



# **Understanding Literacy**

**A Judicial  
Imperative**

**Produced by  
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# Foreword

***by the Honourable Catherine A. Fraser,  
Chief Justice of Alberta***

As Chair of the Judicial Education Committee of the Canadian Judicial Council, I commend this effort to raise awareness about literacy issues and their effect on access to justice. The scope and seriousness of the problem of illiteracy demand the attention of public and professional educators. The articles in this booklet, which are designed to assist judges, explain how essential knowledge about this topic truly is to the decision-making process. This worthwhile initiative by the John Howard Society of Canada complements on-going judicial education efforts across Canada to focus judges' attention on contemporary social issues. As such, it reflects the importance of cooperation between the courts and the community.

# Preface

**by Burt Galaway,  
President,  
John Howard Society of Canada**

Without literacy, there can be no justice. This theme, with variations, is consistently made by the judges who prepared materials for this compendium. Without literacy, defendants may not understand the proceedings against them or the conditions to which they have agreed for release. Witnesses may not be able to test the veracity of their statements written by others. The processes of justice become ritualistic and carry little meaning or significance to defendants, witnesses and jurors if one does not understand. Embarrassment about low literacy and the tendency to deny the existence of literacy problems may conceal the problem. Unusual astuteness on the part of judges and other criminal justice officials is required to verify when the level of literacy is interfering with the person's ability to understand what is happening.

For the past several years, the John Howard Societies across Canada have been promoting increased attention to questions of literacy in the criminal justice process; many societies have been offering programs to increase the level of literacy for offenders. This compendium, along with the companion piece *Literacy and the Courts: Protecting the Right to Understand* and the video *Literacy and the Courts*, are offered as tools to invite judges and other professionals involved in the administration of criminal law to consider the importance of literacy among persons who appear before our courts or are under the supervision of our corrections systems.

Is the literacy level sufficient to ensure that a defendant understands justice procedures and what is expected of him or her? Is literacy systematically considered and reported on in pre-sentence reports? If not, are judges requesting this information? And, when necessary, is participation in programs designed to increase the level of literacy, a condition of probation? Is the literacy level of all prisoners systematically assessed and are remedial programs offered? The safety of all citizens depends on the ability of all of us to understand justice proceedings and to develop sufficient reading, writing and computational skills to function in the 21st century.

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# I Literacy Awareness: One Factor Contributing to Fair and Equal Judgments

*by the Honourable Douglas R. Campbell,  
Federal Court of Canada*

## Introduction

In my opinion, all judges should have a working understanding of literacy, not only of the demographics, but also of the problems that may become obvious when a person who is low literate appears in court. The odds are that many people who appear daily in courtrooms are functioning in their everyday lives with the disability of low literacy, because they have had limited learning opportunities in their lives, because they have a learning disability that was not diagnosed or appropriately addressed, or because they have faced other life difficulties which have made learning hard for them. Yet because many have become very skilled at developing strategies to deal with and hide their literacy problems, it is possible for a judge to misinterpret what he or she is seeing and hearing. This risk of misinterpretation can increase the danger that judgments will fall outside what most people see as fair and equal.

## Factors Which Influence Judicial Decision Making

The principal issue is to recognize that the judge's own life experience influences decision-making. All too often it is forgotten that the key player in the decision making process is the judge. While the law and precedents and the arguments of the lawyers are critically important, it is still the judge who makes the decisions. Therefore, the experience of the judge, the judge's world view, the judge's background knowledge and awareness and understanding are the key elements on which the judge draws in making a decision.

Some argue that judicial decision-making is a much more simplified process and that judges, as lawyers, are trained to simply hear the facts, consider the law and, as a result, make a decision. This formula approach is, in my opinion, simplistic. In fact, what occurs is far more complex. The judge hears the evidence; the judge examines the law; and the judge listens to the arguments. From that combination of events, the judge makes findings of fact and makes findings of law. As a result of this analytical process, he or she makes a decision.

Thus, the findings of fact and the findings of law are quite highly subjective elements of the decision-making process. In coming to conclusions, the judge has only one place to go for answers and that is into his or her own decision-making ability which is strongly influenced by the judge's training and experiences as well as by other more factual aspects of the case.

### The Influence of Knowledge about Social Problems and Life Experiences on Judgments

Obviously, the extent to which the judge understands the broader social context to a legal question affects the decision. Therefore, if the judge understands a great deal about societal problems and questions of real life experiences involving many people, the likelihood will be greater that the judge will make a decision that seems fair and equal to a broad range of individuals. The narrower the judge's understanding of societal problems and knowledge of the real life experiences of other people, the greater the danger that the judgment will be unjust. The challenge then is to expand each judge's knowledge and sensitivity.

