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Final Report

Access to Justice in Both Official Languages:

English and French Before Federal Courts

Conference – April 2003

The Canadian Centre for Management Development

in Partnership with the Department of Justice of Canada

and the Office of the Commissioner of Official Languages

Canada

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A Word from the Commissioner of Official Languages

The right to use French and English before Canada's tribunals is one of the most important symbols of Canadians' desire to live together with dignity and respect. However, implementing this fundamental right is a challenge for the general public, lawyers and all staff members at federal tribunals. The Internet as a communications tool and the changing interpretations of linguistic obligations shape the environments of tribunals and the way they function.

The Department of Justice organized a conference for key stakeholders to get together and discuss these challenges and, above all, to share their best practices. This initiative should be applauded. Nonetheless, implementing language rights is a collective responsibility that we all share.

This conference brought together representatives from federal tribunals and from associations of French-speaking lawyers. It was a unique learning and knowledge-sharing venue, in which participants pooled the effective practices that some tribunals have already implemented to concretely improve access to justice in both official languages.

I would also like to single out an initiative of the Group of Chairs of Federal Courts, which will create a working group that will follow up on the analyses and reflections that resulted from the conference. This will surely open up new possibilities for providing service in both official languages in federal tribunals.

This document is the result of the participants' collective efforts to improve access to justice in both official languages. I am pleased that I was a part of this successful event and hope it will lead to other forums where federal tribunals will be able to continue to share ideas in order to fully achieve their mission of respecting the language rights of Canadians who appear before the courts.

Dyane Adam
Commissioner of Official Languages

Acknowledgement

The participation of many individuals greatly facilitated the organization of this event and the presentation of the historical, legislative and contextual perspectives on the issues relating to access to justice in both official languages.

This event and its ensuing results were made possible in large part because of the successful cooperation between three institutions that put their knowledge to good use while ensuring that they worked together to create a genuine discussion forum. The Canadian Centre for Management Development joins the Department of Justice and the Office of the Commissioner of Official Languages in expressing sincere gratitude to Richard Rochefort, then Director General of Business Learning and Development Events, Canadian Centre for Management Development, Marie-Claude Gervais, Legal Counsel, Official Languages Law Group, Justice Canada, and Johane Tremblay, General Counsel, Office of the Commissioner of Official Languages.

Special recognition is also given to Kate Hart, Client Relations Officer, Canadian Centre for Management Development, to Liliane Marcil, Assistant, Official Languages Law Group, Department of Justice, and to Chadia Brahim, Paralegal, Official Languages Law Group, Department of Justice. Their commitment to organizing this event contributed significantly to its success.

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Access to Justice in Both Official Languages: English and French Before Federal Courts

April 22 and 23, 2003

Fairmont Chateau Laurier, Ottawa

Program

Objectives:

- Training on the current state of the law
- Awareness of linguistic requirements
- Identification of best practices and other possible solutions

Day 1

Laurier Room

8:00 – 8:30 a.m. **Breakfast**
Drawing Room

8:30 – 8:45 a.m. **Words of Welcome**
Richard Rochefort
Director General of Learning Events and
Business Development
Canadian Centre for Management Development

8:45 – 9:00 a.m. **Opening Remarks**
Yves de Montigny
Chief Legal Counsel
Public Law Group
Department of Justice of Canada

9:00 – 10:00 a.m. **Contextual Setting**
Chaired by Yves de Montigny
Chief Legal Counsel
Public Law Group
Department of Justice of Canada

Marc Tremblay
General Counsel and Director
Official Languages Law Group
Department of Justice of Canada

Parts III and IV of the Official Languages Act: Historical Background, Interpretation and State of the Law

Johane Tremblay
Director, Legal Services
Office of the Commissioner of Official Languages

The 1999 Study of the Office of the Commissioner of Official Languages on the Equitable Use of English and French Before Federal Courts: Findings, Recommendations and Follow-up

10:00 – 10:30 a.m. **Health Break**
Drawing Room

10:30 – 11:30 a.m. **Discussion Group**
Main challenges

11:30 – 12:00 noon **Discussion Report**
Richard Rochefort
Director General of Learning Events and
Business Development
Canadian Centre for Management Development

12:00 – 1:30 p.m. **Lunch**
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1:30 – 3:00 p.m. **Knowledge Café**
Bilingual capability of courts and tribunals
Active offer and operating procedure for identifying the language of proceedings
Evidence and evidence by affidavit
Interpretation and record of the interpretation
Language of decisions and decision-drafting methods
Use of the Internet in the management activities of tribunals

3:00 – 3:30 p.m. **Health Break**
Drawing Room

3:30 – 5:00 p.m. **Discussion Panel**
Chaired by Marie-Claude Gervais
Counsel
Official Languages Law Group
Department of Justice of Canada

Dyane Adam
Commissioner of Official Languages

Louise Aucoin
Counsel
Fédération des associations des juristes d'expression française

Antoine Hacault
Counsel
Thompson, Dorfman, Sweatman

Gilles Dufault
Vice-Chairperson
Canadian Transportation Agency

5:00 p.m. **Cocktails**
Drawing Room

with the compliments of Gowling Lafleur Henderson LLP

Day 2

Laurier Room

8:00 – 8:30 a.m. **Breakfast**
Canadian Room

8:30 – 9:30 a.m. **Matrix Interview**

Identify three positive actions to ensure better understanding by the Canadian public of their language rights

Identify three possible avenues for partnership where the courts could share resources in order to ensure access to justice in both languages

Develop three areas where institutional support could prove useful for filling the needs of the courts

Define three ways to improve consultation among the various participants involved in the promotion of access to justice in both official languages

9:30 – 10:00 a.m. **Report and Consensus**
Richard Rochefort
Director General of Learning Events
and Business Development
Canadian Centre for Management Development

10:00 – 10:30 a.m. **Health Break**
Canadian Room

10:30 – 11:30 a.m. **Reaction**
Yves de Montigny
Chief Legal Counsel
Public Law Group
Department of Justice of Canada

Dyane Adam
Commissioner of Official Languages

Yvon Tarte
Chairperson
Public Service Staff Relations Board

11:30 – 12:00 noon **Closing**
Morris Rosenberg
Deputy Minister of Justice
Department of Justice of Canada

12:00 noon **Lunch**
Canadian Room

Address by the Minister of Justice and Attorney General of Canada

The Honourable Martin Cauchon

Dyane Adam

Commissioner of Official Languages

Holds a master's degree and a doctorate in clinical psychology from the University of Ottawa. Her career led her to work in Quebec and Ontario, where she combined private practice in clinical psychology with university teaching and research. She maintained her practice when, in 1988, she became Professor and Assistant Vice-President, French Programs and Services, at Laurentian University in Sudbury. In 1994, she was appointed Principal of Glendon College at York University in Toronto. Over the years her commitment to the community has been significant for both its quality and its scope. Her community activities in the areas of health, education and the status of women have been motivated by the objectives of social justice and equity, and recognition of the rights of the French-speaking minority.

In the field of education, Dr. Adam has chaired the Advisory Committee on Francophone Affairs of the Ontario Ministry of Education and Training, a committee responsible for advising the Ministry on all issues concerning post-secondary instruction in French. She has played an important role in various national and international organizations in the field of higher education, such as the Consortium des universités de la Francophonie de l'Ontario, the Canadian Society for the Study of Higher Education, and the Conseil d'orientation de l'Université virtuelle francophone of the Agence universitaire de la francophonie. She has also chaired the Regroupement des universités de la francophonie hors Québec and its subcommittee on the development of French-language instructional materials.

Dr. Adam has also been involved in major initiatives in the field of health, including the Centre de santé médico-social francophone de Toronto and the Sudbury-Manitoulin Self-Help Group Development Network, of which she was president until 1993. She was also a founding member of the Regroupement provincial des intervenants et intervenantes francophones en santé et services sociaux en Ontario (RIFSSSO), which was formed in 1990.

A researcher and lecturer, she has taken part in some 100 colloquiums and conferences at the provincial, national and international levels. Dr. Adam is the author of many professional and scientific publications on subjects as varied as drug addiction, marriage counselling, self-help groups, women's mental health, and university education in French.

In recognition of all her achievements, she was awarded honorary doctorates by McGill University, the University of Ottawa and Université de Moncton, and was made Chevalier de l'Ordre des Palmes Académiques de la République française.

She is currently Chair of the Forum of Canadian Ombudsmen and Vice-President of the Association des ombudsmans et médiateurs de la francophonie.

On August 1, 1999, Dyane Adam became the fifth Commissioner of Official Languages. Dr. Adam is the first woman and first Francophone from outside Quebec to fill this position.

Biographies

Louise Aucoin

Professor of law – Université de Moncton

Graduate of the Université de Moncton (LL.B.) and the University of British Columbia (LL.M.). Professor Aucoin teaches in the areas of environmental law, wills and estates as well as employment law at the Faculté de droit, Université de Moncton.

Louise Aucoin is very active in her community. She is president of the Association des juristes d'expression française du Nouveau-Brunswick, member of the Pay Equity Committee of the National Association of Women and the Law, Vice-President of the Forum pour une école secondaire communautaire francophone à Moncton and founding president and member of the New Brunswick Coalition for Pay Equity.

Martin Cauchon

Minister of Justice and Attorney General of Canada and Minister with political responsibility for Quebec

(January 2002 – December 2003)

Martin Cauchon was elected to his third term as Member of Parliament for the federal riding of Outremont on November 27, 2000. On January 15, 2002, Prime Minister Jean Chrétien appointed Mr. Cauchon as Canada's 45th Minister of Justice and Attorney General of Canada and Minister with political responsibility for Quebec. Mr. Cauchon previously served as Minister of National Revenue and Secretary of State Responsible for the Economic Development Agency of Canada for the Regions of Quebec.

In addition to his ministerial duties, Mr. Cauchon is a member of the Cabinet committees on Economic Union and Social Union and the Special Committee of Council, where he serves as Vice-Chair. Mr. Cauchon also sits on the Ad Hoc Committee for Public Security and Anti-Terrorism.

From 1993 to 1995, Mr. Cauchon served as President of the Liberal Party of Canada (Quebec). In 1994, he was Vice-Chairman of the Standing Committee on Public Accounts. In 1994-95, Mr. Cauchon chaired the Canada-France Inter-Parliamentary Association. From 1994 until his appointment as Secretary of State, he was a member of the Standing Committee on Human Resources Development. Minister Cauchon was also member of the 2000 National Platform Committee.

Before entering politics, Mr. Cauchon received a Licentiate in Civil Law from the University of Ottawa in 1984. From 1985 to 1993, he practised civil and commercial litigation. In 1990, he completed a Master of Laws in International Law at the University of Exeter in England.

Mr. Cauchon was born in La Malbaie, Quebec.

Yves de Montigny

Chief Legal Counsel, Department of Justice

(June 2001 – December 2003)

Yves de Montigny oversees the International Law, Trade Law, Privacy and Access to Information, Human Rights Law and Constitutional and Administrative Law sections of the Department. He is also a member of the Executive Council of the Department.

Prior to joining the Department in March 2000, he was Director General (Strategy and Plan) at the Department of Intergovernmental Affairs, where he was responsible for the national unity file.

From 1982 to 1997, when he joined the Public Service, Mr. de Montigny was a professor at the Faculty of Law of the University of Ottawa, teaching constitutional, human rights and administrative law.

In addition, he acted as special advisor to the Quebec Minister of Canadian Intergovernmental Affairs in 1992-93, and represented the Attorney General of Quebec in several cases before the Supreme Court of Canada.

He has published many articles on constitutional law and the *Canadian Charter of Rights and Freedoms.*

Gilles Dufault

Vice Chairman, Canadian Transportation Agency

Gilles Dufault, from Montreal, Quebec, was appointed Vice-Chairman of the Canadian Transportation Agency on August 1, 2000, after having served as a member of the Agency since January 20, 1998. Mr. Dufault has had more than twenty years experience in senior management positions in both the private and the public sector. Prior to joining the Agency, Mr. Dufault was President of Selligesco Inc., a management consulting firm. Mr. Dufault holds an M.B.A. from the Université du Québec in Montréal.

From 1985 to 1987, Mr. Dufault worked as General Manager of Sales and Services for VIA Rail Canada Inc. As General Manager, he was responsible for directing all sales and off-train services, ticketing, reservation systems, pay load control, station properties and regional activities and community relations system-wide. Before that, Mr. Dufault was Vice-President of Operations. He directed transportation and maintenance activities system-wide, including fleet management, on-time performance, safety and support systems.

Between 1982 and 1984, Mr. Dufault was Vice-President of VIA Atlantic. From 1977 to 1982, he held the positions of Assistant to the President and Director of Corporate Affairs.

Mr. Dufault also worked in the Office of the Prime Minister of Canada from 1971 to 1977. He was a special assistant and advisor to the Prime Minister.

Antoine F. Hacault

Partner with Thompson Dorfman Sweatman, a Winnipeg law firm with more than 70 lawyers

Mr. Hacault's wife is a school principal in the French school division. They are the proud parents of a daughter attending University of Ottawa and of two sons who reside at home. He obtained his LL.B. from Moncton University in 1984. He has been a part-time member of the National Parole Board, Prairie Region, since 1998. He has appeared before courts at all levels, including the Federal Court. He was Counsel in the Manitoba reference to the Supreme Court of Canada on language rights. He also appears regularly before various administrative tribunals in Manitoba including the Board of Revision, the Municipal Board, the Land Value Appraisal Commission and the Automobile Injury Compensation Appeal Commission.

He has been a member of the Province of Manitoba Working Group on the Enhancement of French Language Services in Manitoba's Judicial System since 1996. He was the chair-person of the subcommittee and author of a 50-page report for the Program for the Integration of Both Official Languages in the Administration of Justice (POLAJ) with respect to Criminal Code amendment recommendations by the Federal Department of Justice in "Towards a Consolidation of Language Rights in the Administration of Justice in Canada" (1997). He was a member of the organizing committee for the National Symposium on Official Languages in Canada held in Ottawa (September 1998) and a member of organizing committee for the National Symposium "POLAJ: Twenty years of Administration of Justice in Both Official Languages – Taking Stock and Looking Forward" (2001). He was a member of the Federal Justice Focus Group in Ottawa, Ontario, on the Status of Access to Justice in Both Official Languages (2002).

With respect to his professional involvement, he has been a member of the Association des juristes d'expression française du Manitoba since 1989, a director since 1994 and the President for 1996 and 1997. He was elected to the Manitoba Bar Association Council in 2001. He was a resource person for the Manitoba Court of Appeal Rules Revision Committee in 2002. He is a guest lecturer at the University of Manitoba Law School in Municipal Law. He is a member of many community organizations and plays guitar as a pastime.

Marie-Claude Gervais

Counsel – Official Languages Law Group
Department of Justice of Canada

Marie-Claude Gervais was born in Montreal, where she obtained a B.A. in French Studies and a master's degree in Comparative Literature and graduated in law as well. She was called to the Bar of Quebec in 1996 after obtaining a master's degree in law at the University of Montreal and articling in the private sector. From 1993 to 1998, she also taught Legal Methodology and Interpretation of Statutes at the Law Faculty of the same university. She is currently pursuing a doctorate in law at the University of Montreal in co-direction with the University of La Sorbonne with respect to legal hermeneutics and language rights.

Marie-Claude Gervais joined the Department of Justice in 1997 as counsel in the Bijuralism and Drafting Support Services Group (then Civil Code Section). She has also been counsel at the Office of Francophonie, Justice in Official Languages and Bijuralism and is now a member of the Official Languages Law Group.

Richard Rochefort

Director General of Learning Events and Business Development, Canadian Centre for Management Development (CCMD)

(until August 2003)

Prior to joining CCMD, Mr. Rochefort was responsible for Network Development at Leadership Network. He was involved in promoting, developing and supporting networks of leaders throughout the Public Service of Canada and in assisting them in the ongoing challenge of *La Relève – Public Service Renewal.*

Mr. Rochefort also worked at the Privy Council Office, where he contributed to the *La Relève* initiative from its beginnings. Since he joined the Public Service in 1977, he has worked for several departments and agencies, including the Department of the Secretary of State, Elections Canada, the Royal Commission on Electoral Reform and Party Financing, Statistics Canada, the Treasury Board Secretariat, the Public Service Commission and National Defence.

During his 12 years in the field of elections, he took part in three general elections and a referendum. He also represented Canada in the first parliamentary elections in Russia in 1994 and in the first free elections in South Africa in 1995. In 1999, Mr. Rochefort was presented with the Head of the Public Service Award for his outstanding leadership in valuing and supporting people. Mr. Rochefort graduated from Laurentian University.

Morris Rosenberg

Deputy Minister of Justice and Deputy Attorney General of Canada on July 1, 1998

Mr. Rosenberg began his public service career as a lawyer with the Department of Justice in 1979. In 1987, after holding progressively senior positions with Legal Services at Consumer and Corporate Affairs Canada, he became Head of the Trade Law Section and spent much of the following year in Washington negotiating the procedures for dispute settlement under the newly formed Free Trade Agreement.

Mr. Rosenberg left Justice in 1989 to accept the position of Assistant Deputy Minister, Corporate Affairs and Legislative Policy, with Consumer and Corporate Affairs Canada. From 1993 to 1996, he served as Assistant Secretary to the Cabinet, Economic and Regional Development, at the Privy Council Office, becoming Deputy Secretary to the Cabinet (Operations) in 1996.

