ARCHIVED - The Equitable Use of English and French Before Federal Courts and Administrative Tribunals Exercising Quasi-Judicial Powers - May 1999

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EXECUTIVE SUMMARY

The role of federally constituted courts in Canada remains vital to the preservation and continued evolution of a legal system composed not only of civil and common law elements, but also characterized by the use of English and French in all regions of the country. In addition to traditional courts of record (such as the Federal Court and the Tax Court), Parliament has over the years established various administrative tribunals endowed with adjudicative functions in respect of activities falling under a wide range of federal statutes. Whether it be the resolution of claims of discrimination in the work place, issues related to labour relations in the public service, applications for refugee or immigrant status, the protection of intellectual property, rights to pension benefits, the conditional release of prisoners, the revocation of broadcasting licenses, or access to unemployment insurance benefits, to name but a few, the importance of hearings conducted before federal administrative tribunals is undeniable.

The present study reviews the legal provisions and administrative practices now in place which regulate the use of English and French before both federal courts of record and federal quasi-judicial administrative tribunals. It begins in Part 2 by analyzing the constitutional guarantees which apply to the use of our official languages before such bodies, guarantees which are found in the original *British North America Act of 1867* and also in the *Canadian Charter of Rights and Freedoms* entrenched in 1982. It reviews Supreme Court decisions which interpreted the scope of these guarantees, pointing out the need for statutory reform which those decisions highlighted. The study also deals with court decisions extending the application of the constitutional guarantees to quasi-judicial tribunals and the impact of such guarantees on rules of procedure before such tribunals. In addition to rights relevant to the adjudicative functions of tribunals, this part of the study also examines the importance of constitutional provisions (under the *Charter*) which apply to services to the public offered by federal institutions.

Part 3 of the study then turns to the statutory framework put in place to implement the underlying constitutional right to use either English or French before federal tribunals. It presents a summary of the first *Official Languages Act of 1969*, indicating the type of provisions then in place which applied to parties and witnesses appearing before federal tribunals, and how the issues of simultaneous translation during proceedings and the bilingual issuance of decisions were regulated. The study then examines in detail the individual rights and institutional duties found in the *Official Languages Act of 1988*. It points out the importance of a range of institutional duties which tribunals and the Federal Crown must respect, such as the obligation to provide a judge or adjudicator who understands directly the official language of the party appearing, to ensure that crown counsel appointed to a case can do likewise and that written

pleadings are filed in the language in which a party proceeds. Other statutory duties canvassed include the issuance of pre-printed forms in both official languages and duties relevant to the issuance of decisions in the official language of the parties, in both official languages, and the time delays which must be respected regarding bilingual issuance.

Beyond the rights and duties applicable to the adjudicative functions of federal tribunals, Part 3 of the study also reviews in detail the statutory provisions applicable to services to, and communications with, the public by federal institutions. It explains how services to the public in either official language by federal tribunals naturally complement the implementation of rights and responsibilities applicable to their adjudicative functions. In addition, the study reviews relevant regulations adopted under the *Official Languages Act* and their role in ensuring that services in either official language are offered to the vast majority of minority official-language speakers wherever they are situated in the country. Communications with the public by federal institutions also involve duties regarding the type of media used to reach minority language speakers. This is true both of communications in general and more formal communications which fall under the category of statutory or other instruments.

Part 4 of the study presents a detailed chronology of administrative and procedural stages in gaining access to federal courts and quasi-judicial tribunals. It begins with general inquiries and the filing of documents by members of the public, pointing out how important initial contact with the institution is in establishing official language usage. The study thus underscores the importance of an active offer of service in either official language. It explores the regional differences which may influence the language policies of some tribunals, such as those between the National Capital Region and other parts of the country, as well as the different legal provisions which apply. The applicability of the principle of significant demand in the various parts of the country is also examined.

Administrative procedures in place for identifying the official language of parties or witnesses to any proceedings and for determining the need for translation at a hearing are also reviewed in Part 4. The importance of this both for encouraging the use of either official language and avoiding delays at trial because of language difficulties is underscored. Tribunal procedures in this regard vary considerably, a factor which argues in favour of initiatives to render practices in this regard more uniform. A later stage in the process involves the assignment of judges, adjudicators and administrative staff who have a role to play with respect to hearings. The study therefore points out the importance of language abilities in the selection of staff. This is also true regarding the language abilities of counsel selected to represent the Federal Crown, who are expected to use the official language of the parties in any pleadings and at hearings. Internal guidelines relevant to obligations of the Federal Crown in this regard have been developed by the Department of Justice, and these are reviewed in the study.

Part 4 concludes with an extensive examination of institutional duties regarding the issuance of decisions in the official language of the parties and the circumstances which give rise to the obligation to issue decisions, simultaneously or otherwise, in both official languages. Distinctions are drawn between the issuance of decisions following unilingual proceedings, as opposed to those conducted in both official languages. Statutory obligations with respect to the language in which decisions are issued are broad. Federal courts and tribunals face operational constraints which make it difficult to issue all decisions, including those of no jurisprudential value, in both English and French. The complexities of the legal obligations in this regard are carefully reviewed and the manner in which priorities might be established is considered by reference to the practices of the Tax Court of Canada.

Parts 5 and 6 offer a brief conclusion to the study and a series of recommendations aimed at improving the manner in which rights and responsibilities under the *Official Languages Act* are implemented. The recommendations relate to issues which are explored in greater detail in Part 4 of the study. These included suggestions aimed at improving the active offer of services in both official languages, ensuring that the official language of parties and witnesses to proceedings is identified at an early stage, formalizing procedures for identifying the official language that will be used by legal counsel representing a federal tribunal, rationalizing statutory provisions governing the bilingual issuance of decisions, and establishing a system of priorities which should be used to determine the order in which decisions are made available in both official languages.

1.0 INTRODUCTION

In November of 1995 the Commissioner published a study regarding the equitable use of Canada's two official languages before courts of record operating in all provinces and at the federal level, with particular emphasis upon courts exercising criminal jurisdiction.[1] Our intention at the time was to provide a general overview of the

constitutional and legislative status of our official languages in judicial proceedings across the country as a whole, as well as an assessment of the practical realities surrounding their use as procedural languages.

Among other things, this 1995 study concluded that the opportunities to use English or French in judicial proceedings varies considerably from one region to another. This is understandable given the uneven application of constitutional provisions, as well as the fact that legislative jurisdiction over the courts, both civil and criminal, is divided between the federal and provincial levels of government. Even with respect to criminal proceedings, where Parliament can act to bring some uniformity to the use of official languages through its authority over criminal law and procedures,[2] provincial authorities take the lead responsibility in conducting criminal prosecutions. Moreover, criminal prosecutions take place before courts established and administered by the provinces. As a result, the effectiveness of legislatively-based language rights in the criminal process depends to a great extent upon the cooperation of two levels of government.

The civil process also bears witness to the considerable variability of official language rights before the courts, in large part due to broad provincial legislative jurisdiction over matters involving civil litigation, and to the absence of constitutional or legislative language guarantees in most provinces. While Parliament also has authority to enact statutes affecting civil responsibilities in a number of areas, it remains true that the majority of civil litigants appear before provincially constituted courts whose procedures fall exclusively under provincial jurisdiction.

Nonetheless, the role of federally constituted courts remains vital to the preservation and continued evolution of a legal system composed not only of civil and common law elements, but also characterized by the use of English and French in all regions of the country. The 1995 study emphasized that federal courts are subject to a wide range of language rights and correlative institutional duties under federal statutory law, but its broad scope did not allow for a more focused analysis of their operations and procedures. As the study then pointed out, their unique pan-Canadian status called for a more detailed examination.

The present study concentrates exclusively upon federal courts and a wide range of legal provisions which apply to them. In addition to constitutional guarantees (found in Section 133 of the *Constitution Act, 1867* and Section 19 of the *Canadian Charter of Rights and Freedoms*), federal courts are subject to the *Official Languages Act* of Canada, which sets out in Part III (Administration of Justice) a series of rights and institutional obligations regarding the equitable use of our official languages.[3] Taken together, these constitutional and statutory provisions are designed to ensure that the use of English and French in federal judicial proceedings is uniform, as a matter of law, in all regions of the country.

Traditional courts of record, such as the Federal Court and the Tax Court of Canada, come immediately to mind when reviewing the equitable use of English and French in the administration of justice at the federal level. Yet beyond actual courts of record, Parliament has over the years established various administrative tribunals endowed with adjudicative functions in respect of activities falling under a wide range of federal statutes. Whether it be the resolution of claims of discrimination in the work place, issues related to labour relations in the public service, applications for refugee or immigrant status, the protection of intellectual property, rights to pension benefits, the conditional release of prisoners, the revocation of broadcasting licenses, or access to unemployment insurance benefits, to name but a few, the importance of hearings conducted before federal administrative tribunals is undeniable. The Supreme Court of Canada has recognized that such tribunals carry out functions which are analogous to those performed traditionally by courts of record and that they must respect the constitutional guarantees under Section 133 of the *Constitution Act, 1867* and Section 19 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Moreover, the terms of Part III of the *Official Languages Act* (the *Act*), setting out individual rights and institutional obligations regarding the use of English and French in the administration of justice, apply to such tribunals as well.

The present study therefore covers both traditional courts of record and a range of administrative tribunals exercising quasi-judicial powers. The mandate and methods of operation of more than twenty federal courts and tribunals, covering a broad spectrum of activities regulated by federal law, were reviewed. However, it should be underscored that the tribunals examined do not necessarily represent an exhaustive list of all federal tribunals performing adjudicative functions. A description of each tribunal and the matters which fall under its jurisdiction can be found in **Appendix C**. We stress at the outset, however, that our study does not present a separate appraisal of each tribunal; rather, it seeks to provide an overview of the manner in which the two official languages are integrated into federal adjudicative processes, to identify problems occasioned by two-language requirements, and to propose solutions to difficulties which the system as a whole may be facing in meeting current obligations under the *Act*.

The use of English and French as procedural languages entails a certain level of institutional bilingualism regarding access to general information about the mandate of a court or tribunal, responses to written and oral inquiries from the public, as well as specific requests from individuals for guidance as to how to engage the processes inherent in a court or tribunal's operations. In other words, there are aspects of their day-to-day operations which constitute services offered to the public. These services could be said to complement any purely adjudicative functions of a court or tribunal and would be subject to provisions in the *Act* (Part IV) regarding communications with and services to the public. The latter are subject to a number of conditions, such as significant demand, geographic location and the nature of an office, which are not relevant when considering language rights in the adjudicative process found in Part III of the *Act*. The possible impact this might have on the public's ability to gain access to federal courts and administrative tribunals should thus be carefully reviewed. Accordingly, we have included this dimension of a court or tribunal's activities, and the constitutional and statutory provisions applicable to them, in preparing the present study.

In addition to a review of constitutional and statutory provisions governing the use of English and French in federal adjudicative processes, the present study has endeavoured to identify and assess all written policies and rules of practice of a linguistic nature relevant to the operations of federal courts and quasi-judicial tribunals selected for the purposes of this study. Questionnaires were developed and distributed to judges and adjudicators, as well as their administrative staffs, with a view to gathering information about language policies and practices not necessarily reflected in written documents. Moreover, the completed questionnaires have provided insights into the practical realities of using two official languages in court or tribunal proceedings. The completion of the questionnaires was followed by actual meetings with selected judges, adjudicators and administrative staffs attached to each court or tribunal, whether in the National Capital Region or other localities across the country.

Questionnaires were also distributed to legal counsel who practice in front of these federal tribunals in the minority official language of their localities, and to non-governmental organizations representing official language minorities. The information thus collected helped identify the linguistic realities inherent in the operation of various courts and tribunals. Regional meetings with such individuals and groups were also organized so as to supplement information received via written questionnaires.

Finally, the Commissioner has given the chance to the tribunals and other person concerned by this study to comment the draft study before its publication. This study takes into account the comments received.

2.0 CONSTITUTIONAL GUARANTEES

2.1 Choice of Language in Court Proceedings

The right to use English and French before federal courts, whether in written documents, testimony, oral arguments or any other submission, can be traced to Section 133 of the *Constitution Act, 1867* (originally the *British North America Act, 1867*). That section provides that either language "may be used by any 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". The same constitutional guarantee (applicable by its terms to all federal courts and the courts of Quebec) was later extended to the courts of Manitoba when that province entered Confederation in 1870,[4] and to those of New Brunswick as a result of the 1982 constitutional amendments.[5]

The constitutional right to use either language before federal courts (and before those of New Brunswick, Quebec and Manitoba) is also accompanied by very important guarantees related to the use of English and French in the legislative process. In this regard, the Constitution authorizes the use of both languages in the debates of Parliament and the legislatures of New Brunswick, Quebec and Manitoba; requires the use of both languages in the records and journals of these legislative bodies; and stipulates that all legislation (and other "Acts") of these bodies are to be printed and published in both languages.[6]

The ability to use either English or French before the courts is obviously greatly enhanced by access to statutes and related documents in both languages. Without bilingual legislation, a heavy burden is placed on anyone who wishes to conduct legal proceedings in the minority official language. It is therefore not surprising that the freedom to use English or French before the courts, constitutionally recognized in three provinces and at the federal level, is also supported by guarantees that both languages will be used in the passage, adoption and publication of statutes and related

enactments of these jurisdictions.[7]

The inviolability, meaning and scope of constitutionally protected language rights in the judicial and legislative processes were subject to controversy over a long period of time.[8] As applied to the courts, there was nothing in their wording that clarified the consequences of using one or other official language, such as the ability of court officials to understand and respond in the language chosen. Phrased in permissive terms only, the constitutional right to use either language did not necessarily impose any language requirements on those to whom one was obliged to speak. Taken literally, it meant simply that any individual appearing before the designated courts could use one language or the other, whether this were in written documents, in testimony or in oral arguments, or in any other submission to the court. The question of how one's interlocutor was to understand what one said, in the event there was no common language of communication, remained unanswered on the face of the provisions.

A series of cases before the Supreme Court of Canada highlighted various important issues relevant to the level of institutional bilingualism which citizens might expect from a judicial system where English and French are official languages. These included the legal validity of unilingual summonses (issued under the authority of courts before which both English and French were constitutionally protected);[9] and whether the right to use either language included the right to be heard and understood directly by a judge in the chosen language.[10] Those who initiated court challenges hoped at the time to persuade the Supreme Court to adopt a generous interpretation of constitutional language guarantees applicable to the courts, particularly in light of the broad and liberal interpretation which the Court had already brought to bear on constitutional language rights in the legislative process.[11]

However, the Supreme Court chose to adopt a narrow interpretation of Section 133 as it applied to judicial proceedings. Virtually no correlative State obligations were found to arise from Section 133 regarding the language capacity of judges, crown attorneys or other employees working within the court system; nor were subpoenas, summonses or other court documents required to be issued in bilingual format.[12] In effect, the Supreme Court ruled that Section 133 had been based upon an historic compromise regulating the use of English and French to a minimal degree only. It had not been meant to introduce a comprehensive system of official bilingualism in the courts subject to it:

> Such a limited scheme can perhaps be said to facilitate communication and understanding, up to a point, but only as far as it goes and 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... It is a scheme which, being a constitutional minimum, not a maximum, can be complemented by federal and provincial legislation...[13]

In other words, legislative action is necessary in order to resolve many of the practicalities inherent in the use of two official languages in the judicial process. Constitutional provisions are simply too narrow to regulate in any effective way the two-language capability of our judicial system.

Despite its limitations, the constitutional guarantee provided by Section 133 does ensure that litigants and their counsel will not be prohibited from using their own official language, or forced to provide a translator in order to ensure that other participants in the court process understand what is being said. The provision of interpretation would be a responsibility of the State or of the party unable to understand the official language being used by other participants in the judicial process. Nor could those who operate courts subject to Section 133 refuse to accept documents written in the official language of a litigant without violating the constitutional protection. These are important principles, to be sure, and ones which require the State to consider very carefully the manner in which the practical challenges of using two official languages in the courts can best be met.

2.2 Quasi-judicial Tribunals

The gradual development of administrative tribunals which exercise adjudicative functions similar to those exercised by courts of law raises the issue of whether Section 133 language guarantees apply to them as well. The role of such tribunals is an important one in the administration and implementation of a wide range of statutes adopted by Parliament. They are in effect delegated significant decision-making powers affecting individual citizens which must be exercised by reference to principles set out in law or regulations.

By way of example, consider the role and functions of a Human Rights Tribunal established pursuant to the *Canadian Human Rights Act*, or those of the Refugee Division of the Immigration and Refugee Board established pursuant to the

Canada Immigration Act. Both tribunals determine questions of considerable importance to individuals appearing before them. They also allow evidence to be submitted and representations to be made by the parties or those representing them.[14] Moreover, the tribunals have the power to summons witnesses and to administer oaths; though strict rules of evidence applicable to an actual court of law do not necessarily apply to their proceedings.[15] While they have a duty to act fairly, both tribunals are authorized to consider all relevant evidence, even evidence which might not be admissible in traditional judicial proceedings. When considered as a whole, however, their powers and procedures are analogous to those of actual courts of record.