## Literacy is One of the Social Issues which Influences Fair and Equal Judgments

Where the tires hit the road in terms of the importance of understanding social issues and life experiences is when judges are tested to decide on issues concerning gender equality, Aboriginal justice, racial, ethnic or cultural equity, and when dealing with children, frail seniors or people with disabilities. In terms of people with disabilities, there are many categories which require knowledge and understanding. Obviously, there are physical and mental disabilities. In addition to these, although less recognized, are educational and comprehension disabilities.

In our world today, a person requires a high level of education to be able to cope with everyday life. If a person does not have sufficient knowledge about the way the world operates in technological, political and sociological terms, then that person's ability to function is greatly hindered. A disability which impedes learning is thus a very serious thing. To cope well, a person must be able to speak the language, understand the language and write the language. Each of these skills is key to a person's success.

### Why Is This Important for Judges?

In court, people with limited literacy skills may attempt to hide their fear and cope with their feelings of inadequacy by behaving in ways that can be misinterpreted as avoidance, flippancy or even dishonesty. In my experience, it is most common for people with literacy problems to refuse to speak or even to participate in court.

If the judge is not aware of the possible perspectives and responses of people with low literacy skills, he or she is likely to misinterpret their actions, intentions and motivations. Without this critical understanding, judges may make wrong decisions about a person's credibility which can have important negative consequences for the case and for that person's life.

## What Should Judges Do?

The first and most important step is to gain knowledge about literacy as well as the perspectives and behaviour of people with limited literacy skills. Secondly, judges should avoid making snap judgments about what they see and hear. And third, it is important to make inquiries, no matter how long it takes, about the life history of an individual, to gain a true picture of that individual and the factors that may have contributed to that person's literacy problems.

I have found that such inquiries can be satisfied by: questioning the person directly; asking the lawyer to give more information about the person's background, education and life skills; or by asking that the person be interviewed by a probation officer.

## Conclusion

Research studies have shown that a high percentage of the population across Canada, and an even higher proportion in some locations and regions of the country, have problems with reading, writing and learning skills. Research also reveals that the percentage of people with low literacy skills in prisons is higher than in the general population. The odds then are that many people who appear daily in courtrooms are functioning under these disabilities. It is critical for judges to be aware of these issues and realities. Knowledge of literacy problems and how they can influence decision-making in our courtrooms can contribute to more fair and equal judgments and to greater public confidence in judicial decisions.

## II Becoming Literate About Literacy

*by the Honourable John Maher,  
Provincial Court of Alberta*

### Introduction

I and a number of my colleagues who in the past have expressed an interest in literacy were asked by the John Howard Society of Canada to provide a short essay for other members of the judiciary, focusing on our anecdotal experiences with literacy problems. I think that the purpose of our doing so is to attract some attention to the importance of the "literacy issue" in the administration of justice with the hope that other judges will be sufficiently aroused to acquaint themselves with the problem of illiteracy and how it affects judges in what they do from day to day in the courtroom.

Perhaps I have a short memory, maybe I fortunately am able to wash my brain out after trying a case so that I don't carry it forward with any concern about my conduct of it, or possibly I have not been as attentive to issues of literacy as I should have been. It means that I have a very hard time recounting any noteworthy battlefield experiences where literacy has been an issue, even though I have presided over battles for almost fifteen years.

I vaguely remember cases where a witness has recanted part of a written statement he has made, which was not written in his own hand, because he claims that the statement does not accurately reflect what he said at the time. Did I correctly conclude that perhaps indeed he did not understand that polysyllabic hundred dollar word which was a critical ingredient to the meaning of the statement's content? Moreover, were there other cases where I was not as vigilant as perhaps I ought to have been, in assessing whether there was a misunderstanding?

I know that there are a couple of dozen times when I have concluded, from what counsel has told me, from what a Pre-Sentence report has indicated, or from what a witness or accused has said or done, that what otherwise might appear to be indolence and laziness, really is no more and no less than an inability to secure employment because of an inability to read. But did counsel know, did the probation officer ask, or was I smart enough to follow up in other cases, where I incorrectly thought the witness or accused a slothful lout? Maybe he simply couldn't secure employment because he lacked enough literacy skills to get a job or maintain steady employment.

While I am unable to regale, tantalize or entice other judges with battle stories of the past so that they will become literate about illiteracy, I am sufficiently concerned about literacy and how it affects me as a judge that I want to share with you some of my introspection about the literacy problem".