Mr. Rosenberg holds a B.A. from McGill University, an LL.L. from the Université de Montréal and an LL.M. from Harvard University.

Yvon Tarte

Chairperson, Public Service Staff Relations Board

Graduate of the University of Ottawa (B.A., LL.B.) and member of the Ontario Bar since 1973. From 1973 to 1975, he held the position of Assistant City Solicitor for the City of Ottawa. He was employed as an Appeals and Adjudication Officer with the Public Service Alliance of Canada from 1975 to 1978. He held the position of Counsel for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police from 1978 to 1981 and for the Canadian Human Rights Commission from April 1981 to January 1983. From February 1983 to his initial appointment with the Public Service Staff Relations Board, he was employed as Executive Director with the Office of the Commissioner of Canada Elections and as General Counsel to the Chief Electoral Officer of Canada.

Mr. Tarte was appointed Deputy Chairperson of the Public Service Staff Relations Board in January 1992 and Vice-Chairperson in May 1996. In December 1996, Mr. Tarte was appointed Chairperson of the Public Service Staff Relations Board. His appointment was renewed on May 7, 2001.

Mr. Tarte has been involved since 1989 in several international missions in Namibia, Benin, Burkina Faso, Bulgaria and China (twice). He was a founding member of APEX and currently sits on the Board of Directors of the Council of Canadian Administrative Tribunals (CCAT).

Johane Tremblay

Director, Legal Services, Office of the Commissioner of Official Languages

Joined the team of the Office of the Commissioner of Official Languages as Director, Legal Services, in 2000. From 1989 to 2000, Ms. Tremblay filled the position of Senior Counsel of the Canada Industrial Relations Board. Assigned to the Department of Human Resources Development in 1995, she was a member of the Sims Task Force responsible for the legislative reform of Part I of the *Canada Labour Code*, which led to the passage of Bill C-19 in 1999.

Ms. Tremblay, who holds a Bachelor of Civil Law degree from Université Laval and was admitted to the Quebec Bar in 1983, first practised labour law, constitutional law and administrative law for the firm of Kronstrom, Desjardins in Quebec City. She subsequently pursued advanced studies in constitutional law and labour law at Queen's University, where she obtained a master's degree in 1986.

Marc Tremblay

General Counsel and Director, Official Languages Law Group

In April 2001, Marc Tremblay was promoted to the rank of General Counsel and Director of the Official Languages Law Group at the Department of Justice. Since 1998, he has headed this specialized legal advisory services team, which provides and coordinates legal opinions submitted by the Department to the federal government as a whole, develops and coordinates the positions of the Attorney General of Canada in language litigation, and provides legal policy advice on language matters. In this context, Mr. Tremblay was a member of the litigation team in many cases, including *Beaulac* (S.C.C., 1999), *Arsenault-Cameron* (S.C.C., 2001), and *Lalonde – Hôpital Montfort* (Ont. C.A., 2002). He was also Project Leader on Bill S-41, *An Act to re-enact legislative instruments enacted in only one official language*, which received royal assent on June 13, 2002.

Prior to occupying his present position, Mr. Tremblay was Executive Assistant to the Assistant Deputy Minister, Canadian Unity Group, and he participated in the work surrounding the *Reference Concerning the Secession of Quebec* in the Supreme Court of Canada.

In 1995-96, he was legal analyst on language rights as well as equality rights at the Court Challenges Program of Canada. He also taught at the law faculties of the Université de Moncton (1992-93) and of the University of Ottawa (1991-92).

Mr. Tremblay is a graduate of Carleton University (B.A., sociology, 1987 and law 1986), of the French common law program of the University of Ottawa (LL.B., 1990) and of the Faculty of Law at Cambridge University (LL.M., 1991). He is a member of the Ontario Bar (1995).

Day 1

Words of Welcome
Richard Rochefort

Richard Rochefort, Director General of the Canadian Centre for Management Development, welcomed the 70 participants representing almost 30 organizations. He explained that the conference would explore the theme of the access to both official languages before federal courts, identify problems and search for answers, share best practices and learn from participants. He described the agenda before introducing the first speaker.

Opening Remarks
Yves de Montigny

Yves de Montigny, Chief Legal Counsel at the Department of Justice, set the context of the conference, outlining historical and recent events.

He also described the varied approach to be taken over the two days and quoted Justice Michel Bastarache, who spoke of a growing role for the administration of justice that was particularly important for Canada's official language minority communities. He stated that the Department of Justice of Canada has a vision of both official languages being used in federal courts without obstacles.

Madam Commissioner,
Distinguished guests,
Ladies and gentlemen, good morning.

Legal bilingualism and language rights in general have undergone multiple changes and the interpretation that has been and continues to be attributed to them reflects how fragile and important issues associated with legal bilingualism and language rights are. And, as any other fundamental right, language rights can only evolve, some say, and emerge in the context of a "fair, practical and broad interpretation."

These authors believe that it is necessary to "inject into language provisions their full meaning and scope so that they may actually be effective." These statements and often the teachings that go with them are not devoid of the voice of official language minority communities and stakeholders in the administration of justice. As for federal courts, what have they to say on the subject?

At their meeting of October 18, 2002, the group of chairs of federal courts made us aware of a possible symposium on "Access to Justice in Both Official Languages; English and French Before the Federal Courts."

The Department is grateful to this group for the attention that at the time was paid to our words and we are very pleased particularly with the support we received by this group – which was also eloquently represented at the meeting. As we indicated to you during our presentation, two factors related to the administration of justice define the scope of this conference. I will elaborate on this and then share with you a statement of objectives and the main purpose of this conference.

Legal background and contextual elements

Canada's bilingual tradition is the product of a unique history. The *Constitution Act, 1867*, which was the result of a political compromise between the French and the English, sought, even at that time, to promote the use of both languages in the political process and in the courts.

Later, in 1982, certain constitutional guarantees were formulated, and in the process, Canada adopted the principle of equality of status of the official languages and conferred rights with respect to their use. The rights conferred included the right to interpretation during a proceeding and the right to use French and English in any pleading in or process issuing from any court established by Parliament.

In 1988, the Parliament of Canada also adopted a new *Official Languages Act*. It allows proceedings before courts and quasi-judicial tribunals established by the Parliament of Canada to be conducted in one language, by guaranteeing the right to be heard by a judge who is able to understand the language of the trial without the assistance of an interpreter and requiring the federal Crown to speak the language of the parties or both official languages.

This, briefly stated, is the constitutional and legislative context in which your discussion and analysis will take place.

Moving on to issues affecting us more directly, the Commissioner of Official Languages reviewed in 1999 existing legislative provisions and administrative practices of the time which regulate the use of English and French before courts of record and quasi-judicial federal administrative tribunals: the mandate and the procedures of over twenty judicial or federal administrative tribunals were analysed. At the end of this exercise, the Commissioner formulated a series of recommendations which will be discussed this morning during the contextual setting.

One year later, the obligation of the federal courts to render their decisions and make them available to the public in both official languages was under examination in a lawsuit filed in the Federal Court.[1] The issue at bar involved the Immigration and Refugee Board's failure to provide a French version of all its decisions, past and present. The Board followed a rule of conduct according to which only some decisions deemed important would be translated, whereas a translation would be provided for other decisions in the official language of choice of a person upon his or her request.

The Court determined, nevertheless, that the on-request translation policy was in violation of section 20 of the *Official Languages Act*, which requires that all decisions by federal courts be rendered in both official languages. Deeming it important to "examine the Canadian constitutional and legislative background to the OLA," the Court of Appeal, which also heard the case, stated that language rights "must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada." It also upheld that the on-request translation policy was in violation of section 20 of the Act.

In December 2000, determined to exercise leadership on administration of justice in both official languages, the Department of Justice proposed the creation of a working group composed of federal courts and main stakeholders in this area, whose mandate would be to analyse current practices specific to the administration of justice in both official languages and propose possible solutions. Such project remained unfinished.

In July 2002, the Department also undertook a study entitled "Environmental Scan: Access to Justice in Both Official Languages". It was carried out to help build a profile of the situation concerning access to legal and judicial services in both minority official languages and facilitate the adoption of measures to improve access to justice in both official languages in areas that are under federal jurisdiction.

The Department had also participated in developing the action plan of the coordinating minister of official languages, Stéphane Dion, by ensuring the presence of the "access to justice in both official languages" component.

1 *Devinat* v. *Immigration and Refugee Board* [2000] F.C.

Objectives of this conference and proposed agenda

Considering these factors and how it is eager now more than ever to further the progress of access to justice in both official languages before federal courts, the Department of Justice considered it useful that a forum, in close collaboration with the Commissioner of Official Languages, be made available to the representatives of federal administrative tribunals and federal administrative tribunals exercising quasi-judicial functions so that they could be given the opportunity to deal with and question the current status of the use of English and French before their respective proceedings, particularly

- language of decisions,
- evidence and interpretation services, and
- rules of practice and guidelines.

It is from this perspective that we have spent the past few months implementing an advisory committee, developing a program, determining a work plan and, finally, preparing documents intended for you.

Fostering learning, sharing of information and discussion, the purpose of this conference is threefold: training, awareness and demonstration of best practices and possible solutions. Using a varied approach, thorough presentations will be given by representatives of the Department and the Office of the Commissioner of Official Languages, followed by organized and structured discussions in keeping with the format of thematic workshops.

However, to understand the practical operation of the language scheme of federal courts and federal administrative tribunals that exercise quasi-judicial functions, it is not enough simply to analyse relevant legal texts; one must examine the actual language practices followed during proceedings and how these practices have developed both historically and pragmatically. What are the major challenges that these language practices present? An initial discussion group will enable all participants to identify what these principles essentially are, in preparation for the next exercise, the Knowledge Café.

Although the law is becoming clearer, and beyond the legal foundation of federal bilingualism in the federal courts, those who interpret the law and those who administer justice still face a difficult and arduous task. In order for the judicial system to operate harmoniously on this foundation, the principal players in the administration of justice must establish the rules of conduct. What are these rules? Some – the well-established rules – will be readily apparent. Others – the more ad hoc and less clear rules –, will require more thought. The Knowledge Cafe will provide a special forum for structured, frank and constructive discussion. This discussion of the operation of bilingualism in the federal courts will be organized around topics. At the break, you will be asked to choose three of the six proposed, as presented in the program.

The dialogue will continue, and without interrupting the flow of ideas, a panel discussion will lead us, without losing our focus, into a dialogue that will present a multiplicity of views of various stakeholders: the private sector, which will present the view from outside; a federal administrative tribunal, which will present the view from inside; and the associations of jurists, which will present a more general view. This interaction will shed light on the particular perspective of each stakeholder in our discussion of the administration of justice. But first, Dr. Dyane Adam, the Commissioner of Official Languages, will take this opportunity to share with all of us the lessons she draws from history and the progress we are making today in achieving equality of status of both official languages in the administration of justice.

Since the purpose of this conference is to examine not only current practices but also anticipated future improvements, tomorrow's exercise will encourage us to look ahead. The matrix interview is an important exercise. Its participation component is essential because everyone, without exception, will be free to propose solutions and improvements. The consensus it produces will be by far the most valuable piece of information for improving and harmonizing practices.

This is the range of activities that will make up the discussion in which we are inviting you to participate. As one of your concerns, which you are willing to share with us, the status of French and English in the jurisdictions of which you are worthy representatives clearly will continue to improve, and to command the attention of the officials who have agreed to join us tomorrow to respond to your proposals. Finally, it is my hope that this range of activities will provide the appropriate setting for analysing and making proposals to improve the status of the official languages in the administration of justice.

Conclusion

The administration of justice, as Mr. Justice Michel Bastarache recently noted in discussing the equally controversial issue of judicial activism, is an issue of growing importance in Canada. The whole issue is one that resonates in particular with the official language minority communities.

In our opinion, what is needed to improve bilingualism in the courts is the choice of using both official languages before the federal courts, free of institutional and administrative impediments.

The innovative discussion techniques that the Canadian Centre for Management Development is proposing to us are an invitation to everyone – chairperson, director, jurist, head of communications, technical officer – to share their concerns, their questions and their answers, and in doing so, to advance this issue. The atmosphere of open dialogue that is created can encourage the expression of ideas that, we would like to think, are useful and perhaps even critical to the future of bilingualism in the courts.

I hope that this conference will be a rewarding experience for you all.

Yves de Montigny, Chair

Yves de Montigny introduced Marc Tremblay and Johane Tremblay, saying that they would help outline the constitutional and legislative framework.

Marc Tremblay

Marc Tremblay is Director of the Official Languages Law Group at the Department of Justice. He presented a detailed interpretation of the constitutional provisions for the administration of justice in both official languages, the advancement of the official languages through legislative means and the revitalization of language rights through the Beaulac case and the principles of interpretation.

Contextual Setting

Administration of Justice and Judicial Bilingualism: State of the Law

My presentation today is on the subject of bilingualism in the judicial arena and more specifically in federal courts and tribunals.

A brief reminder of the applicable constitutional provisions and the interpretation – sometimes generous and sometimes cautious – given to them by the courts offers us a broad understanding of the limits of these rights and a better idea of the objectives that Parliament had in mind when it enacted the *Official Languages Act* in 1988.

The questions surrounding judicial bilingualism and the meaning it should be given in Canada have certainly not all been resolved but we can derive satisfaction from the fact the courts are paying greater attention to the problems raised.

Since it is obviously not possible for me to speculate on the future evolution of language rights, I shall look instead at the rules of interpretation suggested by the Supreme Court of Canada in *Beaulac*, which, as we shall see, marked a new beginning for language rights.

INTERPRETATION OF THE CONSTITUTIONAL PROVISIONS GOVERNING THE ADMINISTRATION OF JUSTICE IN BOTH OFFICIAL LANGUAGES

Section 16 is the pivotal provision of the *Charter*[2] – we shall come back to it in the course of this presentation.

2 16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. (3) Nothing in this *Charter* limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Section 19 of the *Charter*[3] restates the fundamental constitutional right to use English or French in the courts, which was originally set out in s. 133 of the *Constitution Act, 1867*. Section 133 provides:

133. (...) and either of those Languages may be used by a Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

Therefore, the case law concerning s. 133 is still relevant and gives us an understanding of the scope and limits of its application.

Scope of application: to "any court established by Parliament"

In *Blaikie No. 1*,[4] the Supreme Court of Canada examined the application of section 133 of the *Constitution Act, 1867* to administrative tribunals, to which no express reference is made in the section.

After noting that the number and importance of non-judicial bodies with the power to adjudicate had increased significantly, the Court extended the scope of section 133 beyond the ordinary courts to include those bodies.

> "If they are statutory agencies which are adjudicative, applying legal principles to the assertion of claims under their constituent legislation, rather than settling issues on grounds of expediency or administrative policy, they are judicial bodies; however, some of their procedures may differ not only from those of Courts but also from those of other adjudicative bodies."[5]

Again in *Blaikie No. 1*, the Court gave the following indications of functions that involved a power to adjudicate:

- The organizations must be created by an Act of Parliament
- These organizations must have the power to adjudicate, which means that
  1. they apply legal rules;
  2. they hold hearings;
  3. their decisions affect rights and obligations; and
  4. their proceedings are adversarial.

The Court also expressed its views as to the content of the right protected by section 133, indicating in passing that besides the option of using either language in proceedings in the courts, s. 133 also permitted the use of either language in rendering the decision and publishing judgments and other documents issued by the courts.

> "It follows that the guarantee in s. 133 of the use of either French or English "by any person or in any pleading or process ..." [includes] not only ... the option to use either language given to any person involved in proceedings ... (and this covers both written and oral submissions) but [also entails that] documents emanating from such bodies or issued in their name or under their authority may be in either language, and this option extends to the issuing and publication of judgments or other orders."[6]

In *Blaikie No. 2*,[7] the Court went on to explain that the rules of practice of the courts and tribunals referred to in section 133 must be adopted and published in both languages because of the judicial nature of their purpose. The Court stated:

> "Rules of practice may regulate not only the proper manner to address the court orally and in writing, but all proceedings, processes, certificates, styles of cause and the form of court records, books, indexes, rolls, registers, each of which may, under s. 133, be written in either language... All litigants have the fundamental right to choose either French or English and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only."[8]

3 19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

4 *A.G. Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016.

5 *A.G. Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016 at p.1028 [emphasis added].

6 *A.G. Quebec* v. *Blaikie*, [1979] 2 S.C.R. 1016 at p.1030 [emphasis added].

7 *A.G. Quebec* v. *Blaikie*, [1981] 1 S.C.R. 311.

8 *A.G. Quebec* v. *Blaikie*, [1981] 1 S.C.R. 311 at p. 332 [emphasis added].

In short, it can be seen that the Supreme Court gave this constitutional provision a broad and liberal interpretation that makes it possible to achieve the goal that the framers of the Constitution had in mind:

- Section 133 provides for optional bilingualism – at the choice of the litigants, judges and officers of the court; this is true of oral and written submissions and applies to a broad range of court documents, including judgments.
- Section 133 also provides for mandatory bilingualism – in the rules of practice and forms, among other documents.