Administrative tribunals of this sort are not, strictly-speaking, courts of law in the traditional sense, and are not specifically mentioned in Section 133. The silence of Section 133 in this regard has been explained by the Supreme Court of Canada in the following words:

> In the rudimentary state of administrative law in 1867, it is not surprising that there was no reference to non-curial adjudicative agencies.[16]

Nevertheless, the Supreme Court recognized that today such agencies "play a significant role in the control of a wide range of individual and corporate activities"[17] and that "[t]he guarantee given for the use of French or English in Court proceedings should not be liable to curtailment by...substitution of adjudicative agencies for Courts..."[18] To avoid this possibility the Supreme Court concluded that it was essential to extend the scope of Section 133 in order "to make it effective through the range of institutions which exercise judicial power, be they called courts or adjudicative agencies."[19]

It is important to note that some quasi-judicial tribunals are given administrative powers and responsibilities the exercise of which should not be qualified as adjudicative in nature.[20] With respect to these purely administrative functions, an adjudicative agency would not be considered a court of law and the question of whether Section 133 applied would not arise. In order to distinguish a tribunal's adjudicative functions, to which Section 133 would apply, from its purely administrative functions, the Supreme Court suggested the following:

> 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.[21]

The fact that an agency is called upon to apply legal principles, rather than social or economic policies, is thus an important factor to consider when determining if it exercises adjudicative functions. At the same time, however, this criterion should be supplemented by other factors courts have used in the past to determine if the functions of an agency are judicial or quasi-judicial in nature, as opposed to administrative. In this regard, one should refer to the enabling statute of a given agency in order to assess the extent to which its decisions are legally enforceable, whether its decisions may affect the rights or interests of one or more identifiable individuals, and to what extent it is obliged to follow rules of procedure similar to standards applied in the judicial process (the holding of a hearing, an adversarial process, the right to cross-examine, the right to present evidence, the right to be represented by counsel, etc.).[22] None of these factors standing alone would be conclusive, but they must all be weighed and evaluated in order to determine if, on the whole, they point to the conclusion that the functions exercised by an agency are so similar to those exercised by a court of law that they should be considered quasi-judicial in nature, rather than administrative. Where such a similarity exists, the guarantees of Section 133 would apply.

2.3 Rules of Procedure

An important State obligation which arises from Section 133 concerns the availability of rules of practice applicable to procedures before designated courts and before administrative tribunals with adjudicative functions. In effect, the Supreme Court of Canada has interpreted Section 133 so as to extend the rule of mandatory publication in both official languages (applicable to federal and Quebec statutes and regulations) to rules of practice before all tribunals subject to Section 133. It did so because litigants who have a right to use English or French before designated courts "...would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only."[23] This view of the Court underscores how important it is, in our view, that a tribunal be able to respond to a litigant in the official language of his or her choice. Even beyond the issue of mandatory forms and practice rules, it remains important to offer a full range of services to the public in either official language, whether that be in the form of

explanations of court procedures, assistance regarding the filing of information or documents, or access to general information about the tribunal's operations. In other words, an adequate level of institutional bilingualism is necessary in order to remove the inevitable barriers to the equitable use of both official languages in judicial proceedings.

2.4 Judicial Proceedings and Language Rights Under the *Canadian Charter of Rights and Freedoms*

Section 133 language guarantees as they apply to federal courts were reconfirmed and set out in Section 19 of the *Charter*.[24] The actual wording of the latter section varies very little from the constitutional guarantee dating from 1867. By its terms Section 19 also applies to the province of New Brunswick, thus constitutionally guaranteeing the right to use either official language before its courts and its administrative tribunals exercising adjudicative functions. While Section 19 of the *Charter* does not purport to change the scope of constitutional language rights as they apply to designated courts, other provisions in the *Charter* establish principles capable of exerting a positive influence on the direction of policy and legislative initiatives relevant to all federal tribunals.

For example, Subsection 16(1) of the *Charter* provides that "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." This basic principle is coupled with the proposition found in Subsection 16(3) to the effect that nothing in the *Charter* "limits the authority of Parliament or a legislature to advance the equality of status or use of English and French."[25] Quite clearly, federal courts and administrative tribunals exercising quasi-judicial powers are important institutions of the government of Canada. As such, English and French enjoy equality of status and equal rights and privileges as to their use in proceedings before them. Moreover, any enhancement of the equality of use of both official languages before such bodies, through policy or legislative action, can find inspiration in the important constitutional declaration set out in Subsection 16(3).

2.5 Services to the Public Under the *Canadian Charter of Rights and Freedoms*

In addition to confirming the constitutional freedom to use either official language before federal tribunals, the *Charter* also recognizes [at Subsection 20(1)] that:

- Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where
    - there is a significant demand for communications with and services from that office in such language; or
    - due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Since federal courts and quasi-judicial tribunals are undeniably institutions of the government of Canada, it follows that the administrative services offered by them to the public are subject to the rights set out in Subsection 20(1) of the *Charter*. Such services would include information offered to the public regarding a tribunal's mandate and functioning, over-the-counter services, written and oral communications with individual members of the public, and the reception of documents relevant to eventual proceedings before a tribunal.

The concept of services to the public constitutes an important complement to specific language rights which apply to actual hearings before a tribunal. In effect, the right to services in either official language imposes a correlative obligation on federal institutions (where the requirements of Section 20 of the *Charter* are met) to ensure they have the language capacity to communicate directly in the preferred official language of members of the public. While this cannot be said to change the nature of language rights as they apply to actual tribunal procedures (which are guaranteed by Section 133 of the *Constitution Act, 1867* and Section 19 of the *Charter*),[26] the provision of services to the public should work to create a positive environment encouraging the use of both English and French as procedural languages.

3.0 STATUTORY FRAMEWORK FOR LANGUAGE RIGHTS IN JUDICIAL AND QUASI-JUDICIAL PROCEEDINGS

3.1 First *Official Languages Act*

Even before the advent of the *Charter* incorporating important language guarantees, Parliament had enacted in 1969

the first *Official Languages Act* (the *Act of 1969*). With respect to proceedings before judicial and quasi-judicial bodies established by Parliament, and before courts exercising criminal jurisdiction, the *Act* introduced the notion that any witness should not be disadvantaged by reason only of the official language in which he or she chose to testify. In addition, the *Act* provided for the conduct of criminal prosecutions in the official language of the accused, provided a number of prerequisites were met.[27]

The constitutional validity of these provisions was challenged at the time on the basis that they constituted an unwarranted extension of Section 133 of the *Constitution Act, 1867*. No government, it was argued, had the legislative jurisdiction to supplement the language guarantees set out in Section 133, were it federal or provincial. The Supreme Court of Canada rejected this position in very clear terms:

> The submission as to s. 133 by counsel for the appellant is that provision is exhaustive of constitutional authority in relation to the use of English and French, and that a constitutional amendment is necessary to support any legislation which, like the *Official Languages Act*, would go beyond it. I do not accept that submission which, in my opinion, is unsupportable as a matter of such history thereof as is available, and unsupportable under the scheme of distribution of legislative power as established by the *British North America Act* and as construed by the Courts over a long period of time.[28]

In effect, the Supreme Court of Canada recognized that Parliament could, by way of legislation, ensure that the right to use either official language in criminal proceedings applied to courts in all provinces, given its very clear powers over the criminal law and criminal procedure. Similarly, Parliament could impose institutional duties related to official languages upon any judicial or quasi-judicial body which had been competently established under federal law, so long as they did not conflict with Section 133 of the *British North America Act* (now the *Constitution Act, 1867*).[29]

With respect to federal courts and to federal administrative tribunals exercising quasi-judicial powers, the *Act of 1969* established a number of principles designed to enhance access to them in either official language. As already mentioned, it established the duty of federal courts and quasi-judicial bodies to ensure that witnesses could be heard in either official language without being placed at a disadvantage by so doing.[30] It further provided for the provision of simultaneous interpretation at the request of a party to any proceedings before a court of record, although this was limited to the National Capital Region and subject to judicial discretion.[31]

The *Act of 1969* also established rules regarding the issuance of judgments and final decisions of any federal judicial and quasi-judicial bodies in both official languages, but these also incorporated various discretionary derogations.[32] While none of the provisions in the *Act* spoke to the language abilities of judges and adjudicators, nor to the language to be used by the federal Crown when it was a party to litigation, the *Act of 1969* constituted an important step towards recognizing the obligations federal institutions must assume in order to facilitate the use of both official languages in judicial and quasi-judicial proceedings.

3.2 Linguistic Rights and Institutional Duties Under Part III of the *Official Languages Act, 1988*

A new *Official Languages Act* was adopted by Parliament in 1988. One of the purposes of the *Act*, set out in Subsection 2(a), is to "ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions."

With respect to the administration of justice, Part III of the *Act* eliminated many elements of judicial and operational discretion present in the previous legislation which had a bearing on the effective exercise of the freedom to use English and French before federal courts. While existing constitutional rights were confirmed,[33] the *Act* also established a number of specific institutional duties vital to facilitating access in either official language to federal courts and to administrative tribunals exercising quasi-judicial powers[34].

As already mentioned, it is fair and reasonable to expect that members of a court or tribunal will understand a party in his or her official language without the aid of interpretation. This basic principle is found in Section 16 of the *Act*, which declares that federal courts or tribunals have the duty to ensure that judges and other officers presiding over proceedings understand directly the official language chosen by the parties, or understand both official languages where the parties proceed in different official languages.[35]

The ability to understand directly a given official language is not necessarily co-extensive with the ability to use it. Nevertheless, it is widespread practice within the courts and tribunals reviewed in this study for judges and adjudicators to address a party in his or her preferred official language.[36] A specific obligation to use the language of the parties is, however, imposed upon the federal Crown and its institutions. In effect, the *Official Languages Act* stipulates that the federal Crown and its institutions, where they are parties to any proceedings, "...shall use, in any oral or written pleadings, the official language chosen by the other parties unless it is established... that reasonable notice of the language chosen has not been given."[37] Where the parties fail to choose or agree on the official language of the proceedings the *Act* directs the federal Crown or institution to use such official language as is reasonable in the circumstances.

In addition to the statutory duties just mentioned, the *Act* also imposes a more general duty upon a federal court "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.[38] An example of disadvantage may be problems of comprehension arising from the use of different official languages by witnesses appearing in unilingual proceedings before a given tribunal. In such cases, the provision of interpretation facilities would be one means to avoid any attendant disadvantage to either parties or witnesses. In this regard, the *Act* makes it clear that a court or tribunal has a statutory duty to ensure that "...simultaneous interpretation of the proceedings, including the evidence given and taken, from one official language into the other..." be made available at the request of any party to the proceedings.[39]

The principle that federal courts and quasi-judicial tribunals should tailor the language they use to that chosen by the parties is also reflected in the statutory requirement that any pre-printed forms addressed to parties, and required to be served upon them by a federal institution, be in both official languages.[40] Respect for this provision undoubtedly avoids difficulties which might arise in cases where the official language of a party is unknown, or some uncertainty exists. With respect to details added to the pre-printed portions of a form, the *Act* allows them to be set out in one official language only. However, the *Act* imposes a statutory duty to indicate clearly on the form "...that a translation of the details into the other official language may be obtained..."[41] Where such a request is made the federal institution is required to make a translation available forthwith.

The *Act* also imposes statutory requirements with respect to the official language in which tribunal decisions, orders and judgments, including any reasons relevant thereto, are issued. It requires that they be made available simultaneously in both official languages where the proceedings leading to their issuance were conducted in whole or in part in both official languages, or where they determine a question of law of general public interest or importance.[42] In the latter case, however, this strict requirement can be avoided if the court or tribunal is of the opinion that it would cause "a delay prejudicial to the public interest..." or result "in injustice or hardship to any party to the proceedings..."[43] If the tribunal so concludes and issues its decision or judgment in only one official language, the *Act* requires that the decision be issued into the other official language at the earliest possible time. With respect to all other decisions, the *Act* requires that they, along with any reasons, also be made available in the other official language at the earliest possible time.

The issue of the interpretation of this Section 20 of the *Act* was submitted to the judgment of the Federal Court in *Devinat*, which will be examined in greater detail in Part 4 of this study.

3.3 Services to the Public

Provisions under Part III of the *Act*, as well as constitutional rights under Section 133 of the *Constitution Act, 1867*, relate to actual proceedings before federal courts and quasi-judicial tribunals. They do not apply to matters of general administration inherent in the day to day operation of such institutions. Nevertheless, the availability of services to the public relevant to the operation of courts and administrative tribunals in both official languages is an important adjunct to specific rights and duties which attach to the legal process itself. In our view, it would be anomalous if individuals had a right to use their own official language in actual proceedings before federal courts and quasi-judicial tribunals, yet found it difficult or impossible to receive services in that language from administrative personnel.

As already mentioned, Section 20 of the *Charter* establishes the basic constitutional right of the public to federal government services in either official language, although this is restricted to head or central offices, to offices located in areas of significant demand, or to offices whose very nature make it reasonable that they offer two-language services.

Part IV of the *Act* also sets out statutory requirements regarding services to the public dispensed by federal institutions. More specifically, Section 22 imposes a statutory duty upon federal institutions to ensure that any member of the public can communicate with and obtain available services in either official language from: (i) its head or central office; (ii) any of its offices or facilities within the National Capital Region; and (iii) any other of its offices or facilities where there is significant demand for two-language services. Clearly, federal courts or quasi-judicial tribunals operating in the National Capital Region are subject to this requirement. Beyond the National Capital Region, however, the notion of significant demand must be considered.

Regulations adopted in December 1991, pursuant to Section 32 of the *Act*, establish parameters for determining significant demand.[44] In general terms, the *Regulations* distinguish between urban centres of 100,000 people or more (census metropolitan areas -- CMA) and smaller cities, towns and rural regions (census subdivisions -- CSD), establishing different threshold levels for the minority population in each category necessary to trigger the obligation to provide federal services in both official languages. Where the minority population in a CMA is at least 5,000, federal institutions located therein are obliged to provide services in both official languages in at least one of their offices. The same rule applies if the minority population within the CMA falls below 5,000 but where the minority population of the service area of the federal office is equal to or above that figure. When these regulatory standards[45] are applied, we find that the administrative apparatus of federal courts and of federal administrative tribunals exercising quasi-judicial powers which operate in the following cities are required to provide services in both official languages: Saint John's, Halifax, Quebec, Sherbrooke, Montreal, Sudbury, Toronto, Hamilton, St. Catharines-Niagara, Windsor, Winnipeg, Calgary, Edmonton and Vancouver.

With respect to the smaller CSD, bilingual services from at least one office of a federal institution located therein are required if the minority population of its service area reaches at least 500 people and represents at least 5% of the CSD population. This is also the case if the service area of an office located in a CSD has an official language minority population of at least 5,000. When the rules applicable to CSDs[46] are applied, we find that those federal quasi-judicial tribunals with offices in the following towns and small cities are required to offer services in both official languages: Charlottetown, Moncton, Fredericton, Kingston and Abbotsford (B.C.).

The *Act* also stipulates that federal institutions required to offer two-language services must take positive measures to ensure that members of the public are adequately informed of this possibility. Such measures include "...the provision of signs, notices and other information" making it known that services are available in either English or French at the option of the individual.[47] It is therefore clear that a passive response to the requirements of the *Act* is not sufficient and that federal institutions subject to Section 22 must reach out with the active offer of service in both official languages.

3.4 Communications with the Public

Part IV of the *Act* also establishes statutory parameters relevant to the manner in which federal institutions communicate with the public. Section 30 provides that where communications are required to be made in both official languages, federal institutions shall use "such media of communication as will reach members of the public in the official language of their choice in an effective and efficient manner."[48]

Communication with the public is obviously related to the services which any given federal institution has to offer.[49] Section 30 contemplates a broad range of communications, ranging from leaflets, brochures, booklets, and manuals, to advertisements in newspapers and to newsletters. Moreover, both the framework and the specific wording of Part IV support the conclusion that the "chosen media" are not limited to printed materials, and may include electronic and oral means of communication.

Of course, what constitutes the most effective or efficient means of communication is best assessed in light of the mandate and activities of a given federal institution. Nevertheless, where decisions are made to communicate in the form of newspaper advertisements, it is apparent that advertisements inserted in the print media of official minority language communities are often an effective and efficient way to reach minority language speakers in their preferred official language. The size and geographic dispersion of an official language minority, as well as the nature of any minority language publication, are factors which must be considered when determining what is the most effective and efficient manner to reach official minority language speakers.

While federal courts and quasi-judicial tribunals should keep the requirements of Section 30 in mind when

communicating with the public, they must also be aware of the more detailed requirements of Section 11. This latter section is found within Part II of the *Act* relating to legislative and other instruments, which are subject in most cases to a rule of mandatory two-language issuance and publication. Specifically, Subsection 11(1)(a) requires that:

> A notice, advertisement or other matter that is required or authorized by or pursuant to an Act of Parliament to be published by or under the authority of a federal institution primarily for the information of members of the public shall,
>
> > (a) wherever possible, be printed in one of the official languages in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that language and in the other official language in at least one publication in general circulation within each region where the matter applies that appears wholly or mainly in that other language...