It fell into my hands as Education Chair of the Alberta Provincial Judges' Association to make a presentation on literacy. In doing so, I came to learn that illiteracy in Canada is far more pervasive and pronounced than I, who thought myself reasonably well informed, would have imagined

## Extent of Literacy in Canada

Only recently has the extent of adult literacy been given any empirical study. In 1987, the Southam News Company newspapers reported that a research survey had concluded that 4.5 million Canadian adults were literacy deficient, in that they could not deal with everyday writing and numbers in a way which allowed them to meet the demands of ordinary life. As to concrete examples it was suggested that:

- seven out of ten adults were unable to find the amount owing from a tax table;
- one in two adults couldn't find a store in Yellow Page ads;
- 29% of adults were unable to identify the amount owing on a telephone bill and
- 13% of adults couldn't find the traffic sign they had been asked to circle on a page.

Two years later, Statistics Canada undertook a comprehensive study directly assessing literacy as distinct from educational achievement. It concluded that 38% of Canadians have difficulty with everyday reading tasks, notwithstanding that a significant portion of them had attended elementary school and even in some cases, high school. That 38% were defined in three levels.

**Level 1:** Seven percent (7%) were "non-readers". They would not likely be able to pick out a sign or any text whatever. They would recognize that they are not able to read.

**Level 2:** Nine percent (9%) were "basic readers". They would be able to find familiar words in simple texts such as grocery ads, but would encounter trouble reading notes their children brought home from school. They would recognize themselves as having difficulty with common reading materials. One in ten high school graduates falls in this level.

At level two, Canadians can use text for very limited purposes. They are most successful when they have to do nothing more than find a word in a text, but the text has to be relatively simple. Forty-two percent could not determine the correct medicine dosage for a seven-year-old when they had to find it in the midst of directions for other ages. They were more successful at tasks where the word or words they were searching for were not surrounded by other text. These respondents probably can find familiar products in a grocery ad by using the labels, but if they have not encountered the word in print, even these tasks may prove difficult. While (these) readers might be able to locate particular information on a label or form, they may have difficulty deciding what to do with the information when they find it.

**Level 3:** Twenty-two percent (22%) were "hesitant readers", They are able to read simple sentences if the material is clearly laid-out and the task they are asked to do is simple. They might be able to fill out bank slips because the steps are relatively straightforward. However, they would have trouble completing order forms and reading maps or charts. They generally do not see themselves as having major reading difficulties, but avoid reading if possible. One in five high school graduates falls in this level.

The pervasiveness of literacy problems in Canada has been confirmed by subsequent studies.

## Extent of Literacy in the Courtroom

On a statistical level, the extent of the problem as it manifests itself in the courtroom is illustrated by the findings of a project of The John Howard Society of British Columbia in 1992, researching the literacy experiences of those serving sentences in Provincial gaols. "Opening Minds Behind Closed Doors: Literacy in B.C. Corrections" found that the overall grade level of educational attainment in the inmate sample was between seven and eight. Twenty-six percent of the sample had completed grade six or less. A further 38% had grade seven or eight.. Of those inmates who were not involved in educational programs at the correctional facilities, 32% either did not read or read below a grade six level. A further 36% not involved in educational programs read between a grade seven and grade eight level.

Other studies of The John Howard Society of Canada suggest that the literacy level of those incarcerated in federal penitentiaries is in inverse proportion to that of the general population. Only 35% of such inmates are literate; 65% have limited literacy skills.

Of clear importance is that as hidden a problem as literacy has been in the general population, and whatever its causes might be, a significantly disproportionate number of those who appear in court and are thereafter incarcerated, suffer from a literacy deficit.

## Systemic Discrimination Against Illiterate People

The term "systemic discrimination" is a loaded phrase which carries with it a connotation of "organized unfairness". To suggest to any judge (who prides himself or herself on a sense of fairness only slightly less than integrity), that "systemic discrimination" frequently occurs in the courtroom over which he or she presides, is akin to waving the proverbial red flag in the face of a bull.

However, "systemic discrimination" means no more and no less than it is the "system" which by its nature, treats a category of people differently because they belong to that category. It is an objective result flowing from that different treatment. It has nothing to do with the intention, knowledge or sense of fairness of the person whose conduct caused that treatment.

The "systemic discrimination" in the administration of justice against the illiterate arises from two sources. Firstly, the everyday demands of the justice system, like those of society in general, require an ability to read and write and to process and understand written communication. Secondly, it is by and large taken for granted by many court personnel, that those who appear in court, as witnesses or parties (alleged victims and accused) have that ability.