The limits of the right: an individual right without corollary duties for the State

While it was clear following *Blaikie* before which bodies it was possible to exercise this right, it was not clear what exactly it involved or the limits to its application.

In 1986, three decisions on language rights in the courts appeared to have reversed the tendency to give a liberal interpretation to the language guarantees in the Constitution, which had applied to that date.

The first question to be answered was: Does s. 133 give everyone the right to be summoned to appear by means of a document issued in his or her own language?

In *MacDonald*,[9] the Supreme Court answered this question in the negative. The right of each person to use his or her language did not mean that the recipient or reader must be able to understand the person or that this person is able to understand those who address him.

> "[T]he language rights then protected are those of litigants, counsel, witnesses, judges and other judicial officers who actually speak, not those of parties or others who are spoken to; and they are those of the writers or issuers of written pleadings and processes, not those of the recipients or readers thereof."
>
> "(...) it imposes no correlative duty on the State or anyone else."
>
> "(...) it does not guarantee that the speaker, writer or issuer of proceedings or processes will be understood in the language of his choice by those he is addressing."[10]

The Court accordingly found that s. 133 does not impose any corresponding obligation on the State.

This result came as a surprise to many.

In *Société des Acadiens*,[11] which was issued at the same time, the Supreme Court explained the bases for this cautious interpretation of language rights:

> "[T]he courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights."
>
> "And there is no language guarantee, either under s. 133 of the Constitution Act, 1867, or s. 19 of the *Charter*, any more than under s. 17 of the *Charter*, that the speaker will be heard or understood, or that he has the right to be heard or understood in the language of his choice."[12]

In *Société des Acadiens*, the issue involved was whether the judge needed to directly understand the language used by the parties.

Here again, the majority felt that the language rights conferred both by section 133 and by section 19 of the *Charter* did not guarantee that a person who expressed himself or herself in the language of his or her choice would be heard and understood in that language.

In short, according to the Supreme Court of Canada, the constitutional language rights

- confer rights on each individual
- do not impose any obligation on the State in the form of a requirement that the judge directly understand the parties without the assistance of an interpreter or a right to understand what the other people involved say and write.

9 *MacDonald* v. *City of Montreal*, [1986] 1 S.C.R. 460.

10 *MacDonald* v. *City of Montreal*, [1986] 1 S.C.R. 460 at pp. 483, 486, 496.

11 *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549.

12 *Société des Acadiens du Nouveau-Brunswick* v. *Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549 at pp. 574, 575, 578.

ADVANCEMENT THROUGH LEGISLATIVE MEANS: FEDERAL LEGISLATIVE PROVISIONS CONCERNING THE ADMINISTRATION OF JUSTICE

These fundamental constitutional provisions created the specific, albeit incomplete, framework of measures governing the recognition and use of French and English.

Nevertheless, the courts indicated that the "constitutional minimum" could be supplemented by legislation.

Let us now turn to a brief overview of the 1969 and 1988 *Official Languages Acts*, which are both examples of advancement by way of legislative means.

The First Official Languages Act of Canada (1969)

The purpose of the first *Official Languages Act* was to give English and French equality of status, not only in the Parliament and courts of Canada, as provided in section 133, but also more broadly throughout the federal government.

The constitutional validity of the Act was challenged at the time on the ground that it improperly extended section 133 of the *Constitution Act, 1867*.

It was argued that no government, either federal or provincial, had the necessary legislative jurisdiction to expand the language guarantees set out in section 133. The Supreme Court of Canada unequivocally rejected that position.

> "[T]here is nothing in it or in any other parts of the *British North America Act* ... that precludes the conferring of additional rights or privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting Legislature."
>
> "There is no warrant for reading this provision, so limited to the federal and Quebec legislative chambers and their legislation, and to federal and Quebec Courts, as being in effect a final and legislatively unalterable determination for Canada, for Quebec and for all other Provinces, of the limits of the privileged or obligatory use of English and French in public proceedings, in public institutions and in public communications. "[13]

This ruling is the foundation for the "principle of advancement through legislative means" – enshrined in s. 16(3) of the *Charter* and recently confirmed by the Supreme Court in the *Beaulac* decision.

The Constitution, we now know, is a floor but not a ceiling, and does not stand in the way of the legislative extension of rights.

It is in that sense that the 1969 Act stated a number of general principles designed to increase access in either official language to the federal courts and federal administrative tribunals that performed quasi-judicial functions.

These included:

- The right of witnesses to testify in either official language without prejudice, subject to broad exceptions.[14]
- The carefully circumscribed right to interpretation services.[15]
- The right to judgments of federal courts in both official languages.[16]

13 *Jones* v. *A.G. of New-Brunswick et al.*, [1975] 2 S.C.R. 182 at 192-93.

14 11(1) Every judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada has, in any proceedings brought or taken before it, and every court in Canada has, in exercising in any proceedings in a criminal matter any criminal jurisdiction conferred upon it by or pursuant to an Act of the Parliament of Canada, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in so being heard he will not be placed at a disadvantage by not being or being unable to be heard in the other official language.

15 11(2) Every court of record established by or pursuant to an Act of the Parliament of Canada has, in any proceedings conducted before it within the National Capital Region or a federal bilingual district established under this Act, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous translation of the proceedings, including the evidence given and taken, from one language into the other except where the court, after receiving and considering any such request, is satisfied that the party making it will not, if such facilities cannot conveniently be made available, be placed at a disadvantage by reason of their not being available or the court, after making every reasonable effort to obtain such facilities, is unable then to obtain them.

16 5(1) All final decisions, order or judgment, including any reasons given therefore, issued by any judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada shall be issued in both official languages where the decision, order or judgment determines a question of law of general public importance or where the proceedings leading to its issue were conducted in whole or in part in both official languages.

The 1969 Act was a major step forward but, as indicated, was subject to many limitations and much remained to be done. Still, it serves as an illustration of the fact that the legislator can, indeed is encouraged by the principles underlying our Constitutional order, to add to the bundle of rights provided by the Constitution; but the legislator is free to do so and may do so at the pace desired, and in the areas it so chooses.

The 1988 *Official Languages Act* was, in many respects, a much bolder step forward.

The new Official Languages Act of Canada (1988)

Aware of the shortcomings of the 1969 Act, and bolstered by the desire to provide a legislative rendering of the 1982 Charter, the Parliament of Canada enacted the new *Official Languages Act* in 1988.

The new Act clearly goes beyond the constitutional minimum and represents an application of the principle of advancement of English and French through legislative means. As Warren Newman noted at the time:

> "It is also a reflection of and a response to the dismay and consternation voiced by many quarters of public and political opinion at the Supreme Court of Canada in the *MacDonald*, *Bilodeau* and *Société des Acadiens* cases."[17]

The new Act begins by setting out that everyone – meaning litigants, counsel, witnesses, judges and other officers of the court – is entitled to use English or French before the federal courts in any pleading and any written or oral submission.[18]

This mirrors the wording and requirements of s. 133.

Part III of the Act would apply to precisely those courts to which s. 133 of the *Constitution Act, 1867* applied.[19]

The Act also repeats, at s. 9,[20] the constitutional rule from *Blaikie No. 2* with respect to the federal courts' rules of practice and procedure. They of course are required to be made in both official languages.

As well, the Act borrows from the 1969 Act, at s. 15,[21] the right of all to testify in one's official language of choice without prejudice, as well as the right to interpreters, while taking away the original Act's exceptions.

One of the principal achievements and advancements, however, is found at s. 16.[22]

17 "Language Difficulties Facing Tribunals and Participants: The Approach of the New Official Languages Act" in *Discrimination in the Law and the Administration of Justice*, Canadian Institute for the Administration of Justice, Editions Thémis, 1993.

18 14. English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

19 3(2) In this section and in Parts II and III, "federal court" means any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament.

20 9. All rules, orders and regulations governing the practice or procedure in any proceedings before a federal court shall be made, printed and published in both official languages.

21 15(1) Every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language.
(2) Every federal court has, in any proceedings conducted before it, the duty to ensure that, at the request of any party to the proceedings, facilities are made available for the simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other.
(3) A federal court may, in any proceedings conducted before it, cause facilities to be made available for the simultaneous interpretation of the proceedings, including evidence given and taken, from one official language into the other where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so for members of the public in attendance at the proceedings.

22 16(1) Every federal court, other than the Supreme Court of Canada, has the duty to ensure that
(a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
(b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and
(c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.
(2) For greater certainty, subsection (1) applies to a federal court only in relation to its adjudicative functions.
(3) No federal court, other than the Federal Court of Canada or the Tax Court of Canada, is required to comply with subsection (1) until five years after that subsection comes into force.

By requiring that the person who hears matters be capable of understanding the language or languages of proceedings directly, the new OLA provides an example of institutional bilingualism – where the duty is imposed on the court, not individual judges. This is important, as the Act could not limit judges' rights to use either official language, pursuant to s. 133. It is up to the Court to assign cases in such a way as to respect both the rights of judges and the rights of those who appear before them.

A second, no less significant advance is found at s. 18.[23] Here, it is provided that the State will use the language of the other party in its written and oral pleadings in the proceedings. Here again, we find an example of institutional bilingualism and yet another illustration of the principle of advancement in a legislative response to *MacDonald* and *Bilodeau*. Significantly, we also find – in the words "pleadings in the proceedings" – language that mirrors the wording used at s. 133 and presumably the same scope and application as was given by the Supreme Court to the same words – in its already broad and liberal interpretation of the expressions in *Blaikie No.1* and *Blaikie No.2*.

Does this duty extend to the evidence and affidavits submitted in court? So far, the Courts have responded in the negative.[24] This is a topic that will be discussed during this conference.

Finally, section 20[25] requires that all final decisions be issued in both official languages, either simultaneously or at the earliest possible time.

Here again we have an example of institutional bilingualism, as the Act preserves the right of judges to issue judgements in one language and ensures the validity of judgments rendered in only one language, while requiring that the decisions be translated.

As you know, the Commissioner of Official Languages recommended in 1999 that the Department of Justice consider whether the present scope of subsection 20(2) is appropriate.

Since then, the courts have dealt with the scope of section 20 and the Department of Justice has decided that there was no requirement for legislative clarification.

As you also know, in the *Devinat* case[26], the Federal Court of Appeal held that s. 20 clearly requires that all final decisions be available in both official languages.

> "In my view, the terms of section 20 of the OLA are clear. They require all federal courts, including the respondent, to issue their decisions, orders and judgments in both official languages at the earliest possible time in most cases or simultaneously in the cases provided for in paragraph 20(1)(a), unless this would be seriously prejudicial to the public or result in injustice or hardship to any party, and in paragraph 20(1)(b)."[27]

23 18. Where Her Majesty in right of Canada or a federal institution is a party to civil proceedings before a federal court,
(a) Her Majesty or the institution concerned shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties unless it is established by Her Majesty or the institution that reasonable notice of the language chosen has not been given; and
(b) if the other parties fail to choose or agree on the official language to be used in those pleadings, Her Majesty or the institution concerned shall use such official language as is reasonable, having regard to the circumstances.

24 See *Lavigne* v. *Canada* (Human Resources Development Canada) (February 25, 1997), Montréal No. A-836-95 (F.C.F.) (appeal dismissed); *Lavigne* v. *Canada* (Human Resources Development Canada) (1995), 106 F.T.R. 308 (F.C.T.D.) (translation of affidavits by the court); *Lavigne* v. *Canada* (Human Resources Development Canada) (1995), 96 F.T.R. 68 (F.C.T.D.) (translation of affidavits by the Crown).

25 20(1) Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where
(a) the decision, order or judgment determines a question of law of general public interest or importance; or
(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.
(2) Where
(a) any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or
(b) the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance, the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.

26 *Devinat* v. *Canada* (Immigration and Refugee Board)., [2000] 2 F.C. 212 (F.C.A.), leave to appeal dismissed [October 12, 2000] no 27727.

27 *Devinat* v. *Immigration and Refugee Board*, [2000] 2 F.C. 212, par. 57.

The Court also held that an "on-request" policy did not meet the Act's requirements.

> "In my view, the respondent is not discharging the duty provided for in section 20 of the OLA. The on-request translation policy does not meet the "earliest possible time" requirement, since it means that most decisions will never be issued in the other official language. If Parliament had wanted federal courts to have an on-request translation policy, it could have so specified."[28]

Beyond the interpretation of s. 20, the *Devinat* case provides a clear illustration of the importance of the *Beaulac* decision, on which it is premised. Let us now turn to the *Beaulac* decision.

RULES GOVERNING THE INTERPRETATION OF LANGUAGE RIGHTS: THE DECISION IN *BEAULAC*

As we have seen, the Supreme Court had concluded in its 1986 trilogy that the courts had to approach language rights with more restraint and that they should hesitate to act as instruments of change in this area.

It was in *Beaulac*[29] that the Court provided the most rigorous reformulation of the position to be taken in interpreting language rights, which must, according to the Court, now be subject to a liberal approach in all cases.

> "Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada".[30]

This change is particularly important because it was in the area of judicial rights – and thus in the area that is of interest to us at this conference – that the restrictive approach had most often been used up to that point.

Before considering the interpretation of s. 530 of the *Criminal Code*, Justice Bastarache examined "the constitutional background that has been so important to the recent interpretation of official language provisions."[31]

Justice Bastarache, writing for the majority, ruled that, to the extent that the 1986 trilogy of decisions concerning language rights advocated a restrictive interpretation of these rights, it should be rejected.

- To ensure the preservation and development of official language communities in Canada, and
- To assist official language communities in preserving their cultural identity.[32]

In so ruling, the majority moved away from the rule laid down earlier by the Court concerning the cautious approach to be taken in the interpretation of language rights in favour of a liberal, purposive rule of interpretation.

In the view of the majority, "the existence of a political compromise is without consequence with regard to the scope of language rights." [33]

In support of this conclusion, Justice Bastarache relied on subsection 16(1) of the *Charter,*

- "which formally recognizes the principle of equality of the two official languages of Canada"[34] and
- "affirms the substantive equality of those constitutional language rights that are in existence at a given time."[35]

This principle of substantive equality has meaning:

> "It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State [references omitted]. It also means that the exercise of language rights must not be considered exceptional, or as something in the nature of a request for an accommodation."[36]

28 *Devinat* v. *Immigration and Refugee Board*, [2000] 2 F.C. 212, par. 58.

29 *R*. v. *Beaulac,* [1999] 1 S.C.R. 768.

30 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 25. [emphasis added].

31 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 13.

32 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 34: "The solution to the problem, in my view, is to look at the purpose of s. 530. It is, as mentioned earlier, to provide equal access to the courts to accused persons speaking one of the official languages of Canada in order to assist official language minorities in preserving their cultural identity." [emphasis added]

33 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 24.

34 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 22 [emphasis added].

35 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 24 [emphasis added].

36 *R*. v. *Beaulac*, [1999] 1 S.C.R. 768, par. 24.

Finally, the principle of "substantive equality", similar to the principle developed by the courts in the interpretation of s. 15 of the *Charter*, requires that the official language minorities be treated differently, where necessary, to reflect their situation and their specific needs.

> "Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada."[37]

Furthermore, the interpretation to be given to existing language rights must respect "as much as possible the words of the provision, but most importantly its spirit" as part of the general objective of protecting official language communities and preserving their cultural identity.[38]

At this point we need to provide some clarification: the Court did not express any intention to move toward an interventionist approach that would substitute its views for those of the framers of the Constitution or those of the legislature. The words chosen by the framers of the Constitution or by the legislature continue to take precedence – and it remains impossible to interpret them in a way that will extend them beyond the original intent. It is therefore the language used by Parliament that is given a broad and liberal interpretation in *Beaulac* – but although the Court noted that some existing rights are of limited use, it did not change their meaning under the guise of interpretation.

Furthermore, the Court clearly stated in its decision in *Lavigne* in June 2002 that the privileged status enjoyed by language rights does not have the effect of changing the traditional approach to statutory interpretation. It is necessary to read the provisions of a statute in their overall context and to take the ordinary grammatical meaning of the words in a way that is in harmony with the spirit of the statute, its purpose and the intent of the legislature.

> According to the majority, the general purpose that language rights are designed to achieve is:"The *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that this Court has recognized them as having. However, their status does not operate to alter the traditional approach to the interpretation of legislation (...)."[39]

However, when the legislature has spoken and conferred legislative language rights in accordance with the principle of advancement entrenched in s. 16(3) of the Charter, "the courts have to respect them." In fact, these rights "are essential for the viability of the nation."[40]

Principles of fundamental justice compared with language rights

Along the same lines, the Court clearly indicated in *Beaulac* that the distinction it had made between language rights and the principles of fundamental justice, such as the right to a fair trial, remained intact.

In effect, "language rights are not meant to enforce minimum conditions under which a trial will be considered fair, or even to ensure the greatest efficiency of the defence,"[41] and they are not limited by an accused's ability to use the other official language.

> "It is also useful to re-affirm here that language rights are a particular kind of right, distinct from the principles of fundamental justice. They have a different purpose and a different origin."[42]

A person's right to make full answer and defence and the ability to understand his or her trial and to make himself or herself understood there are guaranteed by s. 14 of the *Charter* – these are not language rights, as the Supreme Court of Canada confirmed in repeating the conclusions in the *Société des Acadiens* decision.

37 *R.* v. *Beaulac,* [1999] 1 S.C.R. 768, par. 22.