Where the requirements of Subsection 11(1)(a) cannot be met within a region because of the lack of a publication in general circulation in the one language or the other, Subsection 11(1)(b) directs that the notice or advertisement be placed in both official languages in at least one publication in general circulation within that region.

An important aim of Section 11 is to ensure that official notices and advertisements are communicated to Canadians in their preferred official language. Publishing in the minority language press of a given region helps achieve that aim. It is for this reason that Section 11 establishes an institutional obligation to place notices, etc. in both majority and minority official language publications of general circulation wherever that is possible.

Institutional obligations under Section 11 are conditioned by a number of factors, one of the most important being that the notice, advertisement or other matter "must be required or authorized by or pursuant to an Act of Parliament." In other words, reference to the matter must be made explicitly in some statutory or regulatory provision to render the provisions of Section 11 applicable. (It is unnecessary for the notice, etc. to be mandatory, so long as some instrument with legislative effect foresees the possibility of its publication.) This effectively narrows the class of documents to which Section 11 applies when compared to the broad and all-inclusive phraseology of Section 30. While there is undoubtedly some overlap between the communications contemplated by these two sections, the *Act* makes it clear that Section 11 takes precedence over Section 30. This is important to remember, for the requirements of Section 30 are subject to various qualifications, such as significant demand, which are irrelevant insofar as Section 11 is concerned.

The aim of Section 11 is to ensure that members of both official language communities receive official notices, etc. in a way which respects the equality of status of both languages and treats everyone fairly insofar as their official language of choice is concerned. The nature of the text to be published can also influence the type of minority language publication which best achieves the aim of Section 11. Where a text is technical in nature, publication in a specialized journal which appears in the minority official language may best ensure that interested persons receive the notice, etc. in their preferred official language.

Quasi-judicial tribunals which hold public hearings at which intervenors may appear, or in which the general public would be interested, are often required to publish notices of upcoming cases. Institutional obligations which flow from Section 11 must be kept in mind when publishing such notices. While bilingual publication in a majority language publication may be desirable in some cases, careful consideration of the type of minority language publications in a region should always be made. The particularities of a minority language community in any given region should also be a factor considered when determining the type of publication in which a notice or advertisement should appear.

4.0 ADMINISTRATIVE AND PROCEDURAL STAGES IN GAINING ACCESS TO FEDERAL COURTS AND QUASI-JUDICIAL TRIBUNALS

The constitutional and statutory provisions canvassed in Parts 2 and 3 of this study constitute an extensive network of individual rights and institutional responsibilities which, taken together, enhance the possibility for Canadians to gain access to federal tribunals in their official language of choice. Beyond a statement of first principles, however, a complete analysis of federal adjudicative processes must also consider the manner in which various language rights have been implemented. It is one thing to legally recognize a language right, but another to provide actively an

environment which promotes its effective exercise.

A wide range of courts and administrative tribunals were reviewed in the preparation of this study, each one possessed its own procedural rules and policy guidelines. Although the particularities of each tribunal are not herein reproduced and individually analysed, we have endeavoured to present a synthesis of procedures and policies which are pertinent to federal adjudicative processes in general. We make reference to specific tribunals when it appears that their experience or procedures illustrate an approach to the implementation of language rights which commends itself to others or where specific issues they face may have repercussions elsewhere.

We hasten to add, as well, that deficiencies which we may identify in the manner in which language rights are implemented are not necessarily common across all tribunals studied. Our only aim in drawing attention to possible deficiencies is to encourage each tribunal to review its policies and procedures so as to ensure that maximum effort is made to provide an environment which promotes rather than hinders the effective exercise of language rights in tribunal proceedings.

4.1 General Inquiries and Filing of Documents

The initial contact with members of the public can have a major impact on the willingness of individuals to express themselves and request services in their own official language. Where efforts are made by an institution to have written information about its operations readily available in both official languages, where telephones are answered in both official languages, and where staff are present to respond effectively and without delay in the official language chosen by an individual, a climate is established which decreases possible inhibitions which act as barriers to the use of a minority language.

The correlation between the active offer of service in both official languages and the use of the minority official language in a tribunal's actual proceedings is often close. To the extent that delays are frequently experienced because one chooses to use the minority official language, or frustrations arise due to lack of administrative staff who are knowledgeable enough to respond effectively to a full range of questions in the minority official language, a witness, litigant or applicant may very well be deterred from using that language in actual hearings before a tribunal. This is true even where a tribunal has sufficient two-language capability with respect to the conduct of actual hearings, for language problems at the point of initial contact can leave a negative impression which in turn diminishes the likelihood that an individual will request a minority language hearing.

Regional linguistic realities no doubt have an impact on maintaining a strong active offer of service in both official languages. There is a natural tendency to gradually diminish efforts in this regard when members of the public rarely use the minority official language. Yet each decrease in the level of service offered in both official languages serves to reinforce barriers, both real and perceived, to the use of the one or the other language in tribunal proceedings. If a supportive environment is not evident from the beginning regarding the use of both official languages, minority language speakers will be increasingly deterred from engaging tribunal procedures in that language. Federal institutional encouragement of both official languages is one means of counterbalancing the inevitable effects of one language enjoying a strongly dominant position in any particular region of the country.

The majority of tribunals studied are located in the National Capital Region. The large number of bilingual persons, both Anglophone and Francophone, in the region and their presence throughout the full range of federal institutions has facilitated the development of administrative structures ensuring the provision of two-language services to the public. Generally speaking, telephone and over-the-counter services at federal tribunals are routinely available in either official language, as well as written information about their mandate and activities. Official forms which commence procedures before the tribunals are also available in both official languages, either in side-by-side or back-to-back format, or available separately in one official language or the other. In short, reception services at federal tribunal offices in the National Capital Region reflect a concerted effort to actively offer services in either official language.

However, many federal tribunals whose main administrative offices are located in the National Capital Region also have branch offices or hold hearings in other parts of the country.[50] Still other federal tribunals are wholly located outside the National Capital Region. The Federal Court and the Tax Court of Canada are examples of federal tribunals which have regional offices in different parts of the country where proceedings may be commenced, but whose main offices in Ottawa act as central registries. While the capacity of these two courts to provide services in the minority official language exists in most parts of the country, the frequency with which it is used varies considerably. In some cases

one is left with the impression that the capacity to provide services in either official language lies dormant for vast stretches of time. As already mentioned, an unused capacity may tend to diminish over time. Employees who can function in the minority official language move on to other jobs and responsibilities, positions remain vacant for a time, difficulties of recruitment of bilingual candidates emerge, or immediate operational demands render language training for existing personnel impracticable. These are all factors which, when combined with a relative infrequency of demand for minority language services, contribute to the loss of two-language capability.

The same is true of tribunals whose head offices are located outside the National Capital Region. Since regional linguistic realities may not favour the use of the minority official language, efforts by the administrative offices of such tribunals to maintain a two-language capability may be subject to erosion over time. In this regard, the commitment to an active offer of service is an important policy initiative which works to counterbalance the natural dominance of the majority official language in any given region. While this requires a constant renewal of effort, it is the only way to create the type of institutional environment which encourages minority language speakers to use their language when communicating with the offices of various federal tribunals.

The issue of significant demand for minority language services, arising with respect to the administrative activities of federal courts and quasi-judicial tribunals outside the National Capital Region, is linked to Section 22(b) of the *Act*.[51] Moreover, the circumstances which give rise to significant demand have been defined in regulations adopted by the Governor in Council. The combined effect of these legislative and regulatory provisions requires all regional offices of federal courts and quasi-judicial tribunals examined in this study to provide services to the public in either official language. With respect to head and central offices of these agencies, the same requirement arises directly under Section 22 of the *Act* and Section 20 of the *Charter*.

The highest level of bilingualism amongst administrative staff serving the public is found in the National Capital Region, as already mentioned, and in Montreal. This of course reflects the background linguistic realities of both cities. Two-language capability in other regions of the country is also present, but uneven. Again, one cannot underestimate the challenges involved in maintaining an active offer of service in either official language. This is particularly true where the head office of a federal tribunal is located outside the Montreal-Ottawa corridor. In such cases, the duty to provide services to the public in both official languages operates independently of the assessment of significant demand, by virtue of the *Constitution* and the *Act*. Given that federal administrative agencies may exercise adjudicative functions as well as decision-making authority of a purely administrative nature, the duty to provide two-language services to the public must be assessed with both matters in mind.

A good example of an agency's multiple roles is found in the National Energy Board of Canada, whose head office is located in Calgary, Alberta. The Board is by virtue of its enabling legislation designated a court of record and conducts both oral and written hearings related to matters under its jurisdiction. While the distinction between oral and written hearings may have some bearing on the relevance of language rights which attach to the proceedings of a tribunal, both types of hearing would appear to relate to the adjudicative functions of the Board. However, other powers of the Board are exercised in an administrative fashion without recourse to hearings, most often through direct communication with an interested party. For example, many letter decisions are issued by the Board with respect to the regulation of various aspects of the export of electric power. Where application is made to the Board, the official language in which the first communication takes place becomes the language of all subsequent correspondence. Since Hydro-Quebec is the major applicant in this regard, the vast majority of letter decisions relevant to the export of electricity are issued in French. It should also be mentioned that the Board not only has sufficient bilingual personnel to offer its services generally in both official languages, but maintains an adequate two-language capability within its Law Branch to ensure that adjudicative functions can be undertaken in either official language.

The point here is not to analyse the full range of activities of the Board, but to underscore that administrative activities of federal tribunals most often extend beyond the conduct of actual hearings. While these activities may not engage the specific language rights set out in Part III of the *Act*, they are nonetheless covered in most cases by the provisions pertaining to services to the public (Part IV). The same is true with respect to administrative services which underpin and support the strictly adjudicative functions of a federal tribunal. These matters are important, for an active offer of administrative services in both official languages can have a significant impact on the use of both languages in actual proceedings before federal courts and quasi-judicial tribunals.

4.2 Procedures for Identifying the Official Language of Proceedings and the Need For Interpretation

The official language in which parties intend to make their submissions before a tribunal is very significant. In effect, the official language to be used by a party will normally determine the overall language in which the proceedings will be held. This in turn has consequences for the assignment of tribunal personnel, judges and adjudicators, as well as legal counsel representing the federal Crown.

Generally speaking, tribunal administrative offices are first alerted to the intention of a party by the official language in which an initial application form (or initial motion) is submitted. It appears to be the policy of many tribunals to assume that the official language in which an application form is completed (or initial motion filed) will become the overall language of proceedings, thus requiring that judges, adjudicators and other personnel present at the hearing be able to understand that language directly. Only infrequently does the initial application form directly ask the applicant to identify the official language in which he or she wishes a hearing to be held.

The absence of a direct question about the preferred official language of an applicant may create unnecessary misunderstandings about the two-language capability of any given tribunal. This is particularly true where initial contact with the administrative services of a tribunal reveal deficiencies in actively offering services in the preferred official language of an applicant. Moreover, it is often difficult to gauge accurately the level of inhibition a minority language speaker may feel in requesting services in the minority language. As part of an overall policy of active offer of service in either official language set out in Part IV of the *Act*, the inclusion of a specific question regarding the preferred official language of an applicant would clarify the matter at an early administrative stage.

In some cases, an application for a hearing before a tribunal occurs after purely administrative decisions have already been made. This may be the case, for example, of an individual applying for a benefit accorded under federal pension legislation. Such an application is initially processed administratively, written and verbal communication with the applicant presumably taking place in his or her preferred official language. A decision regarding the application is then made, from which a dissatisfied applicant can appeal to the appropriate tribunal (i.e. the Pension Appeals Board). In the event of an appeal, elements of the administrative file pertaining to the application are routinely sent forward to tribunal staff, to whom the language of the file then becomes self-evident. Any subsequent proceedings before the tribunal would thus, as a matter of course, be conducted in the official language of the already existing file. Institutional realities of this sort underscore how the early implementation of the active offer of service in either official language can lay the groundwork for the use of either language in the context of subsequent hearings conducted before federal administrative tribunals.

The nature of proceedings before a tribunal and the number of parties appearing at them are also important factors which must be considered in determining the overall procedural language. Where only one individual party appears, a clear procedural language can be established without great difficulty.[52] This is not necessarily the case where tribunal proceedings involve two or more parties who speak different official languages. Litigation before the Federal Court of Canada may, for example, involve multiple private litigants who all severally enjoy the right to use their own official language. As a result, written and oral submissions to the tribunal may alternate between official languages, making it impossible to establish a single procedural language. Quasi-judicial administrative tribunals may also conduct hearings involving multiple parties which can result in two-language proceedings. It is clearly important to identify the likelihood of two-language proceedings, for the tribunal has the institutional duty to ensure in such cases that the presiding judge or adjudicator be able to understand both official languages directly, i.e. without the aid of interpretation.

Proceedings before a tribunal may involve issues of general public interest and importance, or have an impact on individuals who are not directly involved. It is thus not surprising that provision is sometimes made for interested groups or individuals to appear as intervenors at any particular hearing.[53] When this occurs, it may often happen that the official language in which an intervenor wishes to be heard is not the same as that of the parties directly involved. Early administrative awareness of this fact is important, in the sense that steps must be taken to ensure that witnesses for an intervenor testifying at a hearing are not disadvantaged by reason only of his or her choice of official language. Potential disadvantage would be avoided by timely provision of simultaneous interpretation. This problem would not arise where the parties themselves speak different official languages, for the judge or arbitrator presiding at the hearing would already be able to understand both official languages without the aid of interpretation.

The issue of identifying the official language of intervenors at hearings is sometimes addressed in rules of practice and procedures. This is the case for the National Energy Board of Canada, whose oral hearings quite often interest persons

other than the party making a specific application. In such cases, the following rule applies:

> Where a hearing order has been issued pursuant to Section 23, any interested person may intervene in the proceedings by filing with the Board and serving on the applicant, if any, on or before the date set out in the order, a written intervention that
>
> > (a) in the case of an oral hearing, states whether the person intends to appear at the hearing and the official language in which the person wishes to be heard;

Intervenors are reminded of this requirement in the Hearing Order and Directions on Procedure which are issued prior to any oral hearing. Notice of this sort allows the Board to take steps to ensure that simultaneous interpretation is available at the time of the intervenor's presentation.

Similar considerations arise with respect to witnesses generally, as they may choose not to testify in the official language of the parties themselves. While the official language of any given witness does not change the overall language of procedures, administrative steps must still be taken, as already mentioned regarding intervenors, to ensure that a witness will not be placed at a disadvantage by not being heard in the other official language. Short of ensuring that the judge or adjudicator understands directly the official language in which a witness testifies, the tribunal must arrange for appropriate interpretation services to be present at the hearing. Parties themselves have the right to request that simultaneous interpretation be made available, presumably because of anticipated difficulties of comprehension. A party's right to simultaneous interpretation applies both to the evidence given and to the proceedings generally, although when invoked because of a particular witness's official language of testimony there would appear to be no reason to extend the interpretation to the entire proceedings.[54]

There is no uniformity across the range of federal courts and quasi-judicial tribunals regarding the manner in which the official language or languages to be used at a hearing are confirmed. Where no formal procedures exist, notification that more than one official language will be used can be implied if the parties involved in a hearing submit documents in different official languages. This fact alone does not necessarily indicate that the parties will need interpretation, however, for each party may be sufficiently bilingual to understand the other side. While it does place administrative staff on notice that the judge or adjudicator (and other personnel present at a hearing) need to be bilingual, uncertainty would still persist as to the language abilities of the parties themselves, not to mention those of legal counsel who may represent them. In addition, the language in which any particular witness may give testimony at a hearing will not necessarily be evident from the pre-hearing documents filed by the parties, particularly if the parties themselves use the same official language.

The rules of practice of the Federal Court of Canada contain specific provision for parties to identify the official language of anticipated proceedings. In fact, before the Trial division, an applicant must serve and file a requisition within a specific delay requesting that a date be set for the hearing of the application under the Rule 314 of the *Federal Court Rules (1998)*. This Rule requires that this requisition set out a number of details, including an identification of the language requested for the hearing.[55] Rules of practice applicable to the Federal Court of Appeal contain a similar requirement.[56]

With respect to applications for judicial review, the Trial Division has issued a formal notice (in February of 1993) requesting applicants to provide several pieces of information in writing to the Registry, including an indication of the language to be used at a hearing. Also, with respect to a pilot project on video conference hearings, the Administrator of the Federal Court has issued (November 15, 1996) a circular requesting applicants to indicate, *inter alia*, the official language(s) to be used at a hearing.

Some quasi-judicial tribunals have included provisions in standard letters or notice-of-hearing forms which address the issue of official languages, most often in conjunction with the need for interpretation. Again, there is no uniformity in this regard, but the general objective is to require parties and their counsel to identify the language with which they will address the tribunal and in which their witnesses will testify. One particularly thorough approach has been developed by the Canadian Human Rights Tribunal, which sends out an initial letter containing the following notice:

> It is the Tribunal's understanding that the hearing of this matter will be conducted in *(English/French)*. If you wish to present your case or call witnesses who prefer to be heard in the other official language, you must advise the Registry at least 45 days in advance of the scheduled hearing so that appropriate arrangements can be made.