## Judicial Ignorance of Illiteracy?

That judges should take for granted the literacy of those who appear in their courtrooms as witnesses or parties, is understandable. Most Canadians, until recently, never questioned the extent of literacy in this country. Literacy was taken for granted in the general population.

Further, it only makes sense that in an age when intelligence and knowledge are increasingly important in the social definition of individual worth and success, those who lack literacy skills will attempt to hide or conceal their deficiency. Studies in prisons and social service agencies throughout North America in the last few years have shown that those who lack literacy skills go to extraordinary lengths to avoid disclosure of their inability to read. Some have utilized ingenious adaptations to disguise their lack of skill, and have developed remarkable coping and compensatory techniques to prevent others from learning of their secret shortcoming.

The social stigma which is felt by those lacking in literacy skills is such that often even spouses and children are misled. Consequently, until there was a comprehensive survey measuring the extent of literacy and revealing significant problems with literacy in Canada, there was little reason for Canadians to be aware of the pervasiveness of the problem.

Judges have an even more particular vulnerability to assuming the fact of literacy. A judge, not unlike everyone, tends to think of him or herself as no different from anyone else. Similarly, the corollary, another person is no different than the judge.

The fact is that judges are different. They are different by nature in that they are extremely curious and persistent. That curiosity and persistence is what led them to enter law school in the first place, and presumably to master a legal career, a career in which they developed an extraordinary ability to read and write and to process and understand written communication. If one instinctively projects that same sense of curiosity to others, the very condition of illiteracy is even more Incredible to the curious mind (as ill-informed as it might be).

Judges are also different by nurture in that they have already mastered to a high degree of ease the ability to read and write and to process and understand written communication. The fact is that we instinctively tend to assume that others are able to do what we can do.

Not only is it impossible to imagine a judge who is Not highly literate, it is very probable that in the case of most judges, both as a lawyer and as a judge, almost all of his or her time and activity professionally and socially, will have passed in the company of others who share a similar high degree of literacy. Few experiences of judges after they enter university will have involved issues of literacy.

## Special Significance of Illiteracy to Judges

On reflection, it seems to me to be clear that as a judge, I am, and my colleagues are, almost immune to illiteracy. At most we can only be empathetic to the illiterate and conscious of the fact of illiteracy, its pervasiveness, its manifestations and the stigma attached to it by those who suffer from it. None of us, in our memory has been illiterate.

The greatest part of judging is the judging of human behaviour. That task involves considering, measuring, analyzing and evaluating human behaviour. This is particularly the case in criminal law where intention is so critical and where the disadvantaged, doubly disadvantaged, triply disadvantaged (and occasionally, even more disadvantaged) appear as witnesses, accused and victims.

Illiteracy is a disadvantage in and of itself. It is relevant to behaviour. It may well and often does accompany another disadvantage, and interplay with that other disadvantage. Not only is it frequently silent, it is often actively hidden. That too is relevant to behaviour.

In judging human behaviour we judge largely on the basis of our own experience, actual or vicarious. Are we not after all, at any moment in time, the sum of our experiences to that moment in time? Judges must become literate about literacy if they are to judge fairly and accurately. Otherwise, by relying on their own experience, they will project onto others erroneously their own thoughts, feelings and expectations. Justice will not be done.

## Literacy and the Legal Profession

In 1992, a Task Force co-sponsored by The Canadian Bar Association made the following conclusions of significant concern to judges in the day-to-day administration of justice in their courtrooms.

1. Most legal material is written, and it is written in language peculiar to the legal community.
2. Adults with limited literacy are intimidated by the legal system.
3. Adults with limited literacy do not perceive that the lawyer or the system is there to help them.
4. While the vast majority of lawyers have had experience with a client with limited literacy, they are not aware of all the ensuing difficulties limited literacy creates.
5. Lawyers assume a level of literacy that people with limited literacy skills simply do not possess.
6. While lawyers do recognize limited literacy skills, they still rely, to some extent, on a presumed ability to deal with written material.

## Implications for Judges

There are a number of general implications for judges who wish to ensure that justice is both done and seen to be done, arising from the literacy reality in Canada.