38 *R.* v. *Beaulac,* [1999] 1 S.C.R. 768, par. 28.

39 *Lavigne* v. *Canada* (Commissioner of Official Languages) (June 20, 2002), 2002 SCC 53, par. 25.

40 *R.* v. *Beaulac,* [1988] 1 S.C.R. 234 at p. 269, La Forest J.

41 *R.* v. *Beaulac,* [1999] 1 S.C.R. 768, par. 47.

42 *R.* v. *Beaulac,* [1999] 1 S.C.R. 768, par. 25.

CONCLUSIONS

In short, while the approach to the interpretation of existing language rights is now more generous and this new approach raises a number of questions as to the limits of the judicial decisions referred to earlier, the Supreme Court has not in any event completely abandoned the earlier case law – far from it – any more than it has rejected parliamentary supremacy. Only time will tell which of the precedents may need to be discarded.

New rules now govern the interpretation of constitutional and legislative language rights and this requires a search for substantive equality in the status of both official languages, and hence the protection of language minorities, regardless of the administrative inconvenience.

Part III of the OLA offers an eloquent illustration of the application of the principle of advancement by legislative means.

We must give these legislative provisions a broad and liberal interpretation in light of their ultimate purpose.

This imposes obligations on us, including that of taking the necessary steps to ensure respect for existing rights and to attain the purposes of the law.

This message is geared to us all and poses a substantial challenge.

Johane Tremblay

Johane Tremblay, Director of the Legal Services Branch at the Office of the Commissioner of Official Languages (OCOL), described the Office's 1999 study on the equitable use of English and French before federal courts of record and administrative tribunals exercising quasi-judicial functions. The goals of the study were to identify problems, propose solutions, and collect information on practices and procedures. Information was gathered from questionnaires and interviews with the staff of approximately 20 courts and tribunals.

1999 Study by Office of Commissioner of Official Languages on Use of French and English in Federal Courts

1. 1999 Study

Background

The 1999 study was preceded in 1995 by a study dealing with all the courts (provincial and federal) with civil and criminal jurisdiction. We quickly realized that we could not cover everything and the 1995 study therefore dealt primarily with observance of language rights mentioned in the *Criminal Code*.

In 1999, the OCOL decided to conduct a second study that would deal more specifically with the federal courts and the language rights mentioned in Part III of the OLA.Note that the study was done before the Supreme Court of Canada judgment in *Beaulac*.

Scope

The 1999 study covered the federal courts, that is, the traditional courts of record (the Federal Court, the Tax Court of Canada) and the administrative tribunals performing quasi-judicial functions.

Purpose of Study

- Identify problems encountered by the public
- Suggest solutions: often put forward by certain courts
- Collect information on practices and procedures

2. Methodology

Specific questionnaires were developed and distributed to administrative staffs, judges and adjudicators of approximately twenty federal courts and quasi-judicial tribunals, to a number of lawyers representing citizens before those courts and tribunals, as well as to nongovernmental organizations representing official language minorities.

In addition, interviews were held with many of the aforementioned stakeholders across the country.

General findings: findings similar to those made as a result of the 1995 study

- Members of the public lack information about their language rights
- They shy away from exercising their language rights because they assume that, by proceeding in the minority language, they are likely to be placed at a disadvantage
- Citizens face a number of barriers when exercising their language rights

3. Chief deficiencies found

We found six deficiencies:

1. Notable absence of active offer
2. Inadequacy or ineffectiveness of measures to identify official languages of proceedings in time
3. Inadequacy or ineffectiveness of measures to determine needs in term of interpretation and ambiguity concerning requirement related to the transcription of interpretation
4. Affidavit evidence: ambiguity concerning linguistic requirements
5. Language of decisions: difficulties observing rule that decisions should be issued in both official languages and lack of policy to ensure all decisions are translated
6. Courts have insufficient bilingual capacity

4. The importance of making an active offer

The importance for courts and tribunals to make an active offer of bilingual services cannot be overstated (this also applies to their administrative services and quasi-judicial activities); recent studies (three by OCOL and one by Justice Canada) have shown that the active offer and the exercise of language rights are closely interconnected.

The active offer is an essential requirement in order to:

- make members of the public aware of their rights;
- allow them to exercise their rights;
- counteract the false assumption by litigants that they will be placed at a disadvantage if they proceed in the language of the minority.

Citizens and their lawyers are, in fact, often under the impression that it is an exceptional favour for them to be allowed to proceed in the minority language. Worse yet, they assume that they will be placed at a disadvantage by requesting to have their case heard in the minority language: they are concerned about the potentially increased delays or costs or to the lack of readily accessible material in that language or complete absence thereof.

The active offer is also of importance for practical reasons:

- It allows them to identify, in a timely manner, the language of proceedings and, consequently, to avoid the postponement of hearings due to language constraints.
- It allows them to better plan the use of their resources and assign suitable staff and court or tribunal officers to hear cases.
- It allows them to determine their needs for interpretation.

Time of active offer: at first contact between litigant and court

An inadequate active offer will be one which is not sufficiently proactive or which is not clear enough to inform and to answer litigants' questions – to enable them to know that what they do have are "rights", not favours.

The first contact litigants have with the staff of courts in which they initiate litigation or to which they have been summoned in connection with an action against them is very important. The reality is that courts are frequently intimidating to litigants and the proceedings to be used in gaining access to them are very complicated for them, especially if they are not represented by counsel. The first contact with a court therefore greatly influences the way the proceedings are conducted.

COL'S RECOMMENDATIONS: ACTIVE OFFER

Recommendation 1: The Commissioner therefore recommends that all federal judicial and quasi-judicial tribunals review the means they are presently using to ensure that they make an active offer of their services in both official languages and that they make the necessary changes.

Recommendation 2: The Commissioner therefore recommends that all federal judicial and quasi-judicial tribunals review their forms and originating documents to ensure that any plaintiff is advised of his or her ability to function in both official languages and is asked to indicate the official language of his or her choice.

Recommendation 3: The Commissioner therefore recommends that all federal judicial and quasi-judicial tribunals ensure that their rules of practice provide that the parties to a proceeding can indicate, before the hearing date is set, the official language in which they intend to submit their arguments and in which each witness will testify.

Recommendation 4: The Commissioner therefore recommends that all federal tribunals review their internal policies and administrative procedures to ensure that there is effective liaison with parties regarding the linguistic profile of a given case and the need for interpretation services.

5. Identification of language of proceedings

The 1999 study confirmed the importance of adopting rules of practice regarding identification of the official language of proceedings and identification of interpretation requirements.

Rules of practice may specify, among other things, identification of the choice of the official language for the civil party on the originating document or a specific question in this regard on the initial application form.

Such proceedings will avoid various types of inconvenience, such as cost and frustration of parties to proceedings.

The study also noted the importance of internal administrative rules dealing with the assignment of court staff and members of tribunals to hear given cases that take into account the language requirements of the case.

6. Court interpreters and bilingual transcript of proceedings

A party to proceedings is entitled to obtain, on request, simultaneous translation of the proceedings (OLA, s. 15(2)).

Courts or tribunals may, on their own initiative, arrange for the interpretation of their proceedings where the proceedings are considered to be of general public interest or importance or where they otherwise are considered desirable for members of the public in attendance at the proceedings (OLA, s. 15(3)).

Difficulties

- Conduct of proceedings subject to practical difficulties where an improper determination of translation needs is made

The mere fact of knowing the official language of the parties does not guarantee that an accurate determination of translation needs can be made in any given proceedings. The attendance of witnesses may also have an impact on such determination. When unexpected witnesses are called at the last minute, practical difficulties may arise in terms of providing the necessary translation services.

- Lack of measures aimed at controlling the quality of translation and compliance with equality rules

The provision of substandard translation amounts to a denial of equal access to justice in both official languages for the parties affected. At present, no quality control procedures are in effect.

- Lack of recording or transcription of interpretation and equality rules

As the interpretation is simultaneous, only the direct language of argument or testimony is recorded. The tape and transcript are useful for checking the quality and accuracy of given interpretation. They are also a means of allowing a party to adequately prepare, for example, for an appeal. If there is no means of obtaining a transcript of the interpretation, equal access to justice will be denied.

Note that s. 530.1 of the *Criminal Code* provides for such a transcript of the interpretation.

Possible solutions

- Adopting rules of practice to determine interpretation needs adequately

Such rules of practice may provide, among other things, for identification of interpretation requirements and what is needed for the capability of the tribunal to hear a case in a given language. This identification may be done through the hearing notice, which could include a question on the language of witnesses and the official language in which submissions will be made.

- Assessing feasibility of amending OLA to provide for transcription of interpretation
- Section 530.1 of the *Criminal Code* does provide for such a transcript of interpretation
- Assessing feasibility of creating an interpretation certification system

COL'S RECOMMENDATIONS

Recommendation 4: The Commissioner therefore recommends that all federal tribunals review their internal policies and administrative procedures to ensure that there is effective liaison with parties regarding the linguistic profile of a given case and the need for interpretation services.

Recommendation 10: The Commissioner therefore recommends that the Department of Justice review existing provisions in order to insert a rule that any interpretation from one official language to the other given in a civil proceeding should be part of the official transcript of the proceeding and be made available to any party on request.

7. Affidavit evidence

Rights and duties

Section 14 establishes French and English as the official languages of federal courts. Either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court.

The federal Crown and federal institutions are under a duty to use the official language of the other parties to civil proceedings in "any oral or written pleadings" (s. 18).

- Unless a lack of adequate notice is demonstrated. Absent any choice of official language by other parties or agreement among other parties to the proceedings, the federal Crown and federal institutions are justified in using such official language as is reasonable, having regard to the circumstances.
- Witnesses have the right to be heard in the official language of their choice without being placed at a disadvantage as a result of their choice. (s. 15(1)).
- Persons providing affidavit evidence have the right to do so in the official language of their choice. (s. 14)

Problem

- Should affidavit evidence submitted by the Crown in right of Canada or a federal institution be translated if the civil party chooses to proceed in a different official language from that of the affidavit?
- Is evidence submitted by affidavit covered by the phrase "oral and written pleadings"?

According to *Lavigne*, decided in 1995, the Crown in Right of Canada and federal institutions do not have to provide translation of affidavits as the affidavits are not "oral or written pleadings" within the meaning of s. 18 of the OLA. However, this decision was rendered before the Supreme Court's judgment in *Beaulac*.

In view of the new broad and liberal rules of interpretation based on the purpose of language rights, developed in *Beaulac*, the question arises again. Moreover, this question has arisen in a case currently pending before a New Brunswick court (*Charlesbois*). Although s. 18 of the OLA is not directly involved, the provision of the New Brunswick *Official Languages Act* in question is worded in the same way.

- If affidavits are covered by the phrase "oral or written pleadings", are exhibits in support of affidavits also covered?
- Could the rule of justice and fairness require that the Crown in right of Canada and federal institutions provide civil parties with a translation of affidavits, a portion or a summary thereof in certain circumstances?

In his study (p. 39), the Commissioner expressed the opinion that the fact of not providing a translation of an affidavit could result in injustice in some cases and that it would seem advisable, whenever it is reasonably possible, to provide a translation of the affidavit (not including exhibits). The study includes a recommendation to this effect. That recommendation tries to strike a balance between the fact that a civil party may suffer injustice (if it prevents the party from preparing a case adequately) and the fact that it could be unreasonable for the administration of justice to require the translation of lengthy exhibits (delay and cost).

In this connection we should also note the recent judgment by the Quebec Superior Court in *Stadnick* directing the Crown to provide the accused with a summary of affidavits and exhibits entered in evidence in the latter's official language. That judgment, which has not been reversed by the Supreme Court of Canada, can give an idea of the judicial direction that may be taken on this question.

COL'S RECOMMENDATION

Recommendation 11: The Commissioner therefore recommends that amendments be made to Part III of the OLA to require federal institutions to provide a certified translation (from one official language to the other) of affidavit evidence (not including attached exhibits) which they submit in federal court hearings when a translation is requested by a party submitting his or her arguments in the other official language. In order to reflect the new translation requirements, it would be advisable to amend accordingly rules of procedure which set out deadlines and expiry dates for filing pleadings and other documents.

8. The language of decision

Issues arising out of the application of section 20

- Should all decisions be issued in both official languages or only those that are "final"?

Given that the term "final decision" is used only in s. 20(1), it has been argued that the application of the term is limited to that particular subsection. As a result, there are some who claim that all decisions, whether "final" or not, must be also issued as soon as practicable in the other official language. Others argue, on the contrary, that the term "final decision" applies to both subsections and that, as a consequence, only those decisions that can be considered "final" also must be issued in the other official language or at the earliest possible time.

In the *Devinat* case, the Court held that the basic rule is provided for in s. 20(1) and that s. 20(2) establishes two exceptions. The Court came to the conclusion that section 20 requires that all federal courts and tribunals issue their decisions in both official languages as soon as practicable in most cases, and simultaneously in those cases only coming under s. 20(1).

- When is a decision "of general public interest or importance"?

Courts have not followed the same approach in this respect. Some have established policies, rules or guidelines to define the scope of this test. For example, the Immigration and Refugee Board considers a decision as being of general public interest or importance where it involves a novel, compelling resolution of a legal issue and the resolution, given that legal issue, is likely to have a significant impact on the development of the substantive law or practice and procedure rules of law. On the other hand, the Canadian Tax Court considers a decision to be of general public interest or importance if it is based on the conduct of proceedings in both official languages, or if it is likely to be of interest to the general public.

- What is meant by the phrase "at the earliest possible time"?

Some courts have a policy of translating on request. This does not meet the "earliest possible time" rule as laid down by the Court in *Devinat*. Additionally, some courts have a system of priority for decisions, with the result that some decisions are never translated or are translated several months or years after they are rendered. This does not appear to comply with the "earliest possible time" rule. However, it is difficult to determine what the "earliest possible time" is.

Possible solutions

- Adopting policy on translation priority for decisions

The Tax Court of Canada has established such a policy, which requires a large majority of decisions to be ultimately translated. However, its implementation may not result in all decisions being translated as provided by section 20 of the OLA. However, we must keep the practical side of such a policy in mind. Such a policy may, at least, "facilitate" compliance with s. 20. This is the gist of recommendations 8 and 9.

- Assessing feasibility of amending s. 20 of OLA

This is the gist of the COL's Recommendation 6. Could s. 20(2) not cover only decisions which are precedents or which have some effect on legal principles? While this aspect appeared to be a major concern in interviews conducted for the 1999 study, is it still so today?

- Considering means to exempt certain tribunals from compliance with the s. 20 obligation in certain circumstances: this is the gist of the COL's Recommendation 7

COL'S RECOMMENDATIONS

Recommendation 6: The Commissioner therefore recommends that the federal Department of Justice review the desirability of the present scope of s. 20(2) of the OLA, in so far as that provision requires decisions which are not precedents and have no effect on legal principles to be rendered in both official languages.

Recommendation 7: The Commissioner further recommends, for cases in which the present scope of s. 20(2) of the OLA is not justified by any higher principle, that the federal Department of Justice consider amending the OLA to give the Governor in Council the power to specify by regulation courts which should be exempted from the requirement of handing down their factual decisions in both official languages, when such decisions are not precedents and are not significant in terms of legal principle, and result from a purely unilingual proceeding; also to establish categories of decisions for this purpose. The criteria for such exemption should be clearly defined.

Recommendation 8: The Commissioner therefore recommends that all judicial and quasi-judicial federal tribunals review their current guidelines governing the release of their decisions in both official languages, and if necessary establish written guidelines indicating criteria for setting translation priorities.

Recommendation 9: The Commissioner further recommends that, in establishing a system of priorities for translation of their decisions, federal judicial and quasi-judicial tribunals make a clear distinction between the duty to render their judgments simultaneously in both official languages under s. 20(1) of the OLA and the duty to render other significant decisions in both official languages, within a deadline consistent with the OLA.

9. Bilingual capability of courts and tribunals

Rights and duties

- Every litigant has the right to be heard and understood in the official language of his or her choice by a judge or officer without the assistance of an interpreter. (OLA, s. 16)
- There is no requirement for all members of a court or a tribunal to be bilingual but the court or tribunal must, as an institution, be bilingual.

Accordingly, the court or tribunal must be staffed by a sufficient number of judges or officers in order for that institution to hear matters brought before it in the minority official language or in both official languages.

Possible solutions

- Assignment of members to a given case: Provide rules of practice to determine parties' linguistic requirements before a hearing date is set.
- More general solution: Review the process of appointing members of courts.

Case of interest

Private Copying 1999-2000 (Re: Language of Proceedings), Decision of Mr. Justice Gomery, Copyright Board of Canada, June 10, 1999. In that matter, only one of the three members on the panel (and even of the tribunal's total members) could hear the case in both official languages. The hearing accordingly took place before a smaller panel. Subsequently, there were new appointments which have made it possible to deal with the problem on this tribunal.

COL'S RECOMMENDATIONS

Recommendation 3: The Commissioner accordingly recommends that all federal judicial and quasi-judicial tribunals ensure that their rules of practice provide that the parties to a proceeding shall indicate, before the hearing date is set, the official language in which they intend to submit their arguments and in which each witness will testify.