The arrangements are of two sorts: (i) to ensure that the members of the tribunal can understand directly the official language of the proceedings, or both official languages where circumstances so require; (ii) to arrange for simultaneous interpretation.

At a later date, the actual notice of hearing establishing the date of the hearing contains the following notice:

> AND TAKE NOTICE that the parties have confirmed that the proceedings will be conducted in English/French/both official languages. Any party requiring simultaneous translation services is requested to advise the Registry upon receipt of this notice. *(Last sentence to be deleted if proceedings are to be conducted in both official languages.)*

Further confirmation of the linguistic needs of the hearing is made during a pre-hearing meeting or conference call, so that any need for simultaneous interpretation can be identified and appropriate steps taken.

Other pre-hearing procedures adopted by some administrative tribunals were uncovered in the course of this study. The form letter of the Public Service Staff Relations Board regarding the hearing schedule contains the following:

> It is the responsibility of the parties to advise the Board whether or not they will require simultaneous interpretation at a hearing. If no request has been made three weeks before the hearing date, it may be impossible to provide this service. If neither party requests translation, the hearing will proceed in the language indicated on the file.

The Canada Industrial Relations Board uses the following notice contained in a form letter about the schedule for hearings to take place in Montreal:

> The hearing will be conducted in French/English. If you intend to submit your evidence in the other official language or call witnesses who will be speaking in the other language, please so advise the undersigned within 10 days of receipt of this notice, so that we may make the necessary arrangements for simultaneous translation.

These examples demonstrate that determining whether a hearing will be conducted in one official language or in both, or whether witnesses will be called who will testify in an official language different from that of the procedures in general, has practical consequences for the proper operation of a tribunal. Bilingual hearings (i.e. where the parties use different official languages) must as a matter of law be presided over by a judge or adjudicator able to understand both official languages. Moreover, parties or witnesses may require interpretation in order to follow the proceedings. The tribunal itself must ensure that these requirements are met, a duty it would be unable to fulfil effectively in the absence of relevant information about the linguistic needs of the hearing.

The adequacy of interpretation offered at hearings is an issue raised by a number of individuals and tribunals consulted during the course of preparing this study. It is our understanding that interpretation from one official language to another does not always form a part of the official record of proceedings. This is certainly the case when whispered interpretation is offered to the individual unable to understand the official language of the proceedings. In order to verify the accuracy of any translation, it would appear important to ensure that all interpretation offered is written down or recorded (where a full and complete transcript of proceedings is otherwise maintained by any given tribunal).

It should be stressed that a party who chooses to use the minority official language of the region where proceedings take place should be under no obligation to determine the interpretation needs of other parties to the proceedings. Both English and French are official procedural languages and can be used as of right when appearing before a federal court or quasi-judicial tribunal. While it is reasonable that parties be required to indicate in which official language they intend to make submissions or present evidence, it should be the responsibility of the tribunal's administration to gather any information necessary to determine if interpretation will be needed at any given hearing. It also seems reasonable to expect that a unilingual party to proceedings where both official languages are to be used will inform the tribunal's administrative offices of any need for interpretation. Of course, procedural requirements in this regard assume that the parties are aware of their own needs and adequately informed of the linguistic realities of anticipated proceedings. Several of the practice rules cited above incorporate confirmation of the official language of proceedings, while at the same time advising parties to notify the tribunal of any intention to use the other official language.

4.3 Assignment of Judges, Adjudicators and Administrative Staff

As mentioned above, information gathered regarding the official language or languages to be used by parties and witnesses is essential to ensuring that federal courts and quasi-judicial tribunals are able to meet their obligations under the *Act*. Among other things, tribunals have a duty to ensure that judges or adjudicators are able to understand the official language of a party without the assistance of an interpreter (Section 16 of the *Act*). They must also ensure that witnesses can be heard in the official language of their choice without being placed at a disadvantage by so choosing. Moreover, tribunals have the duty to ensure, at the request of a party to any proceedings, that simultaneous interpretation be made available. They also enjoy the discretion to cause simultaneous interpretation to be made available where they consider any proceedings to be of general public interest or importance, or where they otherwise consider it desirable to do so for members of the public in attendance.

The use of more than one official language at a hearing also implies that support staff (court reporters, clerks, etc.) must also be able to understand directly the official language being used at any particular moment. Indeed, it would be anomalous should the record of proceedings or any minutes relevant thereto not accurately reflect the testimony of parties or witness, or submissions made by counsel to the parties, in the official language in which such testimony or submissions are made. It should also be remembered that Section 14 of the *Act* declares that both English and French are official languages of federal courts (which includes all quasi-judicial tribunals), a status which seems to imply that any record of the proceedings should contain submissions or testimony in the original language. Even where no official record of proceedings is kept,[57] it would seem highly desirable that support staff present at bilingual hearings be able to understand directly both official languages. Moreover, minutes of proceedings should be prepared in the official language used at the hearing.

Internal procedures by which individual judges, adjudicators and support staff at hearings are selected appear almost always to be informal. In other words, written policies in this regard are rare. Nevertheless, it appears that tribunal administrative staffs are usually well aware of the language abilities of individual judges and adjudicators. Once the linguistic requirements of hearings are identified, assignment of judges or adjudicators can be made with these requirements in mind. The same is true of other personnel required to perform various duties during the course of actual proceedings.

The number of judges or adjudicators attached to each federal tribunal varies considerably, as well as the terms for which appointments are made. In the case of the Federal Court or the Tax Court, judges are appointed to serve until normal retirement age. The former has more than 30 full time judges (combining both trial and appeal divisions), at least one third of whom are able to conduct hearings in either official language. The Tax Court has 26 full time judges, of whom approximately two thirds are able to conduct hearings in either official language. The judges of both courts are stationed in Ottawa and travel to various regions of the country to preside at hearings. Quite clearly, the two-language capacity of these two courts of record is sufficient to meet the language requirements of any particular proceeding. Even so, it does occur from time to time (in the Federal Court) that a witness chooses to testify in an official language different from that of the proceedings in general. When this is unforeseen, the presiding judge and other participants may not be in a position to understand directly the testimony of the witness. This can cause delays because of the time required to ensure that interpretation facilities are made available pursuant to Section 15 of the *Act*. An effective pre-trial identification of witnesses and their anticipated language of testimony would decrease this type of problem.

Beyond these two courts of record, the terms for which tribunal members serve can range from three to five years, with possibility of renewal in some cases. The relatively short terms of appointment reflect the fact that in many cases tribunal members are not considered to form a body of permanent professionals with a common background. Rather, they are often drawn from the community at large in order to bring diversity to tribunal deliberations. While the possibility of reappointment makes it feasible to maintain a core group of tribunal members with sufficient experience to ensure continuity and a tribunal's effective operation, the frequent turnover in membership also allows for the renewal of community input into the decision-making processes.

The relatively short terms for which many tribunal members hold office makes it impractical to consider language training as a means to achieve an acceptable level of institutional two-language capability. Accordingly, it is important that this factor be dealt with explicitly at the time of appointment. There would appear to be no written policies in place relevant to the language abilities of persons appointed to various federal tribunals. While appointments to quasi-judicial tribunals are a prerogative of the Governor in Council,[58] the development of some type of advisory system similar to that used when making judicial appointments in general or any other procedures designed to ensure

compliance with Section 16 of the *Act*[59] is an option that has been raised.

A number of past studies of federal administrative tribunals have raised concerns about the manner of appointment of tribunal members.[60] Lack of transparency in the appointment process led to a reevaluation of the process.[61] We were told by the Privy Council Office that it is now government practice to advertise most full-time, fixed-term positions in the *Canada Gazette*. Applicants' qualifications and experience are evaluated against the needs of the organization and the requirements of the position. In addition to the need to achieve regional balance, employment equity, and the ability of the organization to hear cases in both official languages, these requirements take into consideration legislated professional designation of members, the expertise needed by the organization and the skills required to work in an administrative tribunal setting.

The issue of the use of Canada's official languages before federal administrative tribunals could also be integrated into any more formal process of consultation. The Fédération des associations de juristes d'expression française de common law has indicated to us concerning this matter that, in its view, this process should ensure, when it is applicable, consultations with associations of French-speaking jurists. The tribunals themselves could also no doubt provide invaluable advice regarding the importance of language proficiency of its membership for the proper execution of their mandates.

While judges of the Federal Court (Trial Division) or the Tax Court of Canada sit alone on cases brought before them (although the Federal Court of Appeal sits in panels of three) this is not always the situation which prevails regarding hearings conducted before a variety of quasi-judicial tribunals. A quasi-judicial tribunal may, for example, be composed of a panel of three members. This is the case with respect to hearings held by the Canada Industrial Relations Board, the Canadian Radio-Television and Telecommunications Commission, the Copyright Board and the National Energy Board, to name but a few. In addition, the adjudicative functions of a quasi-judicial tribunal may involve highly specialized and technical matters. When this combines with the relatively small membership of some federal statutory agencies, the possibilities of composing a three-member panel of fluently bilingual individuals is sometimes limited. Difficulties of this sort raise sensitive policy issues, as well as the proper interpretation to be given to Section 16 of the *Act*.

No one can doubt that parties to proceedings before federal courts or quasi-judicial tribunals have the right to be heard by a judge or an officer capable of understanding their official language without the aid of interpretation. However, this right would not seem to extend to witnesses or intervenors appearing at any particular proceeding. In such instances, Section 15 of the *Act* would most likely apply, a section which incorporates the principle that any person giving evidence should not be placed at a disadvantage by reason only of the official language in which his or her testimony is given. While the availability of simultaneous interpretation may satisfy the latter principle, it could not be said to respect the right of actual parties to the proceedings (i.e. applicants seeking a favourable decision from a tribunal regarding matters within its jurisdiction) under Section 16 of the *Act*. They would have every right to expect that the tribunal members would understand them directly in their own official language.

As a matter of policy, however, it is highly desirable that at least a majority of panel members composing any given quasi-judicial tribunal be able to understand directly both official languages in those cases where witnesses or intervenors use an official language different from that of the proceedings in general. Indeed, every effort should be made to ensure that all panel members are bilingual where both official languages will be used at one time or another during the course of important hearings. Simultaneous interpretation will no doubt be a required feature of such hearings (for unilingual participants and members of the public), but simultaneous interpretation should not be seen as a way of avoiding the need to enhance the two-language capability of panel members themselves.

4.4 Language Used by Counsel for the Federal Crown

Federal institutions are often important participants in proceedings before federal courts and quasi-judicial tribunals. Where federal institutions are parties to civil proceedings they are obliged to tailor the language they use to that of the other parties to the proceedings. This obligation is found in Section 18(1) of the *Act* which provides that federal institutions "shall use, in any oral or written pleadings in the proceedings, the official language chosen by the other parties..." unless reasonable notice of the parties' choice of official language has not been given.

This obligation obviously has an impact on the selection of legal counsel by federal institutions. In effect, legal counsel representing the interests of a particular federal institution involved in civil proceedings would have to agree to use the

official language of the other parties to the proceedings, at least with respect to oral and written pleadings. Pleadings constitute the formal statement of fact and argument supporting a cause of action (i.e. the assertion of a claim or the exercise of a right) or setting out the defense raised in opposition to such a cause of action. While this clearly constitutes a significant part of civil litigation and other procedures, some elements of the process would appear to fall outside the formal definition of what constitutes pleadings.

The presentation of evidence, for example, would not be something normally included in the concept of pleadings. Indeed, a witness clearly has the right to give testimony in his or her preferred official language (Section 15(1) of the *Act*), whether that be *viva voce* or by way of affidavit. In most cases, it would appear that the examination and cross-examination of witnesses is done in their own official language. While the law imposes no strict requirements in this regard, legal counsel and the presiding judge or adjudicator seem most often to prefer the dynamics of direct examination of a witness. It should not be forgotten, however, that where oral evidence is given in an official language different from that of a party, the party has the right to simultaneous interpretation upon request.

Somewhat more difficult issues arise where evidence is given by way of affidavit, especially with respect to pre-hearing access to such evidence. Indeed, some proceedings may involve only affidavit evidence, as is the case under Part X of the *Act*. While there may be no strict legal requirement to provide access to an affidavit, whether before or at the time of a hearing, in an official language other than that in which it was prepared,[62] it would seem good policy to make a translation available whenever reasonably possible to any party who so requests. Moreover, such a policy would be consistent with the legal right of a party to have access to simultaneous interpretation during the actual course of a hearing.

Internal guidelines or policies in federal institutions would clearly be helpful in ensuring that legal counsel are fluent in the official language chosen by the parties to proceedings before federal tribunals. Where language difficulties are foreseen, a procedure for the transfer of a file should be clearly set out.

With respect to agents appointed by the Attorney General of Canada to represent federal interests, specific provisions have been developed in a document entitled Terms and Conditions of Appointment which underscore the obligations of federal institutions under the *Act*. It is pointed out (in an annex to the Terms and Conditions of Appointment) that "federal attorneys have to use the official language chosen by the other parties in civil proceedings before federal courts (defined...to include adjudicative tribunals), in oral pleadings, failing proof of unreasonable notice." Further elaboration of this duty is found in a Memorandum of Instructions sent to all Crown agents. There we find (at paragraph 18) the assertion that "where proceedings or pleadings may be conducted in either official language, the language used by Crown counsel should normally be the official language chosen by the private party(ies) concerned. If this requires that the case be referred to another agent, steps should be taken to do so." It is therefore a condition of employment as an agent for the Attorney General of Canada that where an agent cannot meet the official language requirements of a given case, the file should be transferred to someone who can.

It should also be noted that the Memorandum of Instructions extends the obligation to use the official language of the other party(ies) to all forms of communication which occur in the context of a pending procedure. The Memorandum states that "in cases where the Crown initiates communications, and the language preferred by the private party is known to the agent, that official language should be used at all times, even prior to the commencement of proceedings." This clearly covers pre-hearing communications such as letters or conferences leading up to a hearing. Although not specifically stated, it follows by necessary implication that the same basic principle should apply when crown agents reply to communications initiated by private parties; thus letters and other forms of communication should be written or conducted in the official language chosen by them.

4.5 Language in Which Final Decisions are Issued

Following Bilingual Proceedings

Provisions under the *Act* (Section 20) require that any final decision, order or judgment (including any reasons given therefor), which arises from a hearing conducted in whole or in part in both official languages, be issued simultaneously in English and French. Quite clearly this applies to cases where the actual parties use different official languages during the course of the proceedings held before a federal court or quasi-judicial tribunal. What is more, simultaneous issuance of decisions, orders and judgments in such circumstances is a consequence of the underlying principle of the equality of status of both official languages in adjudicative processes.

Under Subsection 20(1)(b) of the *Act* mandatory simultaneous issuance in both official languages applies whenever proceedings have been conducted "in whole or in part in both official languages". The effective scope of this provision hinges to a great extent on the scope to be given the notion of "proceedings". In this regard it is interesting to note that the notion of "the language chosen by the parties for proceedings" under Section 16 of the *Act* is rendered in French by the expression "lorsque les parties ont opté pour que l'affaire ait lieu..." This certainly suggests that when interpreting the scope of Subsection 20(1)(b) care should be taken not to presume that the presence of witnesses testifying in an official language different from that of the "proceedings", as chosen by the parties, transforms the hearing into one that was conducted in part in both official languages. To determine otherwise would, by imposing a mandatory rule of simultaneous bilingual issuance of the decision, result in unjustified delay for the parties to any proceedings conducted in their preferred official language.

The potential impact of Subsection 20(1)(b) will obviously vary from one tribunal to the next, depending on the nature of the issues subject to adjudication. As already mentioned, proceedings before some statutory agencies (for example, the National Energy Board or the Canadian Radio and Telecommunications Commission) may very well involve intervenors who have a significant interest in the agency's ultimate decision. The status of an intervenor is much more analogous to that of a party than it is to that of a witness, in any particular proceeding. Where more than one official language is used by the parties and intervenors, it is clearly appropriate that any final decision, order or judgment be issued in both official languages at the same time, subject, perhaps, to the power of the parties and the intervenors to waive any requirements for bilingual simultaneous issuance.

Following Unilingual Proceedings

Where only one official language is used during the course of a proceeding, there is usually no requirement that any final decision, order or judgment be issued simultaneously in both English and French. However, one important exception exists. Subsection 20(1)(a) of the *Act* requires simultaneous bilingual issuance if the decision, order or judgment (including any reasons given therefor) determines a question of law of general public interest or importance. In applying this latter criterion, however, a court or tribunal is also given the discretion to determine if simultaneous bilingual issuance "would occasion a delay prejudicial to the public interest or [result] in injustice or hardship to any party to the proceedings". If the court or tribunal determines that it would, it may first issue its decision, order or judgment in the language of the proceedings, followed by an official version in the other official language at the earliest possible time.

For persons appearing before federal courts and quasi-judicial tribunals, timely access to decisions which have significant jurisprudential value for cases with similar facts is very important. Indeed, such access is essential to meeting one of the underlying purposes of the *Act*, which is to ensure equality of status and equal rights and privileges regarding the use of English and French in all federal institutions. It is for this reason that the rule of simultaneity is applied to the bilingual issuance of decisions which determine questions of law of general public interest or importance. At the same time, however, the *Act* rightly recognizes the important interests that parties have in the expeditious rendering of justice.