1. It would be a grave error to assume that any witness or party is literate, in the absence of evidence of some sort as to that person's literacy level.
2. It would be an even more serious error to assume that any witness or party is literate in the sense that that person is able to read or to process and understand legal terms or conventions of speech.
3. As was noted by the Canadian Bar Association Task Force, much of spoken communication in the law, including communication in the courtroom, is based on and refers to the printed word or written language. The disability from lack of literacy is often carried from the written word to the spoken word.
4. Not all counsel who represent those lacking in literacy skills will adequately represent their clients because of that limitation

## The Role of the Judge

Judges are committed to ensuring access, fairness, equality and respect in the administration and delivery of justice in the courtrooms over which they preside. That is not judicial "activism". That is the quintessential role of the judge.

In performing that role, it is important for a judge to note that while lady justice is blindfolded, she is not unconscious. If we as judges perform according to what we are, and if we are what we have been, we should be consciously aware of the limitations and narrowness of our experience, including the experience of literacy and the richness of opportunity that literacy gives.

Because of literacy problems, access, fairness, equality and respect in the administration and delivery of justice are significantly at risk unless we as judges are consciously aware of the existence of such problems, their manifestations, and the limitations which systemically occur because there is in the entire administration of justice a natural bias favouring literacy and those who enjoy it.

### III Limited Literacy: An Important Challenge for the Administration of Justice

*by the Honourable Susan V Devine, Provincial Court of  
Manitoba*

#### Introduction

Like most other Canadians who were raised in the suburbs and attended middle class Canadian schools, I grew up thinking of literacy as an issue for developing countries. As I became a little older, I began to realize that there might be some senior Canadians who, because of limited opportunities for formal schooling were not able to read or write, or had very limited literacy skills. Of course, occasionally there were classmates who did not seem to learn very well and who were held back in school as a result, but we tended to regard them as just not very "smart". The notion of learning disabilities had not been acknowledged, or if it had, it had not yet permeated the sheltered halls of the schools I attended in the 50's and 60's.

#### My First Encounters with Literacy Issues as a Lawyer and Judge

My first meaningful encounter with literacy issues arose when I was a law student representing an Aboriginal man living in Winnipeg's inner city. The case was part of a pioneering skills course at the Manitoba law faculty. "The Lawyering Process" followed twelve cases over the year with each of the dozen students being responsible with a teammate for interviewing, preparing and ultimately handling a trial. We were to discuss each of these steps with our class.

Our client was from a rural reserve community. He had been charged with theft and possession of a weapon for a purpose dangerous to the public peace and he had given a statement to the police. As my partner and I interviewed our client several times in preparation for the trial and discussed these interviews with our classmates, it became obvious to us that he was not all that comfortable in English. Even after getting to know us over the space of several months, he was still not answering our questions with much more than monosyllabic answers. Yet he had supposedly given the police a logical and tidy narrative statement without the police having to prompt him by asking any questions. As we pored over that statement with him during the months leading up to the trial, it became obvious that he didn't even know the meaning of several of the words attributed to him in the statement. However, he had signed a declaration that he had read the statement over and it was true. He chose to sign this declaration rather than admit that he was incapable of comprehending the officer's handwritten version of his statement. This was my first exposure to the sense of shame of many illiterate people which in this instance led a man to admit to a crime he said he didn't commit, rather than admit that he couldn't read.

My nine years as a staff lawyer with Legal Aid reinforced this lesson many times, although I constantly had to remind myself of the possibility that a client was illiterate, and to search for comparatively sensitive ways to identify what many felt to be a shameful fact about themselves. In some cases their embarrassment was comparable to, or in certain cases, even more pronounced than the embarrassment of whatever legal difficulty brought them to my office. Hence the little old lady who signed the contract with the door-to-door salesman and now was being sued for non-payment, or the person who did get a letter from his lawyer reminding him of his court date but could not read it and felt that there was no one he could ask.

Another literacy issue I became aware of at a very early stage was the incomprehensibility of "legalese" to the general public. In my zeal to be understandable, I may have gone a little overboard on occasion, as one of my articling students pointed out to me on unearthing one of my early files. I had written to an unsophisticated client in a remote community about her charge of "hurting her brother Harry" rather than telling her that her "charge of aggravated assault by wounding had been reduced to assault causing bodily harm and the Crown was now asking for a suspended sentence instead of a period of incarceration". But the lesson of the barrier of legalese has remained with me.

## How I Attempt to Make Court Experiences Understandable to People who have Literacy Problems

As a judge, the words "entering into a recognizance" almost never cross my lips in speaking to an accused. I invariably tell the accused that he or she is required to sign a piece of paper promising the court to do certain things and I outline the consequences if those promises are not kept. Sometimes I think that I may sound somewhat like a simpleton to the lawyers who are present or to the higher court looking at one of my transcripts. Then I remember the compliment I have treasured the most as a judge, that of the clerk on one of my circuit courts in one of my first years as a judge. He told me that when he was working in the court office during one of my dockets, he was both surprised and pleased that the people coming to sign orders made on my docket generally understood what had happened to them in court, contrary to his usual experience.