Recommendation 12: The Commissioner therefore recommends that the Privy Council Office consider the way in which appointments are made to various federal administrative tribunals performing quasi-judicial functions, with a view to proposing a process that will help the tribunals to comply with s. 16 of the OLA. Consequently, the Commissioner recommends that the Privy Council Office ensure that administrative tribunals are consulted on their appointment requirements in terms of their capability to hear cases in both official languages before candidates are appointed.

10. Recommendations

The recommendations contained in the report are designed to:

- draw attention to possible means of solving access problems;
- encourage tribunals to review their procedures and guidelines;
- review the legislative framework and improve it, if necessary;
- increase the accountability of the Privy Council Office.

11. Follow-up conference

- Training
- Raising awareness
- Providing support and networking
- Consolidation of efforts by various stakeholders

Discussion

A participant said that he takes part in hearings of the Canadian Trade Tribunal. This tribunal uses both versions of the relevant acts and official versions of documents of the World Customs Organization and World Trade Organization (which are in English, French, and Spanish). He asked if reading in French from the legislative texts would infringe on the language of people who had chosen to make a plea in English.

Marc Tremblay said that federal legislation is one act in two versions. It is therefore not only permissible but also necessary for the interpreter to refer to and rely on both the English and the French version of federal legislation. The Federal Court rules, for example, now require that parties file both versions with the Court. With unofficial texts, the issue is more complex. Generally, and depending on the rules of the court before which one appears, where they do exist in both official languages, the party referring to such texts has the choice of whether to use them in their original or translated version and will usually indicate in brackets that a given text is the translation of the original. The Attorney General of Canada has gone further and its departmental policies require that it files with the court the translated versions of texts, when they exist, or provide a translation of the text where practicable, in the language of the proceedings.

Yves de Montigny remarked that the *Beaulac* decision challenged the underlying principles upon which the *MacDonald*, *Bilodeau* and *Societé des Acadiens* cases were decided. He asked if one day the Supreme Court would take these new principles into account and overturn these three decisions. Marc Tremblay responded that the risks of such reversal by the courts regarding the language of judges at the federal level are small because these rights have already been guaranteed by the existing legislation. In Quebec, where the constitutional provisions also apply, although the right to be heard directly is not guaranteed by provincial legislation, the risk is unlikely to materialize in practice given the high degree of bilingualism among Quebec's judiciary. As to the second contentious issue, that is, the obligation of the Crown to use the language of the other party, again, the *Official Languages Act* has provided a legislative solution to this issue at the federal level. The willingness of the New Brunswick courts to re-examine the scope of the existing case law in light of that province's specific circumstances points to some potential avenues for future judicial considerations outside the federal sphere.

Richard Rochefort invited participants to list the main challenges in their respective organizations to improving access to justice in both official languages. Then each table designated a representative, who reported the main challenges common to each group as reproduced here.

Discussion Group: Main Challenges

Discussion Report

Group 1 (Translation)

- Veterans Review and Appeal Board (mainly in Ottawa, N.B., and Manitoba) requiring the elderly and often spouses of the other official language to follow procedures. Therefore, there is sometimes a change of language during the proceedings.
- Bilingual capability varies in each province. Bilingual members are therefore forced to travel often.
- Sometimes, change of mind after the hearing (wish to use one language during the hearing, but then decide that they want to hear the decision in the other language).
- Section 20 problem – private decision (factual) – why translate so many decisions?
- Certain courts proceed in private (without public); decisions should not have to be translated.
- Evidence issue = translation? Difficult to translate; nevertheless, there is simultaneous interpretation.
- Scientific evidence issue – difficult to translate.
- Electronic file – Part IV of the OLA – if we must translate the document on the internet, it will reduce access to information since the courts will not be accessible.
- Documentation mix (evidence) in French and in English, i.e. medical evidence = does not want to translate it because it is expert evidence and does not want to lose certain aspects thereof.
- Favour individuals whose rights are affected by the decision = language of the evidence.
- Active offer = Yes, they make it (often in a form), but sometimes, they do not want to insult the justiciable (sometimes Francophone themselves, but want to use English).
- The problem is not French or English, but individuals who speak other languages.

Group 2

- *Devinat* vs. practical realities of what tribunals are actually able to do and what they are doing (cost).
- Translation of documents / exhibits / med. reports filed with board, may be attached to decision, or excerpts therefrom?
- Quality of translation.

Group 3 (Translation)

- Insufficient number of bilingual and specialized employees – not enough members.
- (Administrative Tribunals) & not enough support staff.
- Difficulty of communications among offices within the same entity.
- The beneficiaries feel that they will be better understood if they proceed in English.
- No active offer from the outset.
- Lack of staff = complicates work organization.
- Delays because of translation services.
- Translation – quality of decisions – technical issues – legal issues (civil & common law).
- Different bilingual lawyers can not be compared with legal editors.
- Filing of evidence = no uniformity, no guidelines. One never knows whether the evidence will be translated or not.
- In the presence of appendices, they are not translated because the translation cannot be certified.
- No criteria regarding which documents will or will not be translated.
- Difficulty of communication.
- Decision-making process longer in French than in English in certain courts.

Group 4

- New evidence / witness, which is not in the language of the hearing.
- Bilingualism of GIC's.
- Other languages /cherry picking of board members, judges shopping.
- (Translation) Shortage of support staff in regional offices.
- (Translation) Active offer / translation decisions.
- (Translation) Resources vs. time for decisions in the public interest – Internet publication.

Group 5 (Translation)

- Bilingual linguistic capabilities of the members: training, ministerial recommendations, openness of the process – staff bilingual linguistic capabilities.
- Interpretation – certify quality and accuracy.
- Translation of decisions (volume; costs, simultaneous publication).

Group 6 (Translation)

- Cost and planning of translation and editing; active offer (first contact).
- Appointment of members; staffs and members.
- Simultaneous translation (hearing/Individuals and cost of transcription).
- (Specialization) e.g. transportation, simultaneous translation – hearing, transcription (resources and cost).
- Quality of the translation (revision) (time – delay) (proofreaders, editors).
- Resource scarcity (availability); qualified people.
- Delays in producing the translation.
- Web sites and publication.
- *Devinat* decision – (Treasury Board).
- Planning of financial and human resources.
- Understanding and standardization of practices and guidelines regarding the official languages.

Group 7 (Translation)

- Need to translate decisions (for what purpose?); translating only decisions that concern the parties involved.
- Number of decisions too high.
- Numerous and bulky decisions = high cost.
- Simultaneous publication of decisions and grounds (English and French) delay's problem.
- Members who are not bilingual.
- Identification of the file language from the outset.
- Quality control of the translation.

Beyond the concerns related to the more general understanding of the applicable rules, the incorporation of guidelines and the desired standardization of practices concerning the official languages, the challenges that were identified cover a wide range of issues. Below are the most frequently expressed concerns:

Bilingual capability of the courts

- Increase the bilingual capability of the members, for example, through training, a ministerial recommendation, the opening of a process of appointments based on the linguistic reality;
- Solve the problem of bilingual capability, which varies from one province to another (have bilingual members travel more often);
- Find solutions to the problem of support staff shortage in the regions;
- Maintain the proper development of the hearing when a language change occurs unexpectedly during the proceedings (Veterans Review and Appeal Board);
- Meet commitments with an insufficient number of bilingual and specialized employees at the same time;
- Prevent the decision-making process from being longer in French than in English.

Active offer and identification procedure of the language of the proceedings

- Avoid insulting the justiciable when he/she is requested to indicate, through a form, the language of his/her choice (a Francophone may choose the English language);
- Manage the requests of justiciables who wish to use other languages;
- Encourage the Francophone who believes that he/she will be better understood if he/she chooses English – to choose French;
- Proceed with the active offer from the beginning of the procedure.

Evidence

- Translate the evidence? Difficult for any scientific evidence (there is simultaneous interpretation);
- Manage the fact that the evidence document may be sometimes in French and sometimes in English, depending on the expert witness, and whether translation is advisable or not;
- Manage the uncertainty and the lack of standardization regarding the translation of the evidence;
- Avoid favouring individuals, whose rights are affected by the decision, according to the language of the evidence;
- What to do with the new evidence? a witness who does not speak the language of the hearing?

Interpretation and transcription

- Ensure accuracy and quality.

Decision language

- Change of choice of language after the hearing (want to use a language during the hearing and another for the decision)?
- Manage the application of section 20 of the OLA: factual decisions, often numerous, must be translated, and decisions of a private nature must be translated;
- Bring into line the conclusions of the Devinat case and the daily realities faced by the courts;
- Examine the advisability of translating all the appendices to a decision;
- Ensure the quality of the translation.

Internet use

- Since everything on the Internet must be translated, the costs are high and therefore the decision to restrict access;
- Breach the gaps between the resources and the desire to provide faster access to the decisions on Internet.

Knowledge Café

Participants moved on to the Knowledge Café, which Richard Rochefort explained would focus on moving from challenges to current issues, future challenges and ways to achieve best practices. A high-level summary would be required from each of the three sessions. A template was provided for the summaries and Claude Jacques, Josée Dubois, Greg Miller, Diane Rhéaume, Sylvie Riverin and Reagan Walker were introduced as moderators.

After 90 minutes in the Knowledge Café, the rapporteurs filled out the summaries. The concerns and solutions for each topic are summarized as follows:

1. Appointment of judges and language capabilities of tribunal members (Claude Jacques, Director, Canadian Transportation Agency)

Current issues

- Current composition insufficient to meet linguistic requirements;
- Limited number of bilingual members are those who are always called upon when necessary;
- Public perception of "justice in English" or prejudice concerning the quality of the services in French;
- Ensure that there are bilingual members in the regions;
- Call for simultaneous translation for the members;
- Ensure that the quorum and bilingualism of the members coincide;
- Manage files with part-time bilingual members;
- Availability of bilingual experts and decision language in the presence of a unilingual experts;
- Decision standardization: sometimes there is a bilingual expert available and sometimes there is not; lack of bilingual availability and qualifications;
- When the review and the appeal board coexist, more bilingual members may not be requested for both (problem for the appeal);
- When a smaller number of bilingual members provide mediation, they may not subsequently be assigned for the hearing;
- Balance linguistic training and workload.

Challenges
- Design an option other than a law amendment to set out linguistic criteria;
- Rationalization of the availability of temporary expert members;
- Encourage chairs to play an active role with the private board in charge of appointing judges;
- Encourage the courts to express their concerns more;
- Avoiding violating the law.

Ways to achieve best practices
- Appointment of members on a temporary basis;
- Improve the level of linguistic qualification;
- Improve the knowledge and evaluate the needs (establish an inventory and evaluate the operating level);
- Submit the results of a gap analysis of the resources available and required by the court to a private board;
- Encourage the courts to participate in a proactive manner in the appointments;
- Better promotion of the services that are being offered (advertising campaign, for example);
- Reduce the quorum for board decisions on an acting basis;
- Linguistic training: may well help but impossible for three-year terms (more realistic for the five-year terms).

2. Active offer and operating procedure for identifying the language of proceedings (Josée Dubois, Executive Director and General Counsel, Canadian Artists and Producers Professional Relations Tribunal)

Current issues
- Active offer takes on various formats depending on the nature of the court;
- Offer is more often implicit and not explicit (the request is not direct);
- Party that initiates a procedure is sometimes interested in knowing who the witnesses for the other party are, in order to determine the language for the hearing;
- In the case of a participant who is not represented, there is a negative perception vis-à-vis the use of one language (delays are longer, for example);
- Change of staff and positions that have not been filled;
- Number of major resources at the same level: concerns for small entities;
- Make the active offer over the phone and in person;
- When a choice is offered and the evidence of the parties is not translated, this creates a certain frustration.

Challenges
- Ensure that the court that commits to active offer is capable of carrying it through in a proper manner;
- Ensure that the regions have the bilingualism that is required for active offer;
- Provide the courts with strict active offer procedures that respect the rights of the parties;
- Ensure a better understanding of the areas where the choice of a language has an impact; the pleadings will be translated but the evidence from the parties will not.

Ways to achieve best practices
- Ask the parties, at the time of filing the initial documents of the appeal, to indicate in the notice of appearance the language in which they prefer to manage the hearing and the follow-up provided by the clerk of the court;
- If the court knows in advance that the hearing will be managed in French, for example, it can take the initiative and have the investigation report translated.

3. Evidence and evidence by affidavit (Greg Miller, Counsel, Canadian Human Rights Tribunal)

Current issues
- Those covering the "written pleadings" set out in Section 18 of the OLA;
- No problems; section 18 does not include the evidence;
- Legal value of a translated affidavit when the translation has not been certified;
- The understanding of the decision maker (section 13 OLA) and simultaneous interpretation for the civil party;
- Doesn't it only cover courts of the first instance and not review and appeal courts?
- Affidavit and exhibits: the former is often not very detailed; the latter is very useful but often in only one language;
- Written submissions and evidence: difficult to impose an obligation to translate the evidence;
- Real issue related to the use of languages other than French and English.

Challenges
- Giving the "written submissions" a proper interpretation;
- Managing the fact that, for the parties whose rights are affected, the "written pleadings" must include the affidavit;
- Increasing the awareness of section 18 of the OLA by the parties involved;
- Clarifying the responsibilities of the federal courts;
- Associated challenges: visually impaired justiciables and those speaking languages other than French and English.

Ways to achieve best practices
- Restrict the scope of section 18 of the OLA to what is provided therein;
- Always translate without any exception;
- Amend the OLA to include rules and exceptions;
- Take into account the contrast and the variety in the nature and size of the federal courts;
- As long as the exhibits are not translated, there is no justification for translating the affidavit; in any case, the quality of the translation is never completely reliable.

4. Interpretation and record of the interpretation (Diane Rhéaume, Director General, Canadian Radio-Television and Telecommunications Commission)

Current issues
- Reluctance on the part of the interpreters to transcribe simultaneous interpretation;
- Quality of the transcription;
- Delays resulting from the transcription of the interpretation.

Challenges
- Transcribing each simultaneous interpretation.

Ways to achieve best practices
- Implementation of a pilot project aimed at assessing the costs (the costs have probably been overestimated);
- Use a second system to record the interpretation;
- Consider the recording without transcription and therefore allow the recording of the hearing upon request.

5. Language of decisions and decision-drafting methods (Sylvie Riverin, A/Manager, Canada Industrial Relations Board)

Current issues
- Rendering of a decision in the "public interest" (section 20 OLA);
- Distinction between a quasi-legal role of a court and a non-judicial procedural role;
- Translation of the decisions made behind closed doors, which contain information of a private nature;
- Importance of the costs associated with the translation of the decisions (since the Devinat case);
- Economic impact on the parties (delays incurred);
- Linguistic qualifications of the decision-making members;
- Non-bilingual staff;
- Mediocrity of the translation.

Challenges
- Ensure control of the quality of the translation;
- Manage congestion in the decisions and translation of longer decisions within acceptable delays;
- Agree on a policy (or guideline) for a rule of conduct that may be uniformly applied to the courts concerning decisions, before they are translated, pursuant to section 20.

Ways to achieve best practices
- Hire assigned editors and translators;
- Obtain sufficient resources;
- Establish criteria for, and identification of, exceptions;
- Create a team to work on the interpretation and application of section 20 of the OLA;
- Amend section 20 of the OLA;
- Creation of translation software;
- Shorter edition of the decisions.

6. Use of the Internet in the management activities of tribunals (Reagan Walker, General Counsel, Canadian International Trade Tribunal)

Current issues
- Need, or lack thereof, to translate third-party documents which are accessible on the court's Web site;
- Sections 11, 12 and 30 and cost issues.

Challenges
- Translate decisions before posting them on the Internet;
- Ensure the quality of the translation of written submissions, particularly, administrative decisions that are aimed at the Internet for transparency concerns;
- Identify third-party documents and the lack of need to translate them (policy of the Treasury Board);
- Reconcile compliance with linguistic requirements and maximization of public access;
- Ensure that recourse to the Internet is not more costly;
- Make the evidence documents available in the language of the appellant.

Ways to achieve best practices
- Identify the boundaries of the court's obligations.

Marie-Claude Gervais, Chair

Marie-Claude Gervais introduced the four speakers and invited them to carry on with the dialogue. She stated that the point of view of the private sector, the point of view of the federal administrative tribunal, and the more general point of view of the legal associations should share this forum, and allow, for each case, an individual approach to the administration of justice.

She first invited the Commissioner of Official Languages, who took the opportunity to share with the participants all the lessons she had learned from the evolution of the access to the justice system in both official languages and the current update of the equal status of the two official languages before the courts.

Dyane Adam

Dyane Adam, Commissioner of Official Languages, described the conference as a first-a combined effort of the Office of the Commissioner of Official Languages and the Department of Justice. Canada differs from all other countries in the fundamental right to be heard in the official language of one's choice. It is the responsibility of the two departments to make sure that rights become realities in day-to-day life. Drawing on her background in psychology, Dyane Adam spoke in terms of diagnosis and therapy. First comes listening, defining and analysis, and then comes the response. The therapy is the science of change. Three elements must change: the fears of citizens afraid to speak in their own language before the courts, the insufficient active offer of services, and the bilingual capacity of the courts.