It is interesting to note that the principle of fairness to the parties (i.e. avoiding injustice or hardship), used to attenuate the strict requirement of bilingual simultaneous issuance in the cases discussed here, is similar to the one we raised above regarding the possible issuance of decisions in the official language of proceedings even if a witness testifies in the other. The interests of a party in the latter type of case would seem no less important than that of parties involved in proceedings giving rise to a decision of general public interest but which is issued initially in one official language.

Beyond circumstances which give rise to bilingual simultaneous issuance, all other decisions, orders or judgments (including reasons) of federal courts and quasi-judicial tribunals are required to be issued in the other official language "at the earliest possible time."[63] This is a very broad requirement, one which potentially extends beyond the need to ensure that all decisions and judgments of either jurisprudential value or policy significance are made available to the public in both official languages. In effect, Subsection 20(2)(a) of the *Act* even requires the issuance in both official languages of decisions and orders so factually bound as to be of little or no significance to anyone other than the parties to which they apply. The broad scope of this paragraph imposes an onerous burden on a number of quasi-judicial tribunals to issue a great number of factually-bound decisions arising out of strictly unilingual proceedings.

The Immigration and Refugee Board (IRB) has indicated to us that it issues thousands of decisions in one language each year which are based strictly on the particular facts of an applicant's case and do not involve evolving issues of policy or legal interpretation.[64] The vast majority of such decisions arise out of proceedings which are held either in English or in French (with the claimant before the Board using his or her preferred official language). Many decisions of the IRB are rarely consulted subsequently by third parties because they do not provide any jurisprudential guidance. In a word, they are simply routine decisions involving the application of settled law to a set of proven facts. Nevertheless, the question arises as to whether the IRB or other tribunals are obligated under the terms of Subsection 20(2)(a) of the *Act* to issue such decisions in the other official language.

The obligation of the IRB to make its decisions available to the public in both official languages was raised in a recent application before the Federal Court of Canada (*Devinat* v. *The Immigration and Refugee Board*) in which the Commissioner was granted the status to intervene.[65] The Court reviewed the various policies of the IRB in this regard, as well as the arguments put forward by the Board to justify them.

On the general issue of bilingual access to decisions, the IRB takes the position that Section 20 of the *Act* applies only to decisions which are made available to the public. As a large number of cases before the IRB are heard at in camera hearings (especially those related to refugee status), the resultant decisions are not publicly available on a routine basis. In light of this fact, the IRB does not believe that Section 20 requires that all its decisions be issued in the other official language "at the earliest possible time". Whenever a decision is to be made available to the public (which the IRB considers to be a matter of policy and not law), the confidential nature of proceedings renders it necessary that all personal information capable of identifying the claimant be deleted.

Beyond the issue of confidentiality, the IRB has developed policies for identifying which of its decisions are sufficiently important to justify that they be translated and made available to the public simultaneously in both official languages (after removal of all personal information). These policies relate to Subsection 20(1)(a) of the *Act* and establish criteria for identifying a decision, order or judgment which "...determines a question of law of general public interest or importance". This is the case where:

1. the decision involves a novel, compelling resolution of a legal issue; and
2. the resolution, given that legal issue, is likely to have a significant impact on the development of the substantive law or practice and procedure of the Division concerned.

When these two criteria are met a decision is purged of personal information, submitted for translation, and then made available simultaneously to the public in both official languages.

With respect to all other decisions, it is official policy of the IRB to make a translation available only upon specific request from a member of the public (after removal of all personal information). It would appear, however, that some decisions which do not meet the requirement for simultaneous issuance in both official languages are available in one language only (usually English) in publicly accessible data bases, such as *Quicklaw*, or on site at IRB offices. These decisions often are also found summarized in a bilingual publication called *Reflex* (issued 22 times per year), an information resource designed primarily for internal use at the IRB but also available to members of the public. This document contains summaries in both official languages of recent decisions of the IRB, as well as relevant decisions of the Federal Court and Supreme Court of Canada. These bilingual summaries pertain to decisions which are thought to be of interest to decision-makers in the area of immigration and refugee status, and to members of the public involved in relevant research.[66] A notice included in *Reflex* indicates that a translation into the other official language of the full text of a unilingual decision (summarized in bilingual format in *Reflex*) will be made available upon request (normally within 72 hours).

The applicant in the *Devinat* case takes issue with the IRB policy of providing a translation of decisions accessible to the public only upon specific request. He maintains that this does not satisfy the statutory requirement that a decision issued by a federal court or quasi-judicial tribunal in only one official language be thereafter issued in the other official language "at the earliest possible time". He therefore asked the Federal Court to issue an order in the nature of mandamus requiring the IRB to issue all unilingual decisions, rendered since the IRB's creation, in both official languages.

The judgment of the Federal Court, Trial Division, distinguishes two separate dimensions inherent in the application brought by the plaintiff: (i) the legal standing of Mr. Devinat to bring his action in the first place, as well as the

jurisdiction of the Federal Court and the appropriateness of mandamus as a remedy; and (ii) the actual scope of institutional obligations arising under Section 20 of the *Act*. With respect to the first dimension, Mr. Justice Nadon took note of the fact that Part X of the *Act* provides that a complainant under the *Act* may apply for a court remedy if not satisfied with the results of an investigation, but only with respect to matters related to specific sections of the *Act*:

> Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, section 10 to 13 or Part IV or V, or in respect of section 91, may apply to the Court for a remedy under this Part. (Subsection 77(1) of the *Act*)

Since Section 20 of the *Act* (found in Part III) is not included within the scope of Subsection 77(1), the plaintiff could not use it to establish his standing to bring an application before the Federal Court. It was for this reason that he based his application upon provisions found in Subsection 18.1(1) of the *Federal Court Act*:

> An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

With respect to remedies, Subsection 18.1(3)(a) provides that the Federal Court, Trial Division, may "order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing". The plaintiff contends that the provisions of Section 18.1 of the *Federal Court Act* are broad enough to found his action against the IRB. He further relies on Subsection 77(5) of the *Official Languages Act* which explicitly preserves any rights of action which might exist independently of court remedies recognized under Section 77:

> Nothing in this section abrogates or derogates from any right of action a person might have other than the right of action set out in this section.

In rejecting the arguments of the plaintiff on this point, Mr. Justice Nadon emphasized that Subsection 77(5) does not confer any new right of action with respect to the implementation of the *Act*. It simply recognizes that rights of action unrelated to the implementation of the *Act* are to be preserved intact:

> [TRANSLATION] In my opinion, Subsection 77(5) of the *OLA* does not confer on the plaintiff any new right of action. Rather, this subsection allows the plaintiff to retain or exercise any right of action or remedy ... when this right of action or this remedy is invoked in procedures other than those arising from the application of the *OLA*. In other words, with respect to any violation of the provisions of the *OLA*, the only possible remedies are those set out in the *OLA*, namely, the remedy provided for in the Federal Court under Subsection 77(1) and the complaint procedure to the Commissioner [67].

With respect to an action based upon Section 18.1 of the *Federal Court Act*, Mr. Justice Nadon pointed out that it must be related to the exercise of authority conferred by federal statute.[68] He further determined that the type of decisions of the IRB which were subject to judicial review under Section 18.1 concerned the determination of status of immigrants and refugees:

> [TRANSLATION] In my opinion, it is these decisions concerning the status of an individual in the context of immigration and refugee status which may be the subject of an application for judicial review before the Federal Court under Section 18.1. It is these decisions which arise from a jurisdiction or from powers conferred on the IRB by a federal statute, namely, the *Immigration Act*[69].

The decision of the IRB to translate only those of its decisions which were the subject of a specific request for translation (or which raised a legal issue of general public interest) was thus not considered to be a matter for judicial review under Section 18.1 of the *Federal Court Act*.

While the Federal Court rejected the plaintiff's action for the above-stated reasons, it went on nonetheless to consider how Section 20 should be interpreted and whether the IRB had fulfilled its obligations thereunder. It found that IRB policy concerning the translation of its decisions only upon specific request (with the exception of that narrow range of decisions which, in its view, raised a legal issue of general public interest) had the net effect of ensuring that most IRB decisions would never be made available in both official languages. This conclusion, reasoned Mr. Justice Nadon, was incompatible with the statutory obligation of a federal tribunal to make its decisions available in the other official language "at the earliest possible time" following their original unilingual issuance. The wording of Section 20 could not be diminished by the institution of a policy of translation upon request.

In our view, the wording of Section 20 is also supported by a number of principles applicable to all quasi-judicial administrative tribunals. First, the fact that decisions are considered significant enough to be summarized in publications or data bases accessible to the public suggests that they have not inconsiderable jurisprudential and policy importance. This being the case, they seem potentially related to the needs of future applicants (and their counsel) who may wish to argue significant points of law or evolving policy before the administrative tribunals. While policy of translation upon demand responds in part to these needs, it remains hard to reconcile with the official status of both English and French before all federal courts and tribunals, and with one of the *Act*'s underlying purposes, which is to ensure equality of status of English and French and equal rights and privileges as to their use in the administration of justice at the federal level. In order to respect these latter principles, and thus to ensure that both English and French are viable procedural languages, it is important that decisions of policy significance and jurisprudential value made available to the public be accessible in both official languages as a matter of course.

It is our understanding that the vast majority of IRB decisions are not routinely made available to the public (either in summary format in *Reflex* or in full text in publicly accessible data bases). Even so, the IRB has indicated that the costs associated with routine translation of those decisions which do appear in a data base such as *Quicklaw* are prohibitive in the Board's present fiscal context.[70] Whether this is sufficient justification for failing to meet the requirement under Subsection 20(2)(a) of the *Act* that decisions of the tribunal be made available to the public in both official languages "at the earliest possible time" is open to doubt. Indeed, the Federal Court in the *Devinat* case ruled that budgetary constraints could not be raised to justify a policy which was, on its face, in breach of the obligation under Section 20:

> [TRANSLATION] Budgetary constraints do not constitute valid reasons for not meeting a statutory obligation, any more than the fact that the IRB is the administrative tribunal that hands down the most decisions in Canada. The *OLA* is clear, and I can only find that the respondent does not comply with it. [71]

Since the Federal Court has determined that the wording of Subsection 20(2)(a) of the *Act* is broad enough to require that all decisions of federal tribunals be issued in both official languages "at the earliest possible time", it is all the more essential that decisions of administrative tribunals made accessible to the public as a matter of course be routinely available in both official languages. Such decisions no doubt incorporate legal or policy analysis relevant to the proper interpretation of rules applicable to immigrant applicants or refugee claimants. The equality of status of English and French before all federal tribunals thus calls for their accessibility, as a matter of course, in both official languages.

The plaintiff in the *Devinat* case has appealed the trial level decision to the Federal Court of Appeal, as that decision relates to the applicability of Section 18.1 of the *Federal Court Act* to the plaintiff's action, his standing to bring an action for breach of Section 20 of the *Act* and the appropriateness of a remedy in the nature of mandamus.[72] The Commissioner has applied for and been granted intervenor status before the Court of Appeal. Among other things, it is his intention to argue that Part III (which includes Section 20) of the *Act* has primacy over all other Acts of Parliament (except the *Canadian Human Rights Act*); and that Subsection 18.1(3)(a) of the *Federal Court Act* is broad enough to establish the jurisdiction of the Federal Court to sanction any federal tribunal for failing to accomplish or perform any act it is legally bound to accomplish or perform.

Some quasi-judicial tribunals may not experience difficulties with respect to the bilingual publication of all decisions, orders or judgments. This could be due to a more manageable number of cases heard each year, or to the fact that all decisions of a given tribunal are considered important or are routinely made available to the public. Where all decisions are eventually published by any given quasi-judicial tribunal there can be no justification for failing to publish them in both official languages within a reasonable time. In some cases (such as decisions of the CRTC) all decisions arising from public hearings are issued simultaneously in both English and French, such a policy being a reflection of the assumed national importance of any such proceedings.

4.6 Use of Translation as a Measure to Facilitate Compliance with Section 20 [73]

Persons who seek clarification of a tribunal's policies and an understanding of the manner in which its mandate is executed should not be hindered by reason of the official language in which they choose to engage in tribunal procedures. It is essential that Canadians be able to gain access, in either official language, to the decisions of federal courts or quasi-judicial tribunals. In addition, whether Subsection 20(1) or Subsection 20(2) applies, both versions will have the same value because the *Act* states that the second version is effective from the time the first version is effective. Therefore, access to decisions, orders and judgments should always be possible on the basis of strict equality

between the English version and the French version.

The administrative tribunals have informed us that they must take certain measures to enable them to issue their decisions in both official languages in compliance with Section 20. In general, it seems that, as soon as the judge or tribunal has written the decision in one language (or has delivered it orally in one language and prepared the written version on the basis of the transcription), the clerk must take measures to enable the judge or tribunal to prepare the decision in the other official language and to issue it, either simultaneously in both official languages (ss. 20(1)) or first in only one official language and then in the other language at the earliest possible time (ss. 20(2)), as the case may be.

To this end, it will be necessary to use translation, revision and proof-correction services. It will therefore be preferable to have in place a prioritization policy to handle decisions in accordance with their importance and in compliance with the requirements of Section 20. It would also be preferable for the judge or tribunal to have issued directives with the decision to determine whether it must be handled under Subsection 20(1) or Subsection 20(2). When the decision has been prepared in both official languages, it is made available to the parties, the public and the legal profession, pursuant to the tribunal's policy on priority. At this stage, the decision will also be published under criteria established by the clerk and his revisors or editors. Essentially, such a policy should specify the stages required, with their deadlines, to produce decisions that must be issued simultaneously in both official languages. It should also specify the stages, with their deadlines, for producing decisions issued in only one language,"at the earliest possible time," in the other official language. This stage would necessarily include the translation and publication of decisions.

The priorities inherent in any policy on the translation of decisions that a tribunal may adopt will naturally reflect the different time constraints arising from the nature of the proceedings. When a decision must be issued simultaneously in both official languages, preparation of the translation of the judge's decision will obviously take precedence over the preparation of the translation of any other decision which may be issued in unilingual form and issued later in the other official language "at the earliest possible time". Other factors should also be taken into account, however, in managing the system for prioritizing and handling tribunal decisions, orders and judgments. For example, criteria must be established to determine which decisions come under Subsection 20(1), that is to say, which decisions are of public interest or importance, so as to be able to determine which of them will provide jurisprudential guidance to those interested in a tribunal's mandate. Translation of these decisions should obviously take precedence over decisions which are tied closely to the particular facts of a case and of little or no significance to third parties. Indeed, the preparation of versions in both official languages of decisions which will very likely never be consulted subsequently by third parties does not seem to serve the public interest.

The Tax Court of Canada has adopted such a policy of translation management. It applies to all decisions issued by the Court (both those covered by Subsection 20(1) and Subsection 20(2)) as soon as the decision is prepared by a judge in one language. While this policy does not meet the requirements of the two subsections of Section 20 in every respect, it is useful and effective in facilitating compliance with this section in many cases. In fact, the relative priority accorded to decisions prepared by the judge that will be translated gives rise to four categories: top, high, medium and low. Each category has a time frame within which a translation of the decision is to be completed. In descending order of priority, these are: 10 days, 30 days, 90 days, and "as soon as the resources allow it."

The Tax Court of Canada considers three types of decisions to fall within the category of top priority: (i) those which arise from proceedings where both official languages were used; (ii) those which would interest the public in general; (iii) those for which the Court receives a specific request from a lawyer or member of the public. With respect to the first two types of decisions, administrative personnel rely on judges who preside over proceedings to submit a specific request for translation. It is presumed that judges are in the best position to identify the languages used at the proceedings, as well as evaluate the possible public interest in the decision and determine which decisions should comply with Subsection 20(1) and consequently be issued in both official languages simultaneously. It is our understanding that judges rarely issue directives that their decision be issued simultaneously in both official languages on the basis that both languages were used in the proceedings. Similarly, we understand that judges issue such directives only two or three times a year on the basis that their decision would be of interest to the general public. (Proceedings before the Tax Court normally take place in either English or French, given the fact that the federal Crown as a party to proceedings uses the preferred official language of the individual taxpayer.) Overall, the numbers provided by the Tax Court of Canada would suggest that only minimal resources would be needed to meet the requirement of bilingual simultaneous issuance. The only other top priority relates to specific requests for a particular

decision from a lawyer or a member of the public. Since it appears that specific requests are infrequent, virtually no difficulties have ever been encountered in meeting the maximum time delay of ten days which begins to run from the moment that a request is received.

The category of high priority includes three types of decisions: (i) those of special interest to the legal professions; (ii) those containing a new principle of law or a new orientation of the case law; (iii) those reported in *Canadian Tax Cases*. According to the Tax Court of Canada, unlike many top priority decisions, those categorized as high priority do not have to be issued simultaneously in both official languages. However, the question arises as to whether they should be issued simultaneously in both official languages, subject to the discretion that a tribunal may exercise under Subsection 20(2) in cases where it is of the opinion that the production of a bilingual version of this type of decision 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. Nevertheless, the policy adopted by the Tax Court requires that translation be completed within 30 days and this relatively rapid translation of decisions meets the concern we expressed earlier that access to federal courts not be hindered because of the official language in which an individual wishes to proceed.