In fact, this comment reinforced the practice I had developed as a neophyte judge of having each individual on a docket come to the front when his or her name was called and advising each person of what was happening. Before I began this practice, on a few occasions I had come to the end of a 150 name docket and found that at least one person had not heard his or her name being called, no doubt because the Crown had mumbled to the elite before the bar some cryptic phrase like "consent remand for particulars to next Wednesday for number 100".

I have in recent years learned the value of oral repetition to help reduce literacy problems. Since I deal with everyone appearing without counsel in the same way, by asking if they are aware of their lawyer's request to put the matter over two weeks to a particular date, and if they would like their remand date written down, no one is singled out. My hope is that even those with literacy problems will understand what has happened in court and why. The value of giving low literate or even illiterate people a written note to take away is that people can puzzle over it at their leisure or confer with a trusted friend or relative.

Awareness of literacy issues requires constant vigilance and the court cannot rely solely on counsel because often counsel are even less aware of the problem than is the court. As a lawyer I was appointed to represent a man at the Court of Appeal after leave had been granted to the provincial Maintenance Department to be added as a party, and to appeal an order deleting certain maintenance arrears and setting others. The man had appeared without counsel at the leave hearing and had no real idea of what had transpired in court to that point. After I had been his counsel for some time he disclosed to me that the arrears had accumulated when his wife had left him briefly to reside in Winnipeg and had obtained a court order for maintenance. She had returned to live with him shortly thereafter, they had more children together and he spent some time in jail. Since in his view they had lived together for the majority of the time, he was content to ignore whatever communications he received during the eight or nine years of nomadic existence since the order had originally been made. Again it was only accidentally that I finally found out that he could not read or write, a fact which had not been raised at the original trial where arrears were set, or at the Court of Appeal hearing which he had attended unrepresented, prior to my becoming his counsel.

If it is difficult for lawyers to obtain this vital information from their clients, how much more so for the court? Nonetheless, sometimes the issue can be raised in a tactful way. For example, a witness was asked recently in my court to refresh her memory using a copy of her statement taken down in an officer's handwriting. She sat looking at the page for quite a while. I began to wonder if there was a problem so I asked if she was having trouble reading the officer's handwriting because sometimes a person's handwriting is hard to decipher. She agreed that she was. I adjourned briefly and asked the Crown to read her the statement aloud in the presence of defence counsel.

## Limited Literacy: An Important Challenge for the Administration of Justice

The John Howard Society of Canada asked some judges across Canada to provide anecdotal information about their own dealings with literacy. Because literacy is largely an invisible issue, we tend to forget how ubiquitous a problem it is unless we look at dramatic statistics such as the literacy levels of those incarcerated in provincial and federal penitentiaries. The legal system in which we operate, is so dependent on the written word that it is sometimes easy for us to forget both as individuals and as institutions, that there is a significant portion of the population that may have access problems with our courts on this ground alone. Limited literacy will be one of the important challenges for the administration of justice to meet in the coming years.

## IV The Impact of Illiteracy in the Courts

*by the Honourable David M. Stone,  
Ontario Court of Justice,  
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### Introduction

Suppose that those of us who preside over criminal proceedings insisted on doing so using a language which was not fully understood by up to 70% of the accused and other participants. Suppose further that we did so while failing to provide an interpreter at any stage of the proceedings. Let us suppose that for some reason, counsel for the defence and the Crown not only let us proceed, and without any objection, but they also compounded the problem by insisting that they too use our chosen language. Let us finally suppose that this language was English or French, and was in fact nominally the language of preference of those before us who did not understand us.

It is becoming obvious that the impact of illiteracy among the participants in criminal proceedings has not been adequately recognized or fully understood. The judiciary has not deliberately ignored the problem, and we are capable of responding quite well when we recognize that a party has this or any other difficulty in following all the proceedings. My own experience is that it is very rare to hear from counsel or see in a presentence report that the accused is illiterate or functionally illiterate. However, persons with varying degrees of illiteracy are before us almost every day, and it is likely that their disability is never identified.