Discussion Panel

Promoting the Use of French and English before Federal Courts and Tribunals: the Active Offer Process and the Bilingual Capability of Courts and Tribunals

Ladies and gentlemen:

I am extremely pleased to have an opportunity to address you at this conference on access to justice in both official languages. The initiative taken by the Department of Justice to organize this event in conjunction with the Canadian Centre for Management Development and my Office represents a concrete step toward greater consolidation of our efforts. This is matter of prime importance to me, as the right to use French and English before Canadian courts and tribunals reflects the profound will of Canadians across the country to live in our society with dignity and respect for each other.

It should be recognized, however, that the implementation of this right gives rise to a number of challenges for members of the public, lawyers and staff of federal courts and tribunals. This conference affords us a unique opportunity to examine these challenges together, but most importantly to share the valuable solutions that some of you have already put in place.

In the time allotted to me, I intend to discuss three aspects of the difficulty associated with providing access to justice in both official languages.

- First, I would like to draw your attention to the apprehensions people have about proceeding before courts and tribunals in the official language of the minority.
- Second, I will point out some of the reasons why the active offer process does not seem quite sufficient to correct these perceived fears.
- Third, I will highlight in greater detail the impact of the bilingual capability of courts and tribunals on the exercise of the litigants' language rights.

1. Apprehensions about proceeding with a case in the minority language

Over the last decade, my Office has received approximately 24 complaints from citizens who experienced difficulty in exercising their language rights before certain courts and tribunals. What do these statistics tell us? The relatively low number of complaints in this area, compared with those relating to other organizations, is partly the result of the low demand by members of the linguistic minority for services in their language. It is precisely this low level of the demand for bilingual services that warrants our attention.

Two studies conducted by my Office in addition to another one commissioned by the Department of Justice ("Environmental Scan: Access to Justice in Both Official Languages") have identified two main causes. These are:

- lack of awareness on the part of litigants and their lawyers of the language rights entrenched in the *Criminal Code* or in the *Official Languages Act*; and,
- apprehensions about the negative impact of proceeding with their case in the minority language.

Strangely enough, even those citizens who are aware of their right to use the minority language before the courts and tribunals shy away from exercising such a right. Additional costs and delays are the reasons most often stated for refusing to proceed in French before the courts and tribunals. I was personally struck, while participating in a round-table discussion for TFO's "Panorama" program, by the reluctance of lawyers practising in minority environments to proceed in French. If members of the public, including their lawyers, continue to apprehend the negative impact of having their case heard in the official language of their choice, this could eventually result in a loss of confidence in the judicial system's ability to deliver justice in both official languages.

[1] Office of the Commissioner of Official Languages. (1999) The Equitable Use of English and French Before the Courts and Administrative Tribunals Exercising Quasi-judicial Powers, Ottawa: Public Works and Government Services Canada. Office of the Commissioner of Official Languages. (1995) The Equitable Use of English and French Before the Court, Ottawa: Public Works and Government Services Canada.

2. Making the active offer of services effective: a prerequisite for the exercise of a person's right to be heard in the official language of the minority

This brings me to the second aspect of my address. I believe that the federal courts and tribunals are duty-bound to counteract the apprehensions of any negative impact referred to earlier. They must ensure that Canadians are encouraged to use French and English in their proceedings. In the *Beaulac* case, the Supreme Court of Canada stated (p. 788): "Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided."

One such means, the importance of which for the exercise of linguistic rights tends to be overlooked, is the active offer of service. When no active offer is made, or when it is not made in a sufficiently clear fashion, people are left unaware of their rights or shy away from exercising them. And when litigants or their lawyers do not insist on the right to have their case heard in the official language of their choice, there is natural decline in positive attempts to extend services to them in the minority language. This is an unintended effect of the system that requires immediate corrective action.

Federal courts and tribunals should ensure that the necessary measures for making active offers of service are implemented. Appropriate signage, notices or material, and personal or telephone reception services undoubtedly can all be considered as effective tools to inform members of the public of their right to be served in French or in English, and they are even a necessity. However, I personally believe that these tools are insufficient in the specific context of the federal courts and tribunals. In fact, further measures should be contemplated.

These courts and tribunals should consider yet more effective means of informing Canadians of their right to present their case and have it heard in the language of their choice. For instance, litigants or their lawyers often look up a court's or tribunal's Web site in order to become familiar with the institution's rules of procedure and practice. I personally browsed a number of these Web sites and came to realize that the active offer of bilingual services is not always obvious on these sites. Accordingly, I believe that all federal courts and tribunals should pay particular attention to the way the active offer of service is made through their Web sites.

What I would really like to see is federal courts and tribunals developing an active offer policy specifically tailored to the nature of their services. Federal courts and tribunals are no ordinary federal institutions. As such, they ought to dispel apprehensions on the part of members of the public about proceeding in the official language of the minority.

3. The bilingual capability of federal courts and tribunals, and the exercise of the litigant's right

An active offer policy cannot, by itself, adequately meet the needs and the right of citizens to be heard in the language of their choice. We must ensure that this right is actually implemented by the courts and tribunals, as part of their rules of practice, and that these institutions are provided with the necessary resources to meet their obligations in this respect.

In fact, it should be stressed at this point that section 16 of the OLA gives parties to proceedings in any particular case the right to be heard by a judge or other officer who is able to understand the official language of the parties' choice without the assistance of an interpreter. Although this provision does not require all judges and officers of any given court or tribunal to be bilingual, it does require that the court or tribunal itself be bilingual as an institution. This implies that the courts and tribunals should be staffed with a sufficient number of judges and officers able to hear matters in the minority language or in both official languages.

I am aware that it is difficult for federal tribunals to maintain bilingual capability, owing to a number of factors. First of all, the tribunals have no control over the language skills of their adjudicators. Under the present appointment system, they are appointed by the Governor in Council, and yet no written instructions apply to the linguistic aspect of the selection criteria. Furthermore, the relatively short term of office of the appointees to the tribunals (from three to five years on average) undermines the effectiveness of their language training as a means of allowing the institution in which they serve to acquire an acceptable level of bilingual capability.

These restrictions are further compounded by the fact that several federal courts and tribunals are staffed by a limited number of judicial appointees. In some cases, the specific legislative provisions governing quorum act as a barrier to the actual exercise of the right to be heard in the official language of their choice. For example, if the enabling legislation of a court or tribunal provides for a minimum of three members to constitute a panel, and the court or tribunal, as a whole, is staffed by only four judicial appointees, the capability of that institution to hear cases in both official languages is severely impaired. One potentially workable solution would be to amend the court's or tribunal's enabling legislation in so far as the rules relating to quorum are concerned. The amendment might provide, for example, for a reduction in the number of members required to hear certain types of cases.

However, we should strive to address the root causes of the issue. It is my belief that an in-depth review of the judicial appointment process for federal courts and tribunals should be undertaken with a view to incorporating certain linguistic factors into the process. The objective would be to ensure that federal courts and tribunals are able to maintain bilingual capability. The 1999 study conducted by my Office, which I referred to earlier, recommended that a structured consultation process be adopted for the various law associations as well as for federal administrative tribunals to address official languages issues. The Privy Council Office plays a pivotal role in this respect. It must clearly ensure that tribunal appointees are, as a group, capable of meeting the requirements of section 16 of the OLA. As a matter of fact, during the debate on Bill C-25, the Public Service Modernization Act, I suggested an amendment to the provisions relating to the establishment of the Public Service Staffing Tribunal, with this specific objective in mind.

4. Promoting access to justice: a collective responsibility

In concluding this address to you, I wish to stress that access to justice should be considered a collective responsibility.

First, federal courts and tribunals must agree to implement a whole range of regulatory, policy or administrative measures in order to ensure that they can operate effectively and directly in both official languages.

Second, the federal government will have to show leadership in this regard. Besides recognizing the need for an in-depth review of the judicial appointment process, the government should ensure that the chairpersons of federal tribunals are provided with all the necessary information and other "tools" required to fulfill their mandate as executive heads of their court or tribunal. Indeed, they should be provided with all the resources needed to manage their staff and handle the matters brought before their tribunal in accordance with the OLA and any other relevant statutes.

The various French-speaking jurists' associations and their federation should also play their part. In fact, they must continue to make their members aware of the paramount importance of informing members of the public of their language rights. Lawyers must be in a position to provide assurances to citizens that the exercise of their language rights will not have any negative impact on proceedings before any federal court or tribunal.

My Office will also take part in this collective effort by staying attuned to the language needs of Canadians and by monitoring progress. Our common objective is to ensure that the fundamental right to use either official language in legal proceedings can be fully exercised, in accordance with the principle of equality.

Louise Aucoin

Louise Aucoin, professor of law at the University of Moncton, called herself an external voice, representing the Fédération des associations de juristes d'expression française de common law (FAJEFCL).

Access to Justice in Both Official Languages: French and English Before the Federal Courts

The Fédération des associations de juristes d'expression française de common law (hereafter referred to as the FAJEFCL) would like to express its sincere thanks to the organizers of this event for the invitation. Obviously the FAJEFCL feels very strongly about access to justice in both official languages. It is a sad fact that, even today, access to justice in French is still not a reality in many common law provinces in Canada. For this reason, the FAJEFCL's mission is to unite the provincial associations of Francophone jurists committed to:

- promoting and
- defending the language rights of the Francophone and Acadian communities, specifically by promoting access to justice in French everywhere in Canada.

FAJEFCL OBJECTIVES

In addition to promoting the joining together of Francophone jurists in all common law jurisdictions in Canada, the FAJEFCL's objectives are:

- to act as national and international mouthpiece for its members;
- to facilitate dialogue and partnership;
- to provide support services to its members, in other words to the Francophone jurists' associations, which are aggregations of French-language jurists in the Canadian common law jurisdictions (except Prince Edward Island, Newfoundland, and Labrador).

Visions and Goals

As is the case for many of those who are interested in language rights, the FAJEFCL's vision involves the real equality of Canada's two official language communities both in fact and in law. It also has the vision of enhancing Canada's Francophone and Acadian communities with due regard for the principles of equality and equity. This is the reason it has taken on the following goals:

1. to promote strong jurisprudence that fosters the development and growth of the communities;
2. to inform and foster awareness among the members of Francophone and Acadian communities regarding their language rights and the importance of having access to justice in French;
3. to create awareness among all Canadians about the importance of language rights and access to justice in French;
4. to support the development of common law in French everywhere in Canada.

New Developments in Language Matters

Needless to say, those who fight for recognition of their language rights have seen major developments in language rights since 1999. Case law has become a negotiation tool. Following the decisions that the Supreme Court of Canada made in *R*. v. *Beaulac*[43] and *Arsenault-Cameron et al*. v. *Government of Prince Edward Island*[44] and the decision of the Court of Appeal of New Brunswick in *Charlebois* v. *Mowatt and the City of Moncton*[45], linguistic equality has a new face. These decisions have served as a major impetus to the development of language rights.

Then the Canadian government took note. In the government's *Action Plan for Official Languages, Environmental Scan: Access to Justice in Both Official Languages*; and *The Next Act: New Momentum for Canada's Linguistic Duality*, we see that justice is a priority for official language minority communities. The Department of Justice will be investing new funds for improving access to justice in both official languages.

Although in many regions in Canada we are only at the awareness-raising stage, it is high time that people to be tried are able to take advantage of their language rights.

Needs and Hopes of the FAJEFCL

The FAJEFCL longs for the day when services in French are courteously provided – in other words, an active offer at all levels, on the date when the trial is set or during the initial investigation, etc. The FAJEFCL would also like to see lawyers respecting the language rights of their clients. Similarly, it would be appropriate for all law societies across Canada to follow the example set by the Law Society of Upper Canada and adopt the following standards of the legal profession:

> 1.03 INTERPRETATION
> Standards of the Legal Profession
>
> 1.03 (1) These rules shall be interpreted in a way that recognizes that:
> (b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario;
>
> A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable:

(a) subsection 19 (1) of the *Constitution Act, 1982* on the use of French or English in any court established by Parliament,
(b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,
(c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and
(d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

There is still much work to be done, and the needs are great. Here are some examples of those needs:

1. Commencement of Proceedings forms that ask for the official language chosen by the plaintiff.
2. Forms and documentation in French in almost all areas.
3. Bilingual staff at all levels of the legal system including:
   - Judges (stated case in French translated into English);
   - Referees;
   - Administrative staff;
   - Lawyer(s) chosen to represent the federal Crown.
4. Legal decisions rendered simultaneously in both official languages.

43 [1999] 1 R.C.S. 768.

44 [2000] 1 R.C.S. 3.

45 (2001) 242 R.N.-B. (2e), 259.

The Future

To date, language rights within the legal system, including before the courts, vary tremendously from province to province. The FAJEFCL wants to work with the various partners in the justice system to make justice bilingual through and through!

Antoine Hacault

Antoine Hacault, a partner with the Winnipeg firm Thompson, Dorfman, Sweatman, began with two anecdotes from his life as a minority French speaker in the Prairies, demonstrating the attitudes that make people reluctant to exercise their language rights. He sees the results of such attitudes in his role as a part-time member of the National Parole Board.

Bilingualism in Minority Communities

Active offer

When you are a customer, what makes you go back to a restaurant, a show, a car dealership, or a store? What makes you buy one product over another? What makes one business a success while another goes bankrupt? If our courts were to compete, would they be among the successful companies or among the bankrupt ones? Over the next few weeks, I encourage you to take note of 10 businesses that have affected you as a customer and see if you and your colleagues and staff provide the same quality of service to members of the public who use your services.

Promotion

How did you discover that a particular restaurant or business exists? How did you become aware of a product? Is there a segment of the population that you serve? How do you make people aware of your services?

Do members of your tribunal go to minority schools to talk to the students? Do you have billboards in strategic locations? Do the managers in minority community organizations know which key people to contact in your tribunal in order to be served in the minority language? Do you provide press releases on current issues to the media including community newspapers? This is one way to obtain free advertising and to market the bilingual people in your office.

First contact

Again I challenge you to think about your own positive experiences as a customer. When you go to a store, the business and the types of products for sale are identified. If your offices have a parking lot, are the signs bilingual? At the entrance door, are the postings bilingual?

It is important that the first contact be bilingual, whether it's over the phone, in a letter or in person. In the waiting room, relevant documents should be bilingual. There should not be documents in French and documents in English. All forms should be bilingual. In some provincial offices in Manitoba, there is a worrying trend of having unilingual forms, or bilingual forms but printed recto verso.

There is also the same worrying trend on the Internet. Information is either in French or in English. The reality is that some people in minority communities feel more comfortable if both versions are on the same page. If they don't understand a French word, they can easily check the English version.

In minority communities, forms should inform the people filling them out about the availability of services in the official language of their choice and ask them to indicate their choice by checking a box. This way, the client is assured of being given an active offer. Also, this form can be used to identify the language choice for the subsequent steps in the process. At an appropriate moment, staff should remind customers about their right to be served in the official language of their choice. Draw a parallel with stores. During that first contact, a store informs the customer about the products and services they offer without imposing.

It has to be obvious to our customers that the service is available. Do you wear a pin? In Winnipeg, for example, the bilingual police wear pins that say

Francais? (French?)
avec Plaisir (Why, certainly!)

Is our greeting bilingual?

In Manitoba, following the Chartier Report, the Province chose to create bilingual service centres. All staff members, without exception, have to be bilingual. Before these bilingual centres existed, personnel managers tried to place bilingual staff in certain strategic positions. As a result, customers were not always greeted in both official languages and bilingual service was not always available.

Many studies have confirmed that people in a minority situation in western Canada are afraid to ask for service in the minority language. Therefore, if they are greeted in English or by a unilingual Anglophone, they do not ask for service in French.

Hearings

On all forms, the parties should be invited to state their language choice and the language of their witnesses.

All those involved, in other words, the clerk and officers of the court, should be bilingual. Even though people choose to proceed in French, they are not always familiar with the French legal terms.

Unless there are Anglophone witnesses, there is no reason to have interpreters.

When interpreters are required, their skills must be verified. The skills to consider are continuity and accuracy of the interpretation and the impartiality of the interpreter.

In Manitoba, when a pleading is filed in English and another is filed in French, the process for translating the pleadings is immediately started. When there is a transcript of evidence, the provincial government covers the costs connected with the translation. This eliminates the concerns the parties have about paying additional fees resulting from a hearing involving interpretation.

How do we go about training members of administrative tribunals? In my opinion, each tribunal should be institutionally bilingual in each region it serves. Language training can be done by exchanging members in the various regions. For example, I am a member of the National Parole Board for the Prairie Region. It was helpful for me to spend two weeks in the Quebec Region. This allowed me to refresh my memory on terminology. The benefits of doing it this way are the ease of providing the training and the cost savings.

In the Prairie Region, all rulings in French from the National Parole Board are automatically translated into English. Otherwise, the mostly Anglophone staff in the prisons and the tribunal would not know the results of the hearing.

Conclusion

Any service must be regularly evaluated. Therefore, just as we are asked to fill out an evaluation questionnaire on this seminar, persons who speak a minority language should be invited to fill out questionnaires. Where applicable, the person should state the reasons why he/she chose not to proceed using the minority language. What are the reasons why a Francophone would choose not to use French? What was the quality of service at each stage? What are the person's general comments?

Are there groups or individuals in the community that you can consult to obtain comments on improving service?

Gilles Dufault

Gilles Dufault, Vice-Chair of the Canadian Transportation Agency, said he had been involved with official languages from the early 1970s and continues to be a champion. He sees progress, but it is long-term work. He mainly talked about the way official languages obligations are carried out in quasi-judicial bodies.