The third category of medium priority includes a number of elements which are also related to providing access in both official languages to past decisions of the Court useful in the preparation of future cases. All decisions which interpret statutory provisions, which criticize existing law or a previous reported decision, which provide a review of existing law, or which involve unusual facts are thus given the priority level of medium. Legal revisors working for the Court have the responsibility to review decisions with these criteria in mind. Once a request has been received from a legal revisor, a translation is required to be completed within a maximum period of 90 days. Upon specific request for translation, the same time period applies to decisions from which appeals are taken under the General Procedure of the Tax Court, or from which an appeal is taken to the Federal Court. This third category of priority should, in our view, facilitate compliance with the requirements of Subsection 20(1) or Subsection 20(2), as applicable, and not only Subsection 20(2).

The three priorities just discussed do not of course cover all decisions issued by the Tax Court. In point of fact, approximately 30% of its decisions are included in the fourth category and receive a low priority. Nevertheless, this should, in theory, facilitate compliance with the requirements of Subsection 20(2). In actual fact, however, no specific time limit for translation is imposed in such cases, so that Subsection 20(2) is not always complied with. The Tax Court informs us that no time limit for translation is imposed in such cases principally due to the continual issuance of new decisions which may fall within categories of higher priority and require immediate attention. Decisions given a low priority are essentially those which have practically no jurisprudential value and thus will in all likelihood never be consulted by lawyers or other members of the public. Based on what we have been told by the Tax Court of Canada, given current resources available for translation, it would not appear possible to make available in both official languages all decisions classified as having a low priority. Given the present wording of Subsection 20(2) of the *Act*, this falls short of legal requirements, and it is in this sense that we stated above that the Tax Court's policy on translation priority, despite its usefulness, does not in every respect meet the requirements of the *Act*.

Federal tribunals which do not face the same volume of decisions as the Tax Court of Canada have the opportunity to comply more easily with the requirements imposed by Section 20 of the *Act*. Nevertheless, many tribunals could no doubt profit from adopting a system of priorities to facilitate compliance with Section 20 of the *Act* and thereby ensure at least that the decisions, orders or judgments most important to lawyers and other members of the public are made available in both official languages. As this discussion has shown, not all decisions are of equal significance for third parties. Those which provide some precedential value or indicate the policy direction of a given tribunal should receive a higher priority with regard to their issuance in both official languages in the shortest time possible, unless Subsection 20(4) allows a judge to issue an order to the effect that a decision, other than one referred to in Subsection 20(1), shall be issued in only one language. However, all the other decisions, which, pursuant to the current wording of Subsection 20(2), should also be available in both official languages, must also be taken into account. Only an amendment to Subsection 20(2) could permit relaxation of this requirement. This might be warranted, in our opinion, since the COL has found, in the course of this study, that the tribunals that issue the most decisions are in any event unable, in actual fact, to comply fully with the requirements set out in Subsection 20(2) of the *Act*.

5.0 CONCLUSION

The use of English and French before federal courts and quasi-judicial tribunals is supported by constitutional provisions, legislation and policy initiatives. Together they form a framework within which basic language rights are affirmed and important institutional obligations are recognized and acted upon.

As this study has shown, the equality of status of our official languages in the judicial system implies that courts, quasi-judicial tribunals and government institutions should be able to function effectively in either language. Accordingly, the *Act* recognizes a number of institutional duties designed to ensure that individual citizens can, without disadvantage, engage procedures and receive a full range of services from federal courts and quasi-judicial tribunals in the official language of their choice. These include the duty to ensure that an individual can be understood directly by the presiding judge or other decision-maker, to provide simultaneous interpretation upon request by a party to proceedings, to issue decisions in both official languages, to provide where required a range of services to the public in either official language, as well as the duty of the federal Crown to use the official language chosen by the other party or parties to any proceedings.

The courts and administrative tribunals reviewed in this study should be commended for the efforts they have made over the years to ensure that procedures may be conducted before them in either official language. Whether in the National Capital Region or in major centres across the country, resources are now available in most cases to ensure that individuals may appear at hearings held in their preferred official language. Where the demand for minority language hearings may in some instances appear low, this may be due to public unawareness of existing resources, or assumptions about institutional reluctance to use the minority official language.

In addition to recognizing formal rights and statutory duties, we have emphasized that practical measures should be undertaken which diminish possible barriers to the use of one or the other official language. For example, it is desirable that administrative measures be put in place which help identify the linguistic profile of pending cases and facilitate the assignment of tribunal decision-makers and other personnel. Moreover, steps should be taken to ensure that services are actively offered in either official language at the earliest moment of contact between a tribunal and members of the public; and procedures should be developed for arranging for simultaneous interpretation, where appropriate. Institutional obligations with respect to the issuance and publication of decisions in both official languages also make it desirable that policies regarding translation priorities be established.

The range of activities administered by federal courts and quasi-judicial tribunals is considerable, as is confirmed by a brief description of the tribunals examined in this study found in **Appendix C**. Such tribunals hear and consider questions pertaining to many aspects of the social, cultural and economic relations of Canadians. It is thus doubly important that the fundamental right to use either official language in tribunal procedures be fully implemented through a broad set of legal and policy initiatives. Our review of the statutory requirements and procedural realities facing federal courts and quasi-judicial tribunals will hopefully assist Canadians to understand better the opportunities they currently enjoy to use either English or French before them. We also hope that the recommendations set out below will be useful in addressing a number of residual difficulties related to the full implementation of individual language rights and to correlative institutional duties in the federal judicial and quasi-judicial system.

6.0 RECOMMENDATIONS

While the present study has made no attempt to examine and set out the specific practices and policies of every federal court or quasi-judicial tribunal, it has identified a number of areas where the practicalities of using two official procedural languages raise issues relevant to adjudicative processes in general. The following recommendations are meant to focus attention upon the possible ways in which these issues should be addressed. We hasten to add that these recommendations do not seek to pass judgment on the manner in which any particular court or tribunal operates; rather, the Commissioner proposes them with the view to encourage a review by each court or tribunal of how its current procedures and policies support the use of both official languages. By the same token, these recommendations also address the ways in which the Department of Justice can improve the existing legislative and policy framework relevant to the official status of English and French before all federal courts and quasi-judicial tribunals. Respect for the basic principle of the equality of our official languages should not lead us to endorse or maintain policies which diminish support for the essential objectives of the *Official Languages Act*. Service to the public in both official languages can be achieved without unreasonable requirements which only serve to obscure the important

and laudable objectives of the *Act*.

(A) Identification of a Party's Official Language

The active offer of service in either official language is an essential prerequisite to the use of English and French before federal courts and quasi-judicial tribunals. It should be evident from first contact with such institutions by a member of the public that they are able to operate in his or her preferred official language. This requires that a broadly based active offer of service in both official languages be implemented. Clearly visible signs inviting the use of either official language, two-language telephone messages, rapid and effective over-the-counter services in both official languages, the prompt availability of written materials concerning a tribunal's jurisdiction and operations -- these are some of the measures which should be maintained with a view to creating a positive environment in which both official languages may be used. As part of an overall active offer of service in both official languages, it is important that any forms or other documents which must be completed in order to engage tribunal procedures actually request an applicant to identify his or her preferred official language. Quite obviously, the *Act* requires that a federal institution which is a party to any proceedings use bilingual pre-printed forms when serving other parties to the proceedings (Section 19 of the *Act*). It thus seems reasonable that the court or tribunal itself take early steps to ensure that the preferred official language of the parties is clearly identified. This would both remove uncertainty about a party's preferred official language as well as provide a type of notice to the federal Crown in this regard. Moreover, such a specific request should help eliminate any procedural delays caused by misunderstandings regarding the preferred official language of a party to proceedings.

Recommendation number one

The Commissioner therefore recommends that all federal courts and quasi-judicial tribunals review the means they currently use to ensure that they actively offer services in both official languages and implement any appropriate changes.

Recommendation number two

The Commissioner therefore recommends that all federal courts and quasi-judicial tribunals review their current initiating forms and documents to ensure that applicants are informed of their two-language capability and requested to identify their preferred official language.

(B) Rules of Procedure and Related Policies

Our study identified a number of actual rules of procedure applicable to specific courts or tribunals which deal explicitly with the use of official languages. Quite clearly, the choice of official language to be used at actual proceedings has an impact on the choice of presiding judge, crown attorney and other tribunal officials. Moreover, where both official languages will be used at proceedings there may very well be a need to provide interpretation to the parties or members of the public, or to enable the proper examination of witnesses. Such realities require arrangements to be made well in advance of the actual hearing. The rules of practice of some courts and tribunals may already provide for notice in this regard, while in other cases they are silent with respect to the linguistic needs of a future proceeding.

Recommendation number three

The Commissioner therefore recommends that all federal courts and quasi-judicial tribunals review their official rules of practice so as to ensure that they require that parties to a proceeding identify, prior to setting the date of a hearing, the official language in which they intend to present arguments and in which each witness will testify.

Given that the administrative offices of a court or tribunal may have to take steps in light of information provided regarding the official language to be used in arguments and by witnesses, it is important that policy guidelines or administrative procedures be established. For example, it seems reasonable that administrative staff should communicate with the parties to a proceeding where it appears that more than one official language will be used at a hearing. Information from the parties will help determine if interpretation will be needed at the hearing, and if so, for what part of the hearing. If only one witness is to testify in an official language different from the language of the proceedings in general, it would seem reasonable to arrange interpretation only for the duration of that witness's testimony. Even where parties propose to use different official languages for their own pleadings, it may be that they are sufficiently bilingual not to need or desire interpretation. Only direct communication with the parties will bring these realities to light.

Recommendation number four

The Commissioner therefore recommends that all federal courts and tribunals review their internal policies and administrative procedures to ensure that a proper liaison is established with the parties regarding the linguistic profile of any particular case and the need for interpretation.

(C) Policy Guidelines for Crown Attorneys and Agents

Federal institutions which appear as parties in civil proceedings before federal courts and quasi-judicial tribunals have an obligation under the *Act* to ensure that their legal counsel use the preferred official language of the other party or parties. As our study has indicated, the federal Department of Justice has addressed the issues which arise from this obligation both as a matter of internal administrative policy and with respect to the terms and conditions assumed by agents of the Department. It may very well be that some federal institutions engage legal counsel who are not under the direct authority of the Department of Justice. This being the case, it is important that federal institutions in general review their administrative policies regarding this particular obligation under the *Act*. Given the role of the Department of Justice in the administration of justice at the federal level, it seems reasonable that it confer with federal institutions with a view to reaffirming their obligations with respect to the official language or languages used by legal counsel representing their interests.

Recommendation number five

The Commissioner therefore recommends that the federal Department of Justice write to federal institutions requesting that they review their internal policies and administrative practices so as to ensure that institutional obligations under Section 18 of the Official Languages Act *are fully respected.*

(D) Language of Decisions

As our study has pointed out, it is clearly important that judgments and decisions of federal courts and quasi-judicial tribunals which have jurisprudential value or policy significance be routinely available to the public in both official languages. The present scope of Section 20 of the *Act* is more than sufficient to meet this requirement. Indeed, Section 20 appears so broad as to require the issuance in both official languages of decisions which simply apply well-established law to a set of established facts, in other words, decisions of no particular significance with respect to evolving policy or legal principles.

The present scope of Section 20 seems to place an onerous burden upon some quasi-judicial tribunals without advancing any recognizable policy objective. Even a court of record, such as the Tax Court of Canada, appears to be currently unable to issue every decision of the court in both official languages, although all judgments of policy and legal significance are routinely available in both official languages, as well as those arising out of proceedings where both official languages were used. It seems reasonable that a review take place of the policy reasons which may support the necessity to issue, in the other official language, the purely factually bound decisions arising out of strictly unilingual proceedings. Of course, requests by an individual with a relevant interest for a specific decision should continue to be accommodated, as would appear to be the present policy of the various tribunals reviewed in the course of this study.

Recommendation number six

The Commissioner therefore recommends that the federal Department of Justice review the appropriateness of the current scope of Subsection 20(2)(a) of the Official Languages Act *insofar as it requires the routine issuance in both official languages of decisions of no jurisprudential value or policy significance.*

Recommendation number seven

The Commissioner further recommends that, should no significant policy justify the current scope of Subsection 20(2)(a) of the Official Languages Act*, the federal Department of Justice consider the possibility of amending the* Official Languages Act *in order to accord a power of regulation to the Governor in Council to determine which tribunals, if any, should be exempted from the duty to issue in both official languages factually bound decisions of no jurisprudential or policy significance arising out of strictly unilingual proceedings and to establish appropriate categories of decisions accordingly. The criteria for such an exemption should be clearly defined.*

(E) Translation Policies and Priorities

Our study has indicated that a viable system of priorities should be established to facilitate the translation of decisions of federal courts and quasi-judicial tribunals. As a model, we offered the system of translation priorities established by the Tax Court of Canada. Although the specifics of any system of priorities may vary from one tribunal to the next, it seems reasonable to establish a descending order of legal and policy importance in order to ensure that decisions most essential to individuals engaged in future proceedings are readily available in both official languages.

Recommendation number eight

The Commissioner therefore recommends that all federal courts and quasi-judicial tribunals review their existing policies with respect to the issuance of their decisions in both official languages and, where appropriate, establish written policies setting out the criteria for determining translation priorities.

Recommendation number nine

The Commissioner further recommends that federal courts and quasi-judicial tribunals, when establishing a system of priorities for the translation of decisions, clearly distinguish between the obligation to issue judgments simultaneously in both official languages under Subsection 20(1) of the Official Languages Act*, and the obligation to issue in both official languages other decisions of significance within a time frame consistent with the* Official Languages Act*.*

(F) Evidence and Interpretation

Our study has pointed out the practical difficulties which may be encountered when two official languages are used in judicial or quasi-judicial proceedings. Where one or more witnesses use an official language different from that of the parties, or the parties themselves use different official languages, a need for interpretation will very likely arise. Currently there would not appear to be any specific requirement that interpretation given at a hearing be recorded and made available to a party upon request. While not all tribunals record evidence and submissions made at hearings, those that do so appear to have no consistent practice regarding the recording of interpretation. In order to help ensure the accuracy of interpretation offered at a hearing, it would seem appropriate that it be recorded in the same way as the evidence in its original language. Such a practice is currently required under the *Criminal Code of Canada* with respect to criminal proceedings conducted in the minority official language.

Recommendation number ten

The Commissioner therefore recommends that the Department of Justice review the current provisions of the Official Languages Act *with a view to introducing a statutory requirement that any interpretation from one official language to the other given at civil proceedings constitute part of the official record of the proceedings and be made available upon request by any party to the proceedings.*

Evidence may also be submitted at civil proceedings by way of affidavit. Where federal institutions are parties to proceedings at which they intend to present evidence by affidavit in an official language different from the preferred official language of any other party, they are currently not required to provide a written translation. This may very well give rise to unfairness to parties who wish to prepare their cases in light of the written evidence submitted by federal institutions.

Recommendation number eleven

The Commissioner therefore recommends that appropriate amendments be made to Part III of the Official Languages Act *to require federal institutions to provide a certified translation (from one official language to the other) of affidavit evidence (excluding attached exhibits) they submit at hearings before federal courts and quasi-judicial tribunals when so requested by a party who is conducting his or her case in the other official language. To reflect any new translation requirements, any consequential changes to rules of procedure that establish time frames and deadlines for the filing of pleadings and other documents should also be made.*

(G) Language Abilities of Tribunal Members

As our study has pointed out, the short terms for which many tribunal members hold office make it impractical to consider language training as a means to achieve and maintain an acceptable level of institutional two-language capability. Accordingly, it is important that this factor be dealt with explicitly at the time of appointment. Comments

were received in regard to policies relevant to the language abilities of persons appointed to various federal tribunals. Suggestions made in past studies regarding the appointment process in general provide a useful starting point for improving the manner in which candidates are recruited. Moreover, the current advisory system in place for actual judicial appointments may provide additional guidance when considering new procedures for selecting members of federal administrative tribunals exercising quasi-judicial powers.

Recommendation number twelve

The Commissioner therefore recommends that the Privy Council Office review the manner in which appointments are made to various federal administrative tribunals exercising quasi-judicial powers with a view to proposing a process which would better enable tribunals to meet their obligations under Section 16 of the Official Languages Act.

In particular, the Commissioner recommends that the Privy Council Office ensure that administrative tribunals are consulted on their appointment needs with respect to their ability to hear cases in both official languages prior to appointments being made.

APPENDIX B

CHAPTER O-2
An Act respecting the status of the official languages of Canada

SHORT TITLE

1. This Act may be cited as the *Official Languages Act*. 1968-69, c. 54, s. 1.

DECLARATION OF STATUS OF LANGUAGES

2. The English and French languages are the official languages of Canada for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada. 1968-69, c. 54, s. 2.

STATUTORY AND OTHER INSTRUMENTS

3. Subject to this Act, all instruments in writing directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of the Parliament or Government of Canada or any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada, shall be promulgated in both official languages. 1968-69, c. 54, s. 3.