The Honourable Judge Donald Fraser recently told me of a case where counsel for the accused was cross-examining a civilian undercover agent working for the police. Counsel seemed to be destroying a highly evasive witness by referring the agent again and again to the agent's notes; the agent seemed to be deliberately skipping by the parts he was being questioned about, and balking at referring to his notes. The frustration levels were rising. Judge Fraser spoke to counsel in the absence of the witness, and raised the delicate concern that unless the agent was being completely obstructionist, he might be illiterate. It turned out that when the agent returned to the safe house with the constable after each transaction, whereupon "we made our notes", in fact he had arranged things so that he dictated and the officer wrote down what had happened. In court, even at the risk of seeming like an unbelievable witness, the agent was not prepared to volunteer that he was illiterate and therefore unable to read the notes.

If this was an isolated occurrence, we would congratulate Judge Fraser for his insight, and move on. Instead, we must dwell on the concern that many judges would have missed the literacy issue, and that it is before us on a regular basis.

According to a Southam survey in 1987, 70% of Canadians could not find the amount owing on a tax table, one in two could not find a store in the Yellow Pages, 29% could not identify the amount owing on a telephone bill, and 13% could not find the traffic sign they were to circle on a page. When new inmates arrive at the federal penitentiaries, they are routinely tested on a variety of scales. According to Mr. Keir MacMillan, Assistant Warden (Correctional Programmes), Bath Institution, Millhaven, in the Ontario Region of the federal system, 77% of the inmate population has Grade 10.9 equivalent or lower, and 65% has Grade 8.9 or lower! I am informed through the John Howard Society of Canada, echoed by Mr. MacMillan, that a person at the functioning level of Grade 10.9 or lower is considered to be not functionally literate. This is a matter for some debate.

For purposes of ordinary functional literacy in contemporary society, the generally accepted level of understanding is at the Grade 5 - 6 level, according to academic resource criteria in use in the Durham Region Board of Education. That level allows a person to follow a standard cookbook, use basic instructions for operating a VCR at home, and follow the signs in a building without getting lost. I understand that the grade 8 level would allow the person to comprehend a normal 200 page novel. Full functional literacy for court purposes would seem to require a higher level, short of the ability to understand legal maxims. For the purposes of the following comments, then, illiteracy must be seen as a relative term.

## The Scope of the Problem

Consider the challenges facing an accused who is illiterate to the point of being unable to read or write; the problems for people with lesser degrees of illiteracy will vary proportionately. If the fully illiterate accused is released on an appearance notice, he cannot read it. While the document may have been explained to him by the police officer, if the accused is suffering the lingering effects of alcohol or drugs, that explanation may be wasted or undermined. A recognizance or undertaking with conditions, although also explained by a justice of the peace, will be useless as a reference document.

The accused makes it to court. There are posters prominently displayed, and numerous signs. To the generally literate, these signs provide access to the right courthouse personnel, and to assistance from Legal Aid, treatment agencies, and other outside sources of personal, procedural or legal support. To the illiterate they are of lesser or no value.

Many persons of limited literacy are, of course, financially disadvantaged. The judge is patient and helpful, and directs them to Legal Aid. Some of these people are simply unable to fill out an application form for Legal Aid. Although my information at present is strictly anecdotal, it appears that the embarrassment factor will make a percentage of criminal accused or other litigants resist being exposed as illiterate when they are handed the form. When those people return to court three weeks later and inform the judge that they did not get around to the application, some judges will infer malingering. If another three-week adjournment produces the same result, sanctions may be imposed.

Meanwhile, the Crown has provided disclosure in a criminal case, or the C.A.S. or opposing party has served documents of legal significance. If Duty Counsel is available, and has an uncharacteristically large amount of time to spend with the person, then using his or her techniques for circumventing illiteracy, the accused person may obtain considerable information. That is to say, although Duty Counsel may never know he or she was dealing with a person who is illiterate, that person will have used techniques to get Duty Counsel to tell him or her what generally is in the documents. As for important specific information that never gets discussed by Duty Counsel, the person will simply remain unaware.

While the trial is pending, documents may be served by way of further pleadings, further disclosure, or notices under the Canada Evidence Act. What do they mean to the person? Are responses required, failing which certain deeming provisions will vest?

With or without counsel, the case goes ahead. At trial, documents may be tendered to prove their contents. A witness may be cross-examined on his criminal record. If a lawyer is unaware that her client or opposing party is wholly or functionally illiterate, considerable injustice can occur. The very fact that a witness seems to stumble when confronted with a document can lead to an adverse finding on credibility.

The trial judge, like the remand or pretrial judges before her, is well-educated and well-read. She unconsciously and naturally selects the right word at each moment to convey her meaning. In addition to unusual or complicated English, the occasional non-English word creeps into the conversation, as when she refers to serving a subpoena *ducas tecum*. on a hospital nurse. The accused is not stupid, but can be forgiven when his eyes glaze over. "Subpoena do who take what?", he may ask himself. "I thought I was charged with assault." Next he may wonder if serving one is like what the waitress does to him at the coffee shop. As he ponders all this, the next three sentences from the judge escape him completely.