Access to Justice in Both Official Languages, an Administrative Tribunal Experience

Colleagues, Ladies, and Gentlemen,

I am happy to be here with you this afternoon to have the opportunity to participate in this discussion. I'd like to thank the conference organizers for this excellent initiative, and particularly the panel members who spoke before me to get the discussion under way.

My personal involvement in official languages goes back to the early 1970's when I represented a central agency in a working group on the implementation of the *Official Languages Act*, as a government priority. Several years later, I was at VIA Rail Canada, where I established the official language policy and program, as well as support services.

Today, as Vice-Chairman and member of the Canadian Transportation Agency, I serve on the Agency's Executive Committee, and for more than two years I have acted as the Champion of Official Languages.

Since I first got involved in the official language issue, I know that much progress has been made. However, I am also aware that it is a long-term job and that there is still much to do.

Today I will talk mainly about the way that the Transportation Agency fulfills its official language obligations, about the lessons we've learned as a quasi-judicial administrative tribunal in administering justice and providing services in both official languages. I am aware that other tribunals have very likely had similar experiences, since we all face the same challenges.

First, allow me to highlight the immense diversity in the administrative tribunals, which differ in mandate, size, operating procedures, decision process and type of clientele.

Even though they range from 2 to over 200 members, the average size of an administrative tribunal is just under 15 members. Their mission may be social, economic, or both. Clients may primarily be individuals or organizations, or sometimes both. In some tribunals, written hearings are preferred, whereas in others they prefer oral hearings.

In some tribunals, the members sit alone and prepare their decisions themselves. In others, the members sit on a panel; one member prepares the decision, which is then reviewed, discussed, and approved by the other panel members. Finally, there are tribunals where the members sit on a panel, agree on the decision and reasons, and give their instructions to specialized staff who write up a draft decision, which is then reviewed, discussed, finalized, and approved by the panel members.

Despite these differences, one thing remains the same: regardless of their size or operating procedures, the administrative tribunals have the duty to respect the letter and the spirit of the *Official Languages Act*, especially the provisions regarding the administration of justice. They must also respect the rules of natural justice and equity by which they are governed, as well as government policies on communication, service to the public, working language and equitable representation.

Under the *Official Languages Act*, federal administrative tribunals in particular must:

- allow parties to use French or English in oral and written proceedings;
- provide, at the request of one party, simultaneous interpretation services from one official language to other official language;
- ensure that the person or persons who are listening can understand the proceedings in the official language(s) chosen by the parties, without an interpreter; and
- ensure that the decisions, including the reasons, are made available to the public simultaneously in both official languages, in accordance with section 20 of the Act.

As I mentioned earlier, administrative tribunals are also governed by the rules of natural justice and equity, which, although distinct from language rights, may impose certain requirements regarding the use of English and French during legal proceedings.

These requirements relate to language skills only in that claimants must be able to understand their cases and to make themselves understood. As a result, federal administrative tribunals, as part of their procedures, must always ensure that language rights and the rules of natural justice are respected.

Where there is doubt about the need to provide a translation in one official language or offer any other language service in a given situation, a tribunal generally errs on the side of caution to ensure that the parties' rights are respected. This usually involves more time and money, and increases the administrative complexity.

Let's turn now to the Transportation Agency.

I would like to start by talking about the way that the Transportation Agency currently fulfills its obligations under Part III of the *Official Languages Act*, regarding the administration of justice:

- The Agency is able to hear cases in both official languages without an interpreter;
- Its lawyers use the language chosen by the parties;
- The parties may be heard in the official language of their choice;
- Its rules of procedure are available in both official languages;
- Simultaneous interpretation services from one official language to the other are provided on request; and
- Our final decisions, including the reasons, are made available to the public simultaneously in both official languages, in accordance with section 20 of the Act.

This is made possible by several factors, such as the availability of financial and human resources and the way they are used. It is also dependent on reaching critical mass when appointing members and recruiting bilingual staff.

I will now present an overview of our tribunal to give you the context in which we operate and to identify certain challenges that arise daily from respecting the provisions of the *Official Languages Act*.

The Agency is a specialized quasi-judicial tribunal. Its mission is primarily economic, but it is also social because of its powers in accessible transportation. Under its enabling legislation, the Agency must render its decisions within the statutory time frame of 120 days.

The Agency has 10 members and a specialized staff of 280 employees who support the members in making decisions and resolving conflicts among the carriers, between carriers and shippers and between carriers and passengers.

Members are appointed by order in council. They are from all regions in the country and they bring to the Agency a diverse range of decision-making experience.

Because of the scope of its mandate and field of competency, the Transportation Agency has a multidisciplinary staff, with a range of working experiences and skills. As well as specialized investigators for each transportation mode, we have a stable of experts who are familiar with the various legislation and regulations that we must enforce.

As soon as a complaint is lodged with the Agency, a process for ensuring rapid, effective and equitable processing begins. A panel of at least two members examines each complaint. When the panel has received the arguments from all parties, its members may request that Agency staff assist them in analysing all issues relating to the matter to be able to examine it from a legal, economic, operational, and environmental perspective before rendering a decision.

In 2002, the Agency rendered about 1,200 final decisions and orders on issues in air, rail, marine, and accessible transportation. For orders, the bilingual version may be 1 or 2 pages long, but many decisions exceed 50 pages and some can be over 100 pages.

The Transportation Agency strives to render its final decisions simultaneously in both official languages, within the statutory time frame of 120 days, legislated by the Canada Transportation Act, while meeting high standards of quality. We engage the services of 2 translators, 5 revisers and 1 manager. In addition, we call on the Translation Bureau of the Department of Public Works and Government Services for translating all our final decisions. We devote more than $500,000 annually to translation and revision to meet the official language requirements.

Rendering decisions simultaneously in both official languages, within the statutory time frame, and wishing to serve the public within a reasonable time all have an impact on our limited resources and can sometimes cause difficulties. Translating a decision normally takes 10 days, which takes that many days away from our 120-day decision-making time.

The financial resources allocated to translation are not a guarantee of effectiveness, quality, or respect of the statutory time frame. In fact, we are at the mercy of the Translation Bureau's priorities. The Translation Bureau has a heavy workload, and the Agency is not its only, or its largest, client. In addition, the transportation field requires specialized translators who are familiar with the vocabulary and technical terms in this field.

It can be difficult, even impossible, to get a decision translated in the time required to meet the statutory deadline. Such a situation requires that the Agency and the Translation Bureau negotiate the overtime hours that the translators will have to work and the resulting additional costs of over 30%. It may turn out on occasion that there is simply no translator available to work the overtime.

Dividing the work between several translators is another option. However, experience has shown us that the consistency of the translation and consequently its quality leaves a lot to be desired, thereby increasing the time that the Agency's revisers need to spend. In other words, the time saved in the translating is lost in the revising.

As a result, reconciling the statutory time frame with the requirement for producing our decisions simultaneously in both official languages sometimes depends upon the talent of our secretariat and requires much ingenuity, effort, and resources.

I would now like to talk about human resources and the importance for an administrative tribunal to have critical mass in terms of members and bilingual staff.

In an ideal world, to comply with the requirements of the Act and provide service in both official languages, all members and staff of a federal tribunal who are involved in the hearing and decision process should be bilingual. Unfortunately, our world is far from ideal, and there are no easy solutions. However, if that were the case, we wouldn't be here discussing the subject, nearly 35 years after the first legislation on official languages was enacted.

For an administrative tribunal where the member sits alone, it is obvious that the number of bilingual members must be enough to meet the demand. For a tribunal that sits with a panel, as is the case at the Agency, the number of bilingual members must be sufficient for giving the tribunal chair the flexibility in assignments and to prevent bilingual and unilingual cases from always being assigned a panel with the same members. Hence the importance of appointing a critical mass of bilingual members, or members who understand both languages, to hear the case and render the decision in the parties' language.

The need for appointing bilingual members in sufficient quantity is particularly real when you consider the shortness of a term, and the workload does not encourage people to pursue language training to reach an acceptable level of bilingualism within a tribunal.

Where there are not enough members who understand the official language chosen by the parties during a hearing, some tribunals resort to temporary members. This is a creative and ad hoc solution, but not very practical. Other tribunals resort to simultaneous translation, despite section 16 of the *Official Languages Act*. I believe that everyone would win if this situation could be corrected.

It is also important that the tribunal staff be sufficiently bilingual to properly support the members in all stages of hearing a case in one or both official languages. This is particularly important for the specialized staff who are called upon to prepare the decision under the members' direction.

Moreover, recruiting specialized bilingual staff is a reality that the Transportation Agency must constantly face. Not only we are competing with the private sector; we must also recruit specialized staff within the transportation industry, an industry that, apart from its front-line staff, is not known for its bilingualism.

This problem, which in all likelihood is not unique to the Agency, can sometimes create unexpected situations. For example, a situation may arise where all members of the tribunal and the parties use the same official language, and where the proceedings and arguments are carried out in this language. However, the first language of the only expert on the matter within the tribunal in question may be the other official language. He/she may be bilingual enough to understand the substance of the case and the matter at issue, but not enough to write a draft decision in the language of the case.

The expert will therefore submit to the panel members a draft decision in his/her own language, and the bulk of the work leading to the final version of the decision will be done in a language other than that of the case. The decision will eventually be translated into the other language not of the case, revised by the members, and then issued in the parties' language.

Although a situation like this is rare, it is real possibility and clearly shows the type of difficulty that specialized tribunals face when an expert is not sufficiently bilingual, and when the work load does not justify hiring a specialist in each official language.

To conclude, completely implementing the language rights conferred by Part III (Administration of Justice) of the *Official Languages Act* is feasible. However, it presents certain challenges in terms of time and financial and human resources.

Translation is unavoidable and essential. It does affect the decision process, though, and is a strain on resources.

Finally, it is obvious that appointing a critical mass of bilingual members and hiring bilingual staff for all positions participating in the hearing and decision process is fundamental to success.

Such an approach will certainly make it easier for administrative tribunals to respect language rights and will enable more complete and effective access to justice in both official languages.

Discussion

After thanking the panel, Marie-Claude Gervais asked if any of them verified the quality of their bilingual services with their clients, as suggested by Antoine Hacault. Gilles Dufault said the Canadian Transportation Agency does a version of this regarding its services in general, though not specifically about the active offer.

A participant asked Dyane Adam if she could intervene with the Prime Minister to influence judicial appointment of bilingual people. D. Adam said her predecessor had made a recommendation that the bilingual needs be taken into consideration in making appointments. There was no formal answer from the Privy Council or the Prime Minister, but commissioners never give up. She said that participants can echo this recommendation. If more parliamentarians were aware of the situation, action would be more likely.

Responding to another question, D. Adam said the bilingual capacity of tribunals is not documented. The studies only described the difficulties they faced. This conference could recommend such a study.

In response to another question, D. Adam said CEOs meet several times a year with Treasury Board to hear about new developments, but there is rarely a meeting specific to tribunals such as today's. Johane Tremblay added that the 1999 study recommended that 50 per cent of tribunals' staff be bilingual.

Day 2

Matrix Interview

Richard Rochefort explained the matrix interview process, which seeks to pool the collective wisdom and experience in the room. Participants were arranged in groups of four, with one of the four questions assigned to each group member. In seven rounds, all participants responded to all the questions through an interview process. Participants then met in groups to summarize the key points in the responses to their question on flip charts. Four representatives presented the results in point form.

Question 1: ***Identify three positive actions to ensure better understanding by the Canadian public of their language rights:***

- an awareness campaign on rights and obligations to partners;
- slogans and positive messages;
- children in school-the future generation-should be targeted;
- appealing, positive sentence tags;
- a champion in each tribunal;
- resources for communication;
- review at all stages of the procedural rules and integration of the active offer.

Question 2: ***Identify three possible avenues for partnership where the courts could share resources in order to ensure access to justice in both languages:***

- partnership solutions devised by tribunals;
- formal working groups-meet four times a year, organize discussions;
- share facilities and staff;
- pool translation resources;
- create a common web site-advertise access, advise of rights, chat room; private section only accessible by tribunals; data bank on interpretation, translation;
- specialized conferences on tribunals, organized by tribunals for tribunals;
- identify potential clients and advise them of their rights.

Question 3: ***Develop three areas where institutional support could prove useful for filling the needs of the courts:***

- specialized translation services for tribunals;
- a systematic procedure for appointing members based on needs;
- a forum for sharing innovative practices-the format is not important.

Question 4: ***Define three ways to improve consultation among the various participants involved in the promotion of access to justice in both official languages:***

- central agencies provide structure for sharing of ideas;
- sharing of ideas should happen at all levels;
- an awareness campaign at the Prime Minister's Office on the required capacities and necessary resources;
- meet with clients to survey expectations and raise awareness of the services available;
- Web site with a forum for sharing of ideas, suggestions and opinions.

Reaction
Yves de Montigny

Yves de Montigny, speaking on behalf of the Department of Justice, said that he was impressed by the number of ideas and proposals. The discussion will be followed up as it is always hard to respond on the spot. He said he heard three main themes in the feedback from participants: the language of decision, the language competency of tribunal members, and the active offer and what it implies.

Section 20's requirement that all final decisions be presented in both languages raises issues. Many decisions are purely factual, not of interest to anyone beyond the litigants. Quality of translation remains a problem, and if everything must be translated, cost is an issue and there is no answer to this yet.

Tribunals must ensure that the judge understands the language chosen by the participants. Members are chosen by order in council, which is not regulated by the *Official Languages Act*. The number of judges on a tribunal varies, as does their term. If the term is short, it is difficult to train. The appointment process should consider the language needs of the tribunal.

The *Official Languages Act* states that federal institutions must ensure that the public is able to communicate with federal offices. There is an obligation to adequately and actively inform. Ways of doing this include notices, signs, Web sites, and so on. The language issues involved in the first contact may have an effect on the language of the process. If choosing the minority language causes delays, people will be less likely to exercise their right to use the language of their choice. Some groups said that an active offer at first contact would allow a tribunal to decide on language from the beginning and thus avoid delays.

Yves de Montigny congratulated participants for airing their concerns in an open spirit. Ways must be found to involve clients in a similar discussion. The Department of Justice is aware of participants' desire to see respect for official language languages obligations and it is also aware of the challenges that participants face every day. The Department is pleased with the commitment and determination to find realistic solutions. This conference is a first step.

Since the Department of Justice has an arm's length relationship with tribunals, it cannot play a key role in the upcoming events, but it will be supportive. Tribunal chairs meet as a group on May 9. It is possible that a subgroup could be created to review the issues raised at this symposium and to design a program for change. He encouraged participants to continue the constructive dialogue.

Dyane Adam

Dyane Adam described the energy of the conference's process as palpable. It showed the need and the participants' commitment to make the most of the day's opportunity. From the reports, she sees the beginning of engagement and a willingness to take charge. She identified three main approaches from what she had heard: an awareness approach, a determination to increase the bilingual capacity of tribunals, and a requirement to increase the external support structure.

An attempt to raise public awareness also produces internal awareness. Currently there is a lack of knowledge even within the tribunals. It may be necessary in some cases to develop more consistent practices and to establish working groups.

Increasing the bilingual capacity of tribunals will create a favourable climate for the use of minority languages. D. Adam commented that she had not heard anything from the groups about working environment. The requirements of the *Official Languages Act* must be played out every day in the workplace. Quality cannot be sustained if the minority language is only used with clients. Tribunals are different from one another but have similarities. Tribunal chairs meet four times a year, but it would be useful to have a permanent secretariat. The Office of the Commissioner of Official Languages has an ombudsman role, as well as being a watchdog. It can examine legislation before it comes before Parliament and make proactive suggestions. She invited participants to inform her Office of changes needed in their legislation. This conference is part of her Office's liaison and promotion role and she strongly believes in people's willingness to meet their language obligations. There is always a way to find solutions through dialogue, and to maintain an ongoing relationship outside of litigation.

Dyane Adam said she heard requests for increasing external support structures. She said her Office would try to make representation to the Privy Council Office and she encouraged participants to continue to take a proactive approach. When vacancies arise, review staffing needs, for example, and show the need for bilingual staff. If participants put pressure on the Privy Council Office, Adam's Office can back them up.

Yvon Tarte

Yvon Tarte, Chair of the Public Service Staff Relations Board, said he lives with the issues of the conference every day. In a perfect world all tribunal members would be bilingual and there would be all the resources necessary to implement the rules. In many cases, it is just a matter of money and human resources. He sees a desire at many tribunals to achieve the ability to function in both official languages, but this is less obvious as one moves beyond the National Capital Region.

Positive actions such as public awareness campaigns, while not the responsibility of the tribunals themselves, are necessary to make the public aware that services are available in the two official languages. The active offer must be serious and tribunals must be able to follow through on it. Champions are also an excellent idea. The availability of specialized resources is a money issue. Treasury Board always seems to say "no." Departments must explain why they need money to carry out their mandates.

Participants talked about creating groups. Mr. Tarte does not agree that these groups should be formal. It would be useful to have a group to coordinate efforts, share best practices and maybe even share translation services. The Public Service Staff Relations Board spends $500,000 annually on translation. It would be possible to pool translation for all three staff relations tribunals within the Public Service. A caution is that whenever people are grouped, the biggest tribunal's priorities will supersede all others. Another way of grouping would be for clients to be able to access all tribunals through one Web site. This would mean less repetition and duplication and resources could be better used. Conferences are wonderful but they take time.