4. All rules, orders, regulations, by-laws and proclamations that are required by or under the authority of any Act of the Parliament of

Canada to be published in the official gazette of Canada shall be made or issued in both official languages and shall be published accordingly in both official languages, except that where the authority by which any such rule, order, regulation, by-law or proclamation is to be made or issued is of the opinion that its making or issue is urgent and that to make or issue it in both official languages would occasion a delay prejudicial to the public interest, the rule, order, regulation, by-law or proclamation shall be made or issued in the first instance in its version in one of the official languages and thereafter, within the time limited for the transmission of copies thereof or its publication as required by law, in its version in the other, each such version to be effective from the time the first is effective. 1968-69, c. 54, s. 4.

5. (1) All final decisions, orders and judgments, including any reasons given thereof, 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 interest or importance or where the proceedings leading to its issue were conducted in whole or in part in both official languages.

(2) Where any final decision, order or judgment issued by a body described in subsection (1) is not required by that subsection to be issued in both official languages, or where a body described in that subsection by which any final decision, order or judgment including any reasons given therefor is to be issued is of the opinion that to issue it 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 issue, the decision, order or judgment including any reasons given therefor shall be issued in the first instance in its version in one of the official languages and thereafter, within such time as is reasonable in the circumstances, in its version in the other, each such version to be effective from the time the first is effective.

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in one only of the official languages, of any decision, order or judgment or any reasons given therefor.

(4) All rules, orders and regulations governing the practice or procedure in any proceedings before a body described in subsection (1) shall be made in both official languages but where the body by which any such instrument is to be made is satisfied that its making in both official languages would occasion a delay resulting in injustice or hardship to any person or class of persons, the instrument shall be made in the first instance in its version in one of the official languages and thereafter as soon as possible in its version in the other, each such version to be effective from the time the first is effective. 1968-69, c. 54, s. 5.

6. Without limiting or restricting the operation of any law of Canada relating to the conviction of a person for an offence consisting of a contravention of a rule, order, regulation, by-law or proclamation that at the time of the alleged contravention was not published in the official gazette of Canada in both official languages, no instrument described in section 4 or 5 is invalid by reason only that it was not made or issued in compliance with those sections, unless in the case of any instrument described in section 4 it is established by the person asserting its invalidity that the non-compliance was due to bad faith on the part of the authority by which the instrument was made or issued. 1968069, c. 54, s. 6.

7. Where, by or under the authority of the Parliament or Government of Canada or any judicial, quasi-judicial or administrative body or Crown corporation established by or pursuant to an Act of the Parliament of Canada, any notice, advertisement or other matter is to be printed in a publication for the information primarily of members of the public resident in the National Capital Region or a federal bilingual district established under this Act, the matter shall, wherever possible in publications in general circulation within that

Region or district, be printed in one of the official languages in at least one such publication appearing wholly or mainly in that language and in the other official language in at least one such publication appearing wholly or mainly in that other language, and shall be given as nearly as reasonably may be equal prominence in each such publication. 1968-69, c. 54, s. 7.

[...]

DUTIES OF DEPARTMENTS, ETC.
IN RELATION TO OFFICIAL LANGUAGES

[...]

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 being so heard he will not be placed at a disadvantage by not being or being unable to be heard in the other official language.

(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 official 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.

(3) 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, any court in Canada may in its discretion, at the request of the accused or any of them if there is more than one accused, and if it appears to the court that the proceedings can effectively be conducted and the evidence can effectively be given and taken wholly or mainly in one of the official languages as specified in the request, order that, subject to subsection (1), the proceedings be conducted and the evidence be given and taken in that language.

(4) Subsection (1) and (3) do not apply to any court in which, under and by virtue of section 133 of *The British North America Act, 1867*, either of the official languages may be used by any person, and subsection (3) does not apply to the courts of any province until such time as a discretion in those courts or in the judges thereof is provided for by law as to the language in which, for general purposes in that province, proceedings may be conducted in civil causes or matters.

(5) The Governor in Council, in the case of any judicial or quasi-judicial body established by or pursuant to an Act of the Parliament of Canada, and the lieutenant governor in council of any province, in the case of any other court in that province, may make such rules governing the procedure in proceedings before such body or court, including rules respecting the giving of notice, as the Governor in Council or the lieutenant governor in council, as the case may be, deems necessary to enable such body or court to exercise or carry out any power or duty conferred or imposed upon it by this section. 1968-69, c. 54, s. 11.

35-36-37 ELIZABETH II

CHAPTER 38

An Act respecting the status and the use of the official languages of Canada
[Assented to 28th July, 1988]
[...]

PART III

ADMINISTRATION OF JUSTICE

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.

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.

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.

17. (1) The Governor in Council may make such rules governing the procedure in proceedings before any federal court, other than the Supreme Court of Canada, the Federal Court or the Tax Court of Canada, including rules respecting the giving of notice, as the Governor in Council deems necessary to enable that federal court to comply with sections 15 and 16 in the exercise of any of its powers or duties.

(2) Subject to the approval of the Governor in Council, the Supreme Court of Canada, the Federal Court and the Tax Court of Canada may make such rules governing the procedure in their own proceedings, including rules respecting the giving of notice, as they deem necessary to enable themselves to comply with sections 15 and 16 in the exercise of any of their powers or duties.

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.

19. (1) The pre-printed portion of any form that is used in proceedings before a federal

court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages.

(2) The particular details that are added to a form referred to in subsection (1) may be set out in either official language, but, where the details are set out in only one official language, it shall be clearly indicated on the form that a translation of the details into the other official language may be obtained, and, if such a request is made, a translation shall be made available forthwith by the party that served the form.

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.

(3) Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or

delivery, in only one of the official languages, of any decision, order or judgment or any reasons given therefor.

(4) No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.

[...]

PART XII

RELATED AMENDMENTS

Criminal Code

94. (1) The *Criminal Code* is amended by adding thereto, immediately after section 530 thereof, the following section:

"**530.1** Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

- (*a*) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
- (*b*) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
- (*c*) any witness may give evidence in either official language during the preliminary inquiry or trial;
- (*d*) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;
- (*e*) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;
- (*f*) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;
- (*g*) the record of proceedings during the preliminary inquiry or trial shall include
- *(i)* a transcript of everything that was said

during those proceedings in the official language in which it was said,

- *(ii)* a transcript of any interpretation into the other official language of what was said, and
- *(iii)* any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and
- (*h*) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused."

Short title

APPENDIX C

FEDERAL COURTS AND ADMINISTRATIVE TRIBUNALS EXAMINED IN THE COURSE OF THE PRESENT STUDY

1. BOARD OF ARBITRATION AND REVIEW TRIBUNAL

Established under the *Canada Agricultural Products Act* (R.S.C., 1985, c. 20 [4th supp.]). The Board and Review Tribunal are both part of a review process relating to complaints against dealers in agricultural products (as defined in the *Act*) for allegedly failing to comply with regulations concerning grades, standards or marketing of prescribed agricultural products in import, export or interprovincial trade. The *Act* designates both agencies as courts of record. Both the Board of Arbitration and the Review Tribunal are composed of not less than three and not more than five members appointed by the Minister of Agriculture.

A complaint is first heard by the Board of Arbitration (sitting as a three-member panel), which is empowered to make whatever order it considers appropriate to provide adequate relief from the activity complained of, including payment of compensation and interest. A party to those proceedings who is aggrieved by the Board's decision may appeal that decision to the Review Panel. The latter considers the evidence and other material that was before the Board, any additional evidence received and accepted, and any representations made by the parties. The Review Tribunal is then empowered to issue a decision which affirms, varies or cancels the earlier decision of the Board. Decisions made by the Board or the Tribunal may be filed in the Federal Court of Canada and subsequently enforced as a judgment of that court.

The administrative offices of the Board and Tribunal are located in the National Capital Region, although the *Act* provides for the conduct of hearings at any place in Canada either body considers appropriate.

2. CANADA LABOUR RELATIONS BOARD (now CANADA INDUSTRIAL RELATIONS BOARD)

Established under the *Canada Labour Code* (R.S.C., 1985, c. L-2). The Canada Labour Relations Board (CLRB) determines a wide range of issues that arise with respect to industrial relations in any work, undertaking or business which comes under federal jurisdiction (this includes federal Crown corporations such as CBC, CN, and Canada Post). It hears questions related to the determination and variation of collective bargaining units, complaints of unfair labour practices against employers or unions, whether parties are bargaining in good faith, issues of fairness in union activities. It has broad powers to issue orders requiring reinstatement of employees, compensation, reinstatement of union members to their union, back-to-work orders, and other matters related to industrial relations.

Between the time this study began and the report was completed, the Canada Labour Relations Board (CLRB) changed its name to the Canada Industrial Relations Board (CIRB). The name change and certain changes to its structure and mandate were made pursuant to Sections 1 to 61 of *An Act to Amend the Canada Labour Code (Part I), and the Corporations and Labour Unions Returns Act and to Make Consequential Amendments to Other Acts* (S.C. 1998, c. 26), which came into effect on January 1, 1999.

The CLRB consisted of a Chair, five Vice-Chairs and eight Members. When we met CLRB representatives during our study, two Member positions were vacant and the Chair, four Vice-Chairs and four Members (total of nine Members) were apparently bilingual and able to conduct hearings in either official language. Finally, hearings were conducted before groups of three Members.

The CIRB now consists of a Chair, a minimum of two full-time Vice-Chairs and other part-time Vice-Chairs, which the Governor in Council deems necessary to allow the Council to fulfill its role, a maximum of six more full-time Members, three of them representing employees and three representing employers, as well as part-time Members, representing, in equal numbers, the employees and employers, which the Governor in Council deems necessary to enable the Council to fulfil its role. The Chair and Vice-Chairs are appointed permanently for a maximum term of five years, while the other Members are appointed for a maximum term of three years.

The CIRB (like the CLRB before) has its headquarters in Ottawa, but also has five regional offices located in Dartmouth (Atlantic Region), Montreal (Quebec Region), Toronto (Ontario Region), Winnipeg (Central Region covering Manitoba, Saskatchewan, Alberta and Northern Ontario) and Vancouver (Pacific Region).

3. CANADIAN ARTISTS' AND PRODUCERS' PROFESSIONAL RELATIONS TRIBUNAL

Established under the *Status of the Artist Act* (S.C., 1992, c.33) which was proclaimed in May of 1995. The Canadian Artists' and Producers' Professional Relations Tribunal provides a framework for the conduct of professional relations (including collective bargaining) between independent professional artists and producers whose activities fall within federal jurisdiction. The tribunal has the authority to certify artists' associations, which then have the exclusive right to represent self-employed artists in collective bargaining with producers in specified sectors. It also hears applications for revocation of certification, complaints related to obligations and prohibitions set out in the *Status of the Artist Act*, as well as applications for determinations or declarations arising from the operation of a variety of sections in the *Act*.

The Tribunal has to date held hearings only with respect to certification. An application for certification often generates requests from other interested groups or individuals that they be granted intervenor status at the hearing. Other types of proceedings (such as complaints for unfair practices) would not normally involve intervenors. The administrative offices of the Tribunal are located in the National Capital Region, but the Tribunal is itinerant and able to hold hearings in all regions of the country.

The Tribunal currently has four members (the *Act* allows for a maximum of six) who fulfil their functions on a part-time basis. The tribunal conducts hearings in panels of three members (unless the application is uncontested and thus can be dealt with by one member sitting alone). Three of the four part-time tribunal members are currently bilingual.

4. CANADIAN INTERNATIONAL TRADE TRIBUNAL

Established under the *Canadian International Trade Tribunal Act* (R.S.C., 1985, c.47 [4th suppl.]. The Tribunal is empowered to conduct inquiries into whether dumped or subsidized imports have caused, or are threatening to cause, material injury to a domestic industry; hear appeals of Revenue Canada decisions made under the *Customs Act*, the *Excise Tax Act* and *SIMA*; conduct investigations into requests from Canadian producers for tariff relief on imported textile inputs that they use in their production operations; conduct inquiries into complaints by potential suppliers concerning procurement by the federal government that is covered by NAFTA, the AIT and the AGP; conduct safeguard inquiries into complaints by domestic producers that increased imports are causing, or threatening to cause, serious injury to domestic producers; and conduct inquiries and provide advice on such economic, trade and tariff issues as are referred to the Tribunal by the Governor in Council or the Minister of Finance.

The Tribunal is composed of a maximum of nine members (currently there are seven). Depending on the matter in dispute, hearings may be presided over by a panel of three members or by one member sitting alone. While the matter in dispute is subject to considerable study and analysis by Tribunal staff prior to any hearing, the parties are invited to present evidence and arguments during oral proceedings conducted by the Tribunal.

The administrative offices of the Tribunal are located in the National Capital Region, and hearings are conducted at facilities located therein. Provision is made for the conduct of hearings by video transmission in order to accommodate parties living in other regions of the country.

5. CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION

Established under the *Canadian Radio-television and Telecommunications Commission Act* (R.S.C., 1985 c. C-22). The Commission (CRTC) exercises powers and fulfils objectives set out in the *Broadcasting Act* (S.C., 1991, c. 11) and the *Telecommunications Act* (S.C., 1993, c. 38). With respect to the former, the CRTC is mandated to regulate and supervise all aspects of the Canadian broadcasting system and to implement the provisions of the *Broadcasting Act*. The *Broadcasting Act* requires that public hearings be conducted regarding the issuance of a licence, the suspension or revocation of a licence, as well as in cases involving specific performance objectives set by the CRTC or the issuance of mandatory orders.

With respect to telecommunications, the CRTC is mandated to ensure that rates are just and reasonable and charged equally to all users under substantially similar circumstances and conditions. More than 95% of decisions made with respect to regulating telecommunications are made administratively without any public hearings. (In 1995 four public hearings were held in the area of telecommunications.)

The CRTC maintains its head office in the National Capital Region, where up to 50% of hearings are held. It also has four regional offices located in: Halifax, Montreal, Winnipeg and Vancouver. Hearings can be conducted in all major centres across the country. Given the nature of issues determined at CRTC hearings, interested third parties often appear as intervenors and make submissions.

The CRTC is composed of 13 Commissioners, three to four of whom traditionally come from Quebec and are bilingual Francophones. In addition, the CRTC currently has two bilingual Anglophone Commissioners. With respect to broadcasting, hearings are presided over by three-member panels. In the area of telecommunications, the *Telecommunications Act* provides that a quorum of the CRTC consists of two members, except where the matter under consideration is uncontested, in which case a quorum consists of one member.

6. CIVIL AVIATION TRIBUNAL

Established under the *Aeronautics Act* (R.S.C., 1985, c. A-2). The Tribunal has the responsibility to review certain administrative decisions made by the Minister of Transport, principally in the area of enforcement of safety and other standards and regarding licensing. These may include the imposition of monetary penalties, or the suspension, cancellation or refusal to renew a Civil Aviation Document on medical or other grounds. Hearings regarding these matters are held informally but in accordance with rules of fairness and natural justice, with parties presenting arguments and witnesses testifying. The Tribunal is empowered to confirm a decision made by the Minister, substitute its own decision (where proceedings constituted an appeal held before a three-member panel), or refer the matter back to the Minister for reconsideration in light of its findings.

The Tribunal is composed of a Chairperson and a Vice-Chairperson, both of whom are full-time, and a further 21 part-time members. Members of the Tribunal exercise the same powers as a commissioner under Part I of the *Inquiries Act*. Two levels of hearings are provided for. First, an aggrieved party may request that the Tribunal review a decision of the Minister; in which case the matter is reviewed by one Tribunal member sitting alone. Second, an appeal may be taken from the decision of the latter and will be heard by a panel of three Tribunal members (excluding the original decision-maker).

Although the Tribunal's administrative offices are located in the National Capital Region, it conducts hearings in all parts of the country in an effort to accommodate the parties wherever possible. In enforcement matters, the hearing will take place at the location where the alleged infraction took place so that witnesses and Transport Canada may present themselves with a minimum of travel costs.

7. COMPETITION TRIBUNAL

Established under the *Competition Tribunal Act* (R.S.C., 1985, c. 19 [2nd Supp.]). The Tribunal is empowered to hear and decide applications pursuant to the *Competition Act* regarding mergers, abuse of dominant position and trade practices affecting competition.

The Tribunal is composed of four judicial members (who are also judges of the Federal Court) and a maximum of eight other members who have expertise in areas such as economics, accounting, marketing, auditing, etc. (Currently it is composed of four judicial members, one full-time and five part-time other members.) When hearing a matter, the Tribunal sits in panels of three members, one of whom must be a judicial member serving as president of the panel.

Proceedings are almost always initiated by the Director of Investigation and Research, the federal official responsible for the administration of the *Competition Act*. Given the nature of issues reviewed before the Tribunal, intervenors are often present to make submissions during the course of proceedings.

Although the Tribunal may hold a hearing anywhere in Canada when circumstances so require, all but two proceedings (which were heard in Vancouver) have been held in the National Capital Region. The Tribunal's administrative offices are also located in the National Capital Region.