In a criminal case, there may be a presentence report. How many harried counsel pick up their copy of the report, scan it, and then turn it over to the client with instructions to read the report and advise of any inaccuracies, perhaps while counsel scurries to the neighbouring courtroom to speak to another matter? One wonders how many inaccuracies are never identified to the court.

## What Can the Judiciary Do?

There is an obvious disparity between the tested levels of illiteracy and functional illiteracy in the inmate population, and the lower levels recognized as present during the court process. Assuming that being illiterate has a status and stigma that even the most vocal school dropout does not wish to be identified with, we must infer that we cannot expect much success in encouraging illiterate people to self identify. There are, however, a number of strategies which we can consider to ensure full access to the resources of the administration of justice, and to ensure we are adjudicating on the actual position of the parties. This non-exhaustive list was developed with the help of a John Howard Society working group on literacy in Oshawa, Ontario.

1. Be aware of the statistical magnitude of the population in the system of those who are illiterate or functionally so.
2. Be alive to the myriad ways that varying degrees of illiteracy would play havoc in your courthouse with the ability of accused persons, parties and witnesses to access the resources in the system, and to communicate to you the things that they want to tell you and that you need to know to adjudicate properly.
3. Watch for markers that could signal illiteracy. For example:
  - a submission "... left school at age 16 before completing grade 10." If someone with less learned skills and information than grade 10.9 is below the level of full functional literacy for court purposes, has the person had the opportunity to make up any shortfall through other education or experience? If not, is there any indication that the party is failing to understand part of the process, or has failed to receive the benefits of resources in the system?
  - A submission, which I had recently, "He threw away his copy of the recognizance." Or, more common, "He threw away his disclosure material." Why?
  - An accused with less than full high-school education claims to have read his 10-page presentence report in less than 5 minutes.
  - A party who has gone to Legal Aid every day, but keeps going so late that he does not have time to fill in the relevant forms: is he able to fill in the forms?

4. If you think you have a possible situation of illiteracy before you, you must be ready to take the time to do as much orally as possible. You might also try to direct the party, without causing embarrassment, to someone such as a duty counsel, or court-based social worker, ideally one with whom you have discussed your awareness that illiteracy is a problem in the court system.

5. In all cases where the public or parties are before the court (in all cases except perhaps the more esoteric ex parte motions), remember that you need not show off your education on every possible opportunity. Most people who appear before us are apparently willing to assume we (a) went to university, (b) were better than average lawyers (a generous assumption), and (c) have a reasonable level of intelligence (at least prior to verdict). If we remember further that our efforts are in aid of those people in resolving their issues, and not for the mere pleasure of ourselves and counsel, the necessity of speaking so as to be understood by the parties themselves will be obvious. Without sacrificing the integrity of the court or surrendering to true mediocrity, it is possible to lower the actual level of functional literacy needed to understand the courtroom proceedings.

6. That said, never be condescending.

7. Talk to your fellow judges about the clear existence before them of people who are partly or wholly illiterate.

8. Consider raising the topic of illiteracy at the next Bench and Bar meeting. Point out to those who will be appearing before you that they too have apparently represented many illiterate clients, presumably without presence of illiteracy will have nothing to do with the facts of the case, it may have much to do with the adequate instruction of counsel, and the adequate presentation of the client's or witness's position.

9. Ask a representative of the local John Howard and/or Elizabeth Fry Societies to provide you with a written or oral presentation of any programmes they have in your area for identifying or ameliorating problems of literacy among people in conflict with the law. Can you facilitate their interaction with people coming into the legal system? Since low education (and literacy) is linked with both unemployment and legal difficulties, are there programmes that you could consider as part of some probation orders? To avoid stigma and lack of participant co-operation, should the programmes have neutral names (such as "Educational Enhancement" instead of "Overcoming Illiteracy") which are nevertheless understood by local lawyers, probation workers and judges to be aimed at illiteracy?

## Conclusion

In these times, all judges would consider it unacceptable to force someone through a court process which he or she did not fully understand. Unfortunately it appears that each judge who has been sitting for any reasonable length of time has unwittingly done that very thing. The recognition of the problem, and its consideration in the contexts set out by the other judges in this John Howard Society initiative, should result in efforts by the judiciary to minimize the gap in understanding caused by varying degrees of illiteracy.