caused by the improper interpretation in Mr. Sidhu’s trial is properly characterized as institutional delay”.

[366] In an unusual case, the very real difficulty presented by the need to acquire a qualified interpreter in a rare language may be characterized as inherent in the process as opposed to governmental responsibility: see *R. v. Tamang*, [1998] N.S.J. No. 289 (QL) (C.A.). The circumstances here equate to the failure of the government to provide any interpreter at all, an instance where the resultant delay is properly attributable to the Crown: *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (Ont. C.A.), at p. 343.

[367] I agree with the parties’ ultimate position that the further 6-month-delay (Dec. 2/02 to June 2/03) is the responsibility of the government whether described as actions of the Crown or “other reasons for delay”. Mr. Norris had earlier dates than June 2 to 4, 2003 to start the second trial but the prosecution had only one date, in March of 2003. In these circumstances, the two to three-day trial could not be completed until June. Apart from the reported Crown unavailability, on various March dates, it is unfortunate that Kastner J.’s January

21, 2003 wish for priority rescheduling for a case in distress went unfulfilled with only a limited number of dates offered by the trial coordinator. In any event, the appellant ought never to have been in the position of having to commence a second trial.

[368] Although it was expected that the retrial would consume June 2 to 4, 2003, the s.11(b) *Charter* motion consumed a full day of court time. The system offered June 5, exactly the response one would hope for. When the judge fell ill on that date, the evidence completed on June 16 with judgment reserved to July 3, 2003. These delays are neutral or inherent in the trial process.

[369] The adjournment of just over 2 months to September 9 is again an inherent aspect of the criminal process on account of delay to prepare a pre-sentence report. The September 9 to October 21, 2003 adjournment is at the feet of the prosecution.

[370] In summary then, with some rough rounding off, the overall delay may be described in this way:

Sept. 5/01 – Dec. 18/01	intake period/neutral	3½ mon.
Dec. 18/01 – Feb. 13/02	Crown delay	1¾ mon.
Feb. 13/02 – Nov. 12/02	institutional delay	9 mon.
Nov. 12/02 – Dec. 2/02	defence Crown court	1 wk. 1 wk. 1 wk.
Dec. 2/02 – June 4/03	government delay	6 mon.
June 4/02 – Sept. 9/03	neutral	3 mon.
Sept. 9/03 – Oct. 21/03	Crown delay	1½ mon.
TOTAL		25½ mon.

[371] With respect to conclusions as to prejudice and s.11(b) *Charter* infringement, this court, of course, does not owe the trial court the deference ordinarily available in light of the fresh evidence relating to the circumstances of the mistrial as well as the prejudice suffered by Mr. Sidhu.

[372] Despite the serious offences against the person, the appellant has established a breach of his s.11(b) *Charter* right.

[373] The overall delay of 25½ months entirely in the provincial court with 22 days of appearances for a relatively straightforward trial is too long. 18¾ months of delay was not the responsibility of the appellant (9 mon. (institutional) + 6 mon. (government – delay occasioned by mistrial) + 3½ mon. (Crown delay) + 1 wk. (court – Nov. 12/02 overbooking)). Apart altogether from presumed general prejudice, the trial judge found the delay to June 2, 2003 to have had financial, health and employment consequences for the appellant. It would then take over two years on appeal for Mr. Sidhu to finally establish, with the assistance of the Crown respondent, the true context for the 2002 mistrial.

(3) Abuse of Process

[374] Mr. Moustacalis submitted that his client is entitled to a stay of proceedings on the basis that Mr. Sidhu was denied information, now produced from the government in the enhanced appellate record, essential to making full answer and defence in his s.11(b) *Charter* motion before Shilton J. Denied the information, he failed to meet the necessary burden of persuasion in that application and was unnecessarily exposed to a second trial and an appeal. The applicant seeks a stay of proceedings.

[375] The applicant was content to place his argument on the footing of the “residual category” of abuse cases described in *O’Connor v. The Queen* (1996), 103 C.C.C. (3d) 1 (S.C.C.), at pp. 39-42, that the government’s conduct violated fundamental principles underlying the community’s sense of decency and fair play and thereby caused prejudice to the integrity of the judicial system. It was submitted that society’s concern with fair process was flagrantly abused when, through non-disclosure, the applicant was not armed at trial with the facts he now knows; facts suggesting systemic indifference to the s.14 *Charter* right; facts more than equal to the task of persuading Shilton J. to have concluded a s.11(b) *Charter* breach had occurred.

[376] The conduct of the traditional machinery of the prosecution, the applicant accepts, was beyond reproach in this case. While Mr. Moustacalis very clearly submitted that there was no question of prosecutorial misconduct or bad faith in securing Mr. Sidhu’s conviction, he qualified his point as limited to the police and Crown prosecutors. Counsel maintained, however, that government, represented by the Court Services Division of the Ministry of the Attorney General, has demonstrated, and in some respects has continued to do so, if not contempt for s.7 and s.14 *Charter* rights, certainly a profound indifference to those constitutional protections.