Pooling of translation services is a good idea. Even better would be for Treasury Board to have one translation service, paid for by Treasury Board or the Privy Council Office. Translation is a national responsibility.

The appointment of members has always been a problem. The reality is that it is political. The government must be convinced that the appointment of a member should be based solely on serious consultation with the chair of the tribunal and that the nominee must have certain skills. If the government continues to appoint people without expertise, money will be required for training.

Finally, central agencies provide a permanent structure. Tribunals should be grouped under one umbrella. Members often do not understand their responsibilities, so there should be frequent meetings with people who can enlighten them.

Morris Rosenberg

Deputy Minister of Justice Morris Rosenberg congratulated participants on their sharing of ideas over the last two days and underlined the fact that language rights are evolving.

Closing

Introduction

Madam Commissioner,
Distinguished guests,
Ladies and gentlemen, welcome.

Thank you for asking me to close your conference.

I am told that during the last two days, you have had a good exchange of ideas and experiences on an issue that is vital to our justice system. You have focused on the fundamental right of Canadians to access their justice system in our two official languages.

The scope of language rights is undergoing a remarkable change today, in connection with changes in social values and the reconstruction of models of democracy. Their paradigms are being discussed and re-discussed at the same time that their subject matter is being defined and clarified by focusing on one cardinal principle: EQUALITY.

In the name of this principle, efforts have been made to preserve linguistic diversity. Also in the name of this principle, you have agreed to open discussions on the existence of rules that govern the administration of justice in our country.

Language Rights: A New Science

You are aware that modern states are increasingly enacting laws in relation to language policy through legislation governing the status and use of one or more languages in a political context. We should not believe that this is a new phenomenon.

However, there is a relatively new domain of law called 'language law'.

'Language law' has two components.

The first component refers to the rules of the law itself, including duties pertaining to the use of a language on languages.

The second component draws on the study of these rules, and has three specific parts

1. the study of the rules of the law
2. the study of language rights
3. the study of the language of the law, that is to say the language or languages in which the State enacts its laws.

It is precisely the relation between language law and language rights that makes language law a relatively new domain of law. When language rights are recognized, the right to difference is recognized as well, which also mirrors that important values relating to the diversity in our society.

This is a principal reason why countries like Canada turn their language policies into laws, countries enact these laws to address inequities and tensions that may arise when more than one linguistic community co-exist in a given territory – it is to ensure equitable and harmonious relations between majority and minority voices.

The first goal of any language legislation is, therefore, to settle language problems resulting from these contacts, conflicts, and inequities, by planning or accommodating the status and use of the languages in question according to certain rules or following certain criteria.

Thus, a language right is not a right of expression, but rather a right of COMMUNICATION. Choosing a language in the name of freedom does not set up an obligation on the part of the listeners. In our country, the *Canadian Charter of Rights and Freedoms* enables us to express ourselves freely in any language. We must not expect that our conversation partners will understand us. However, when we express ourselves in French or English under certain conditions, we have the legal guarantee of being understood.

Language Rights and Canada's Bilingual Judicial System: Its Challenges

Legislators refer to "official language legislation" as legislation that is intended to give official status to one or more languages specified in the official areas of legislation, justice, public administration and education.

And this is why Parliament has enacted laws guaranteeing access to justice before certain tribunals in both official languages. Today, the principle of judicial bilingualism is well entrenched in our justice system.

Canadians have the right to use English and French before the courts – whether they are a party, lawyer, witness, judge, or other officer of the court. Our ongoing challenge is to make sure it happens.

Also, to respect the exercise of these language rights, the Act accordingly requires all of these courts to provide simultaneous interpretation services on request. You are wondering in this respect whether it would be useful to review your rules of practice.

The law also imposes the obligation on federal institutions to use, in any civil proceedings to which they are a party, the official language chosen by the other parties, unless they prove that they were not informed of the choice within a reasonable time. What is targeted here are oral and written pleadings, but not evidence given in a particular proceeding. You have also been invited to discuss this rule.

It has been said that the lack of a direct question to determine the preferred official language of a plaintiff can sometimes cause unnecessary misunderstandings regarding a court's ability to function in both languages. When and how should plaintiffs indicate the official language of their choice?

Finally, the law requires that the courts' final decisions be simultaneously made available to the public in both official languages when the question of law at issue is relevant or important to the public or when the proceedings take place in both official languages. All other final decisions must be rendered first in one language and, as soon as possible, in the other language. Does this requirement, you asked yourselves, go beyond what is required by the *Official Languages Act* and beyond that which is intended by the goal of language rights in general?

All of these questions are in fact challenges, challenges that are inextricably linked to how your court practices unfold on a day-to-day basis – it is not so much about the what and the why, but more importantly the how.

To understand how the language system of the federal courts and federal administrative tribunals works, you had to examine your own linguistic practices. You concluded that the challenges are many and varied, but quite achievable.

It may also be that the challenges that this conference has helped you identify and share will commit you down a certain path to follow. And of course the Department and the Office of the Commissioner were committed to providing you with a forum for moving the discussions forward, and are very pleased to have initiated the dialogue and to have provided a framework for your thoughts. In doing so, they achieved their objective by giving the players in the administration of justice an opportunity to speak out.

They are definitely happy to see a discussion forum that brings together the federal courts and which, after this conference, will continue to analyze and reflect by proposing, for example, to provide qualitative and quantitative data on services offered by the courts, to concretely identify the barriers to access to justice in both official languages, and finally to determine possible solutions geared towards their specific situations.

Conclusion

With a view to sharing the current practices as well as the desired improvements, this conference has encouraged you to take a critical and prospective look at your respective situations. Without exception, you all had the opportunity to speak out. If there is one thing to be retained from this conference, it is the consensus it generated.

This consensus is a result of your commitment to actively participate in the discussions. It is also a result of the planning of this conference. For that we must thank the Canadian Centre for Management Development, which provided its expertise in conceptualizing and organizing learning events.

We must also thank all those, at the Department of Justice and the Office of the Commissioner of Official Languages, who worked to bring forward and manage this project. The participation of the group of chairs of federal courts, particularly that of all the designated resource persons, must be duly noted and we thank them for it.

Finally, the lecturers and the moderators of the "Knowledge Café" set the right tone, a fair and rigorous tone. We thank them for accepting to take on such an active and determining role.

The federal government, so far as it represents English-speaking and French-speaking Canadians, is committed to providing services in both languages and as a result, to making English and French the official languages of courts. It is in the name of this commitment that you entered into conversation and we thank you for that.

Access to equality is a long-term project, a social vision.

Even though our past efforts to defend minority language rights have not always been beyond reproach, it has always been a goal we have set for Canadian society, since Confederation. And I would say, we have made and continue to make much progress along the way.

You have demonstrated that the federal courts care about equality and access.

Thank you.

Address by the Minister

Address by the Minister of Justice and Attorney General of Canada and Minister with political responsibility for Quebec

The Hon. Martin Cauchon

Minister of Justice Martin Cauchon congratulated everyone associated with the organization of the conference and stated that linguistic equality before the courts and law is fundamental to a justice system that is effective and accessible to all Canadians.

Thank you very much, Richard.

I would like to acknowledge the head table guests, in particular Ms. Adams, whom I have had the opportunity to work with since my arrival at Justice. And, of course, I have had the opportunity to read certain reports by the Office of the Commissioner, particularly that of 1999. I am aware that you are closely following the Department and also the issue of access to justice in both official languages, which is one of your concerns. I just want to say that it is also one of the Department's concerns and one of my personal concerns.

I would also like to acknowledge the Honourable Chief Justice of the Federal Court, Mr. Richard, who has done us the honour of being here today as well. Also, the Honourable Mr. Justice Richard and I work a lot and we work well together. The Federal Court is a court that has seen a substantial increase in its workload over the past few years. I am aware, Mr. Justice, that you are faced with enormous pressures of workload. I believe that co-operation – our co-operation, the co-operation that exists between you and me, can help put the Federal Court as a whole back on the right track. And, when I say on the right track, I mean helping reduce lead time because I know, Mr. Justice, that you have worked very hard over the past few years and months to ensure that the Federal Court's various rules of practice are adapted, more adapted to this workload.

As you know, over the past few weeks, we have had the opportunity to appoint a few more judges and I hope that in the near future we will have the chance to continue in this vein.

Before I get into the main topic, I would like to thank those – thank those who, within the Department, work within the official languages group and Marie-Claude Gervais, who is here with us today, and Marc Tremblay, two dynamic young people within the Department who are committed to the issue of official languages and who are extremely knowledgeable on the matter. Also, I would like to thank you for the work you do and the great presence you have within the entire community.

In fact, today is a key opportunity to speak to you about an issue that is dear to us and discuss the issue of access to courts in both official languages, to discuss what the government has done over the past few months and weeks. It is also a key opportunity to acknowledge the work your working group has done over the past few days to essentially further target the various problems, and also raise the Department's awareness.

And, at this stage, I find that this is fundamental, particularly in the wake of the action plan, which was announced by the Prime Minister and my colleague, Stéphane Dion.

As we all know, linguistic equality before the courts in law is indeed fundamental to a justice system that is effective and accessible to all Canadians. The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 has played a pivotal role in guaranteeing the rights of Canadians to access their justice system in the official language of their choice.

Indeed, the *Constitution Act of 1982* placed the foundation of language rights in Canada. Constitutional guarantees confirming the statutes of French and English as the official languages of Canada and as the languages of instruction in the schools of the official language minority communities are contained in the Charter.

Today, we know that in matters relating to the interpretation of language rights, the courts have used too often divergent and, according to some authors, sometimes even contradictory approaches. In a number of cases, the courts gave liberal and generous interpretations of the language rights guaranteed in the Constitution and legislation. They looked at the content of these language provisions and identified rights and obligations favourable to the official language minorities.

In doing so, they reinforced the principles of equality and protection of language minorities.

In other cases, these principles were pushed aside in favour of a decidedly restrictive interpretation of language rights: this interpretation is largely based on the concept of political or historical compromise, which imposes a certain reserve on the part of the courts regarding the provisions that confer language rights.

However, this attitude of judicial restraint that has prevailed in the interpretation of language rights since 1986 is slowly starting to change and, in *Beaulac* case, the Supreme Court severely shook the foundations of the previously favoured reserved interpretation.

Therefore, all language rights must be given a generous and liberal interpretation from now on, in keeping with their particular subject and with the general objective of language rights.

The interpretation accorded to a language provision must respect to the extent possible the letter and, more importantly, the spirit of the provision within the general objective of protecting official language communities and preserving their cultural identity.

Today, the courts and the legislative assemblies are still defining the language rights of Canadians, and the discussion continues, more constructively than ever. Legislation, regulations, and legal decisions still drive the forum. The Department is eager to take a stand in this discussion and, in light of the fact that linguistic duality is a major competitive advantage for us, it is for the benefit of advancing the principle of equality that the Department of Justice is specifically participating in the government's official languages plan, announced on March 12 by the Right Honourable Jean Chrétien and my colleague, the Honourable Stéphane Dion.

Let me take the opportunity today to talk to you about the action plan.

The action plan is modern and certainly ambitious, but at the same time, realistic and achievable. It proposes concrete measures in the form of initiatives that give priority to a number of fields like education, health, justice and immigration.

Over the next five years, the Government of Canada will invest $751 million to promote the vitality and renewal of Canada's linguistic duality. In the field of justice, for example, this plan will enable us to develop and implement measures to improve access to justice before federal courts and in criminal proceedings. Between now and 2008, the federal Department of Justice will commit $45.5 million to meeting these objectives.

Of this amount, $27 million will be earmarked to meet the legal obligations arising in particular from implementation of the *Contravention Act* and the legislative instrument, the *Reenactment Act*.

We will also commit $18.5 million to implementing various measures: first, funding projects carried out in participation with governmental and non-governmental partners; also providing consistent funding for the francophone jurists' associations and their national federation; developing language rights training tools for legal advisors from the Department of Justice; finally, setting up a consultation mechanism with official language minority communities to take their concerns and needs into consideration when we develop our programs and policies.

In addition, we intend to work actively with our governmental and non-governmental partners in the provinces and territories to bring innovative and lasting projects to fruition, with their help.

We know now, for example, that all members of the official language minority communities are encountering, to varying degrees, problems that stand in the way of their obtaining access to justice in their language. The Department of Justice thought to document and analyze the situation by undertaking a study: ***Environmental Scan: Access to Justice in Both Official Languages***. It found that in areas where an official language minority concentrated and constitutes a critical mass, the number of members of the minority language community is sufficient to support a judicial system that operates in the minority language. These citizens, moreover, tend to request services in their language.

However, it seems that the lower the minority community's demographic weight in a jurisdiction, the more difficult it is for the members of that community to exercise their language rights in the courts. Thus the view has been that a proportionately low number of requests for judicial and legal services in a minority official language justifies providing rather limited services. QUESTION – Should access to judicial and legal services follow the economic law of supply and demand?

In fact, the Department of Justice refuses to take a commercial approach to this issue. The Department takes the perspective of the Supreme Court and the Office of the Commissioner of Official Languages: it is first a question of rights.

This approach imposes "obligations on the judicial system and the government to make services available in the minority official language. This justifies, for example, the idea of a genuine policy for active offer of judicial and legal services in the minority official language."[46]

The offering of services must not depend on demand because the right of the accused, for example to a trial in the official language of his/her choice, is not a favour granted by the State – (it is a standard to be applied. We owe this position to the results of the study commissioned by the Department of Justice entitled ***Environmental Scan: Access to Justice in Both Official Languages***. This study paints a country-wide picture of the situation relating to access to justice in the minority official language.

Granted, many national and provincial studies have been done in the last few years. However, recent developments in case law regarding language rights, increasing court action on language rights issues, and, in the last ten years, the creation of seven francophone jurists' associations and their national federation led the Department to carry out its own study.

The Environmental Scan found, for example, that the costs and time involved in a request for judicial services in the minority language are great and that the lack or insufficient number of judges, lawyers and legal staff who are able to serve people in their official language are major problems. The lack of a policy for active offer was also raised as one of the most obvious barriers to justice in the minority official language.

Following closely on the heels of the Environmental Scan, a federal-provincial-territorial working group on access to justice in both official languages was created in 2002. At the present time, the working group comprises members from Ontario, Manitoba, Alberta, British Columbia, New Brunswick, Nunavut, and the Yukon. Saskatchewan joined recently.

The people responsible for Francophone matters in the provinces and territories are also represented. This study provided qualitative and quantitative data on available services, identified barriers to accessing justice in both official languages, determined possible solutions specific to the reported situations, and drew up an inventory of innovative practices using existing federal levers.

46 Government of Canada, Department of Justice, ***Environmental Scan: Access to Justice in Both Official Languages***, Study, Ottawa, July 2002

It is difficult to report on the current state of an initiative that is under way and that, through its successes and frustrations, continues to surprise us. This movement towards equality has only just begun, and it will likely continue to experience victories.

Before ending my remarks today, I want to leave you with an important last thought. The Official Languages' Commissioner's Report was the milestone in furthering access to Canada's justice system in both official languages. Your exchange of ideas at this conference complements this progress by providing a forum for the representatives of federal administrative tribunals and federal administrative tribunals that exercise quasi-judicial functions to share ideas and expertise. During your sessions, you have had the opportunity to discuss and question the current situation regarding the use of French and English in their respective jurisdictions, more particularly in the areas of the language of decisions, evidence and interpretation services. In short, the rules of practice and guidelines.

As a forum for learning, discussing, and sharing information, this conference focused on three areas: training, awareness raising, and presenting best practices or possible solutions.

After recalling the founding principles of judicial bilingualism and examining the characteristic aspects of the administration of justice in both official languages within the context of your varied experiences, your actions have encouraged a critical approach in the wake of our constitutional heritage, which engendered judicial bilingualism.

This critical approach could very well lead to innovative practices that promote an attitude and culture of equality.

In fact, I believe that in the wake of the action plan, the conference you recently held was an important part of the process. As I have mentioned to you on several occasions, when you look at the action plan, there is a fundamental component for access to justice. Significant funds have been allocated as well. Within the justice component, there are essentially two elements. The first element is, without a doubt, the issue of meeting our legal obligations, which I raised in the speech – in fact, adjusting in terms of the *Contravention Act* and, as you know, an agreement was recently reached with Ontario in that regard. The second element is a departmental programming plan aimed at increasing access to justice in both official languages.

Therefore, this can be done through a group of measures ranging from the training of the various persons involved – support staff at various commissions and lawyers as well – to the issue of judges. And, in that context, which is the second element, that is, the element that involves improving access, I honestly believe the work you have just completed, your consultations, and the recommendations and results of your work will be taken into consideration by every member of the Department's team in the recommendations to the Minister to ensure that the action we will be taking over the next few years reflects your needs, your situations and, when all is said and done, satisfies the objective sought by all of you and also by our Department, our government and me personally, that is to say, to ensure that we aim for this notion of language equality and that access to justice in both official languages is improved, no matter what part of Canada we live in.

Thank you very much for your work. Thank you for your attention as well.