[377] The residual abuse of process category recognized in *O'Connor* is “a small residual category”: *Regan v. The Queen* (2002), 161 C.C.C. (3d) 97 (S.C.C.), at p. 122.

[378] A stay is reserved for cases where “a very high threshold is met” and is generally “only appropriate when the abuse is likely to continue or be carried forward”: *Regan v. The Queen, supra*, at p. 121.

[379] The applicant’s trial is over. Mr. Sidhu has succeeded in his appeal in establishing a breach of his s.11(b) *Charter* right and consequential entitlement to a stay of proceedings. The treatment or “abuse” he alleges he was subjected to is unlikely to continue or be carried forward against others in light of the exposure of the s.14 *Charter* landscape described in this judgment and what I sense to be the commitment of the Criminal Law Division to address relevant wrongful conviction issues.

[380] In the result, I do not find the governmental conduct here as amounting to an abuse of process within the exceptional residual category of that concept.

(4) Declaration of *Charter* Infringements

[381] Mr. Sidhu filed an originating notice of application with the Court seeking a declaration that there had been a denial of his s.7 and s.14 *Charter* rights and seeking a stay of proceedings under s.24(1). In effect, with a Part XXVII summary conviction appeal already perfected, the applicant additionally sought to invoke the superior court’s authority as a court of competent jurisdiction under s.24(1) of the *Charter*.

[382] Recognizing the preference for trial court jurisdiction, Mr. Moustacalis submitted that the essence of the application was the treatment of Mr. Sidhu in the Ontario Court of Justice – issues partly relevant in the context of the s.11(b) *Charter* argument but more specifically focussed upon the “system’s” abuse of his s.14 *Charter* right before Kastner J. aggravated by a denial of critical information to the defence in the pre-trial delay-to-trial motion before Shilton J. Mr. Sidhu points to this court as the forum in which the facts were finally discovered contextualizing his treatment in the OCJ.

[383] Mr. King did not object to this court’s jurisdiction as the only really appropriate forum but disputed the remedy of a stay of proceedings as proportionate to the proven constitutional violations. The Crown accepted, in

light of the evidence adduced on appeal, that Mr. Sidhu's s.14 *Charter* right was breached in the trial before Kastner J. The defendant in that trial was assigned a court interpreter the Court Services Division had every reason to believe was incompetent. The actions of the Division's representatives in this regard were merely one manifestation of the overall indifference to the s.14 *Charter* right in the Peel courthouse.

[384] Mr. Moustacalis placed especial emphasis on the s.7 *Charter* breach occasioned by the lack of disclosure to Mr. Sidhu's trial counsel, Mr. Norris, relating to the *Bhullar* mistrial and the prior history relating to Mr. Dhir – factual subject matter which, it is submitted, would have materially advantaged Mr. Sidhu's s.11(b) *Charter* application before Shilton J. It was argued that the non-disclosure exacerbated the s.14 *Charter* infringement. Mr. Moustacalis, correctly, made the point that it is of no moment that the Criminal Law Division did not possess the knowledge ultimately extracted by the counsel appearing in this appeal – the government withheld the critical information.

[385] Mr. King took little issue with the proposition that Mr. Sidhu's s.7 and s.14 *Charter* rights were infringed.

[386] Mr. King argued against a stay of proceedings given the drastic nature of the remedy and the "clearest of cases" limitation on use of such relief. Crown counsel submitted that a costs remedy would be a more compatible remedy. Given the result of the Part XXVII appeal, Mr. Sidhu is already the beneficiary of a stay of proceedings. By way of s.24(1) *Charter* remedy, the applicant shall have the thrown away costs of the mistrial before Kastner J. paid by the Crown respondent within 60 days of release of this judgment. If the parties are unable to settle the costs issue, the SCJ Trial Coordinator may be contacted for further directions.

CONCLUSION

[387] The appeal is allowed, the conviction is set aside, and a stay of proceedings is entered.

[388] The abuse of process application is dismissed.

[389] It is declared that there has been a breach of Mr. Sidhu's s.7 and s.14 *Charter* rights. The respondent Crown shall pay to the applicant the thrown away costs of the mistrial before Kastner J.

[390] It is unnecessary, in the circumstances, to consider the appeal against sentence.

[391] The outstanding costs motion of Mr. Sidhu may be scheduled by the Superior Court of Justice Trial Coordinator within 30 days unless costs issues are otherwise settled by the parties.

HILL J.

Released: November 17, 2005

COURT FILE NO.: SCA(P) 7131/03
DATE: 20051117

ONTARIO

**SUPERIOR COURT OF JUSTICE
SUMMARY CONVICTION APPEAL
COURT**

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

AVTAR SIDHU

Appellant

REASONS FOR JUDGMENT

[On appeal from conviction by
Shilton J. on October 21, 2003]

HILL J.

Released: November 17, 2005