8. COPYRIGHT BOARD

Established under the *Copyright Act* (R.S.C., 1985, c. C-42). The Copyright Board has jurisdiction in the following areas: the establishment of tariffs for the retransmission of distant television and radio signals; the establishment of tariffs for the public performance of music; the adjudication of rate disputes between licensing bodies representing classes of copyright owners and users of their works; rulings on applications for non-exclusive licences to use published works of unlocatable copyright owners; and setting compensation, under certain circumstances, for formerly unprotected acts in countries that later join the Berne Convention, the Universal Copyright Convention or the Agreement establishing the World Trade Organization.

9. CULTURAL PROPERTY EXPORT REVIEW BOARD

Established under the *Cultural Property Export and Import Act* (R.S.C., 1985, c. C-51). The Board's primary objective is to ensure the preservation in Canada of significant examples of our cultural, historic and scientific heritage. It therefore is empowered to review applications for export permits related to such matters (determining if a permit should issue), and to make determinations respecting fair cash offers to purchase.

The Board is composed of a Chairperson and nine members representing the public interest, public collecting institutions and private collectors and dealers. In the vast majority of cases, applicants to the Board submit written evidence and argument without requesting an actual oral hearing. Applications are therefore determined on the basis of written documents. The administrative offices of the Board are located in the National Capital Region.

10. FEDERAL COURT OF CANADA

Established under the *Federal Court Act* (R.S.C., 1985, c. F-7). The Federal Court has broad jurisdiction involving lawsuits against the Crown in right of Canada, copyright, trade marks, patents, admiralty, taxation, citizenship, and the review of decisions of federal agencies and officials (including decisions related to immigration and refugee status), and claims for relief in respect of aeronautics, interprovincial undertakings and certain kinds of commercial paper. The Court has both a trial and an appeal division.

Although the central registry of the Court is in the National Capital Region, it has offices and courtroom facilities in all provinces. It currently has 30 full time judges (counting both the trial and appeal division together) who are resident in the National Capital Region but who travel to various parts of the country to preside over trials as the need arises. Approximately one third of the judges of the Federal Court are bilingual and able to preside at hearings in either official language.

11. HUMAN RIGHTS TRIBUNAL

Established under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). At the request of the Human Rights Commission (following the results of its investigation into an act of alleged discrimination), the president of the Human Rights Tribunal Panel establishes a Human Rights Tribunal composed of three members. The tribunal's duty is to inquire into the complaint arising from an act of alleged discrimination.

The members of any given Human Rights Tribunal are drawn from the Panel as a whole, which is currently composed of 58 persons appointed for terms not exceeding five years. Persons appointed to the Panel are distributed geographically and usually sit on tribunals in the region where they are normally resident. However, a Panel member can be asked to sit on a tribunal located in another region in order to meet the linguistic requirements of a particular case.

12. IMMIGRATION AND REFUGEE BOARD

Established under the *Immigration Act* (R.S.C., 1985, c. I-2). The Immigration and Refugee Board is composed of three divisions: the Adjudication Division; the Immigration Appeal Division; and the Convention Refugee Determination Division. The Adjudication Division conducts immigration inquiries and detention reviews, processes which are adversarial in nature and involve the questions of whether a person will be admitted to Canada, allowed to remain in Canada, or kept in detention. Such inquiries and reviews are presided over by an independent decision-maker (the adjudicator) and constitute one-member tribunals. The Immigration Appeal Division constitutes a court of record which hears appeals regarding administrative decisions which refuse permanent residence, appeals from removal orders issued by adjudicators, or appeals by the Crown against decisions made by the Adjudication Division granting admission to Canada or refusing to order removal. The Convention Refugee Determination Division is responsible for determining refugee claims fairly and expeditiously. Claims for refugee status are usually heard by two-member panels although, in some situations, decisions can be made by a single member of the Board.

Membership on the Immigration and Refugee Board is distributed geographically. Currently there are approximately 200 members of the Board, most of whom preside at proceedings which take place in the region where they are resident. While the head office of the Board is located in Ottawa, it also maintains offices in Toronto, Montreal, Calgary and Vancouver.

13. NATIONAL ENERGY BOARD

Established under the *National Energy Board Act* (R.S.C., 1985, c. N-7). The Board has the authority to grant authorization for the construction and operation of interprovincial and international oil and gas pipelines, international power lines and designated interprovincial power lines. It also sets tolls and tariffs for oil and gas pipelines under its jurisdiction; and authorizes the export of oil, natural gas and electricity, as well as the import of natural gas. It also has responsibilities with respect to ensuring that projects receive appropriate levels of environmental assessment in accordance with federal statutes. The Board exercises advisory functions as well, being required to keep under review matters related to all aspects of energy supply, production, development and trade which fall under federal jurisdiction; and to carry out studies and prepare reports at the request of the federal Minister of Natural Resources.

While some of its functions are administrative and regulatory, the Board is nevertheless required to conduct oral hearings with respect to decisions on applications to construct and operate facilities, to export gas, and to establish tolls and tariffs. In its quasi-judicial functions, the Board constitutes a court of record and has all the powers of such a court regarding the attendance of witnesses, the swearing in and examination of witnesses, the production and inspection of documents and the enforcement of its orders. Most witnesses at hearings have filed their evidence in written form but are subject to examination and cross-examination orally at the time of the hearing.

The Board normally has five to six permanent members appointed for seven-year terms. It can also have temporary members appointed for the purposes of considering specific applications. Since the work of the Board is highly technical, membership on it requires a knowledge and experience of highly complicated processes and issues. For the purposes of hearings the Board usually sits as a three-member panel, although in extraordinary cases it may sit as a panel of five. Given the nature of issues involved in many hearings, it is not unusual that intervenors appear to present evidence and argument. While most hearings take place in Calgary, the Board is functionally itinerant and holds hearings in other parts of the country from time to time.

14. NATIONAL PAROLE BOARD

Confirmed and continued under the *Corrections and Conditional Release Act* (S.C. 1992, c. 20). The Board has the authority to make decisions regarding conditional releases from federal penitentiaries (as well as from provincial jails in those provinces where no provincial parole board exists), including the revocation of parole or statutory release.

The Board is composed of approximately 45 full-time members (appointed for up to ten years) and a number of part-time members (appointed for up to three years). The members of the Board are distributed geographically corresponding to five administrative regions: the Atlantic Region, Quebec, Ontario, the Prairie Region, and the Pacific Region.

Decisions of the Board involving parole or statutory release are made at hearings involving a Board member and the prisoner or offender, with evidence from various sources, such as parole officers, prosecutors, social workers and psychiatrists.

15. CANADIAN TRANSPORTATION AGENCY

On July 1, 1996, the *Canada Transportation Act* came into force, creating the Canadian Transportation Agency. The Agency is a quasi-judicial tribunal with not more than seven members appointed by the Governor in Council for not more than five years. The *Act* also provides for the appointment of temporary members. The Agency's staff, which numbers some 250, assists the members in the performance of their duties. The head office of the Agency is located in the National Capital Region.

Its primary mandate is the economic regulation of various modes of transportation; it also monitors the equitable implementation of transportation policies established by Parliament. Thus, the Agency issues licences to carriers wishing to operate rail or air services and settles disputes regarding prices and transportation services. It is also responsible for ensuring that no federally regulated mode of transportation presents any undue obstacle to the mobility of individuals with disabilities.

The Agency is an independent body with all the powers of a superior court in matters within its jurisdiction. It can thus order the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations, and the entry on and inspection of property. The Agency's decisions and orders can be submitted to the Federal Court of Canada or any superior court and executed as though they were a court order.

16. OFFICE OF THE UMPIRE

Established under the *Unemployment Insurance Act* (R.S.C., 1985 c. U-1), the latter *Act* now replaced by the *Employment Insurance Act* (S.C., 1996, c. 23). This tribunal is responsible to hear appeals against decisions rendered by boards of referees where, inter alia, the latter have allegedly failed to observe a principle of natural justice, erred in law or made an erroneous finding of fact (in some circumstances). A board of referees is composed of representatives of employers and insured persons and hears appeals from decisions taken by the Canadian Employment and Immigration Commission regarding rights and responsibilities under the *Act*. As such, both the office of the umpire and boards of referees perform adjudicative functions.

Umpires appointed under the *Unemployment Insurance Act* are normally judges of the Federal Court of Canada, although provision is made in the *Act* for the appointment of current and former judges of superior, county and district courts as well. An umpire is empowered to decide any question of law or fact necessary for the disposition of the appeal, and thus may make any decision the board of referees should have made, refer the matter back to the latter to rehear the matter in accordance with any instructions it feels to be appropriate, or may confirm, rescind or vary the decision of the board of referees.

Hearings by an umpire can take place anywhere in Canada, though administrative offices are located in the National Capital Region.

17. PUBLIC SERVICE STAFF RELATIONS BOARD

Established under the *Public Service Staff Relations Board Act* (R.S.C., 1985, c. P-35). The Public Service Staff Relations Board is responsible for the administration of the systems of collective bargaining and grievance adjudication under the *Public Service Staff Relations Act* and the *Parliamentary Employment and Staff Relations Act* (as well as certain provisions of the *Canada Labour Code* related to the occupational safety and health of Public Service employees). It hears applications for certification, revocation of certification, complaints of unfair labour practices, the designation of positions whose duties are of a managerial or confidential nature, or whose duties are required to be performed in the interest of the safety or the security of the public, and complaints and references related to safety and health (under the *Canada Labour Code*). The heaviest volume of proceedings before the Board consists of grievances related to the interpretation and application of provisions in collective agreements or major disciplinary action and termination of employment.

The Board is composed of a Chairperson, a Vice-Chairperson, no less than three Deputy Chairpersons and such other full-time members and part-time members as the Governor in Council considers necessary to discharge the responsibilities of the Board. Currently, there are nine full-time members and five part-time members.

18. PENSION APPEALS BOARD

Established under the *Canada Pension Act* (R.S.C., 1985, c. C-8). The Pension Appeals Board tribunal is responsible for

hearing appeals arising from decisions made by the Department of National Revenue and the Department of Human Resources Development regarding various benefits under the Canada Pension Plan. Two large areas of activity are decisions related to survivorship and disability benefits. (The Board has no jurisdiction with respect to the Régime de rentes du Québec and thus does not conduct hearings in that province.)

The Board currently has 22 members of whom nine are bilingual and able to conduct hearings in either official language. Hearings may be conducted before panels of one, three or five members. Although the offices of the Board are located in the National Capital Region, the Board is itinerant and conducts hearings in all regions of the country (often using the facilities of the Federal Court of Canada for its hearings).

19. REVIEW TRIBUNAL (*CANADA PENSION ACT*)

Established under the *Canada Pension Act* (R.S.C., 1985, c. C-8). The Tribunal has the authority to review decisions made by the Minister of Human Resources Development regarding pension benefits of various sorts under the *Canada Pension Act*. As such, it constitutes a review mechanism engaged prior to any appeal to the Pension Appeals Board.

A Review Tribunal which hears any particular complaint is composed of three members drawn from a panel of between 100 and 400 persons appointed by the Governor in Council. Membership in this pool of potential tribunal members must be distributed so that at any given time 25% are members of the bar of a province, 25% are qualified to practise medicine or a prescribed related profession in a province, and there is representation from every region of Canada.

A Review Tribunal consists of three members, one of whom belongs to a bar of a province and acts as chairperson, and one of whom (where the review relates to a disability benefit) is a person qualified to practise medicine or a prescribed related profession in a province. A Review Tribunal may confirm or vary a ministerial decision taken under certain sections of the *Canada Pension Act*, or may take any action which might have been taken by the Minister under those sections. Decisions of the Review Tribunal are subject to review by the Pension Appeals Board.

20. SUPREME COURT OF CANADA

The Supreme Court, established under the *Supreme Court Act* (R.S.C., 1985, c. S-26), is a court of law and equity which is, in fact, the general court of appeal for the entire country and is a tribunal for the better administration of the laws of Canada It is a court of record with jurisdiction in civil and criminal matters for all of Canada and its decisions are final. It also has jurisdiction to answer questions of law submitted by the Governor in Council in the form of a reference. Pursuant to Section 53 of the *Supreme Court Act*, the Governor in Council may refer to the Court any important question of law or fact concerning the interpretation of the Constitution Acts of 1867 and 1982, the constitutionality or interpretation of any federal or provincial legislation, or the powers of the Parliament of Canada, of the provincial legislatures or of their respective governments, whether or not the particular power in question has been or is proposed to be exercised.

The office of the Clerk of the Court is located in the capital of the country, Ottawa. The Court normally holds three sittings a year, with benches of five, seven or nine judges, depending on the matters before it. It consists in all of nine judges, including a Chief Justice, and all must reside in the National Capital Region or within 40 kilometres of it. Finally, at least three of these judges come from Quebec, pursuant to Section 6 of the *Supreme Court Act*.

21. TAX COURT OF CANADA

Established under the *Tax Court of Canada Act* (R.S.C., 1985, c. T-2). The Tax Court is a court of record with jurisdiction to hear and determine references and appeals on matters arising under the *Income Tax Act*, the *Canada Pension Plan*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act*, Part III of the *Unemployment Insurance Act*, and Part IX of the *Excise Tax Act* for the Goods and Services Tax. It also has some jurisdiction regarding war veterans and war-related benefits accorded former members of the merchant marine.

It currently has 26 judges, 16 of whom are bilingual and able to conduct hearings in either official language (of the remainder, nine are unilingual Anglophones and one is a unilingual Francophone).

22. TRADE MARKS OPPOSITION BOARD

Established under the *Trade-marks Act* (R.S.C., 1985, c. T-13). The Trade Marks Opposition Board conducts hearings involving opposition to an application for the registration of a trade mark. Hearings are therefore adversarial in nature,

based upon written pleadings by both the applicant for a trade mark and any party opposing the registration of a trade mark. (The application and any opposition to it are first reviewed by the Registrar who issues his or her decision based on the arguments and evidence presented. Proceedings man be engaged before the Board following the decision by the Registrar.) Given the intricacies of trade mark law, hearings before the Board are usually conducted by legal counsel with expertise in the area.

The Board is currently composed of three full-time members. Hearings are presided over by one member of the Board. The administrative office of the Board is located in the National Capital Region and all hearings take place in tribunal facilities therein located.

23. VETERANS' REVIEW AND APPEAL BOARD

Established under the *Veterans Review and Appeal Board Act* (S.C., 1995, c. 18). The Board is empowered to review decisions taken by the Minister of Veterans Affairs regarding pension benefits claimed under relevant provisions of the *War Veteran Allowance Act*, or various ministerial decisions made under the *Pensions Act* or other relevant federal statutes. The enabling statute provides that the jurisdiction, powers and functions of the Board are to be interpreted liberally so as to recognize the obligation of the people and government of Canada to those who have served their country so well and to their dependants.

The Board is composed of a maximum of 29 full time members appointed by the Governor in Council, with provision made for the appointment of temporary members if the workload so requires. In carrying out their functions Board members have all the power of a commissioner appointed under Part I of the *Inquiries Act*. Two levels of review of a ministerial decision are provided for. First, an applicant's request for review may be heard by a Review Panel composed in most cases of no fewer than two members of the Board. The applicant is allowed to make written submissions, appear before the Review Panel in person or by representative, and present evidence and arguments. The Panel is empowered to affirm, vary or reverse the ministerial decision under review, or refer the matter back to the Minister for reconsideration. Where an applicant is dissatisfied with the decision of the Review Panel he or she may appeal to the Board, which appeal is heard by an Appeal Panel composed of at least three members of the Board (excluding the original decision-makers). The powers of the Appeal Panel are the same as those vested in the Review Panel.

The administrative offices of the Board are located in Charlottetown, P.E.I.

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Commissioner of Official Languages, *The Equitable Use of English and French Before the Courts in Canada*, november 1995, Minister of Supply and Services Canada, 1995, Cat No. : SF31-32/1995 F, ISBN: 0-662-23928-5.

Association of Canadian Bar, *Rapport du groupe de travail de l'Association du Barreau canadien sur l'indépendance des tribunaux et organismes administratifs fédéraux au Canada*, septembre 1990, ISBN 0-920742-17-3.

Law Reform Commission of Canada, *Report on Independent Administrative Agencies*, (Report No. 26), Ottawa, 1985.

Law Reform Commission of Canada, *Independent Administrative Agencies*, (Working Paper No. 25), Ottawa, 1980.

Notes

1. See *The Equitable Use of English and French Before the Courts in Canada*; a study by the Commissioner of Official Languages; November, 1995; Minister of Supply and Services Canada 1995; Cat. No. SF31-32/1995E; ISBN: 0-662-23928-5.
2. The language rights accorded accused persons are found in Part XVII of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 (s. 530 and 530.1). These *Criminal Code* provisions recognize, *inter alia*, the right of accused persons to be tried before a judge who speaks their official language, to have a prosecutor who speaks their official language, the right to use their official language in oral and written pleadings, various rights respecting interpretation, and the right to the final decision in their official language. For more detail see of our 1995 study, supra, note 1, at pages 16 to 18.
3. For a comparison of the legislative provisions found in Part III of the *Official Languages Act of 1988* with the provisions of the *Official Languages Act of 1969* and the language rights provisions of the *Criminal Code* (s. 530.1) see **Appendix A**. For the text of the provisions of these three acts, see also **Appendix B**. A more complete discussion of the *Criminal Code* provisions is found in our 1995 study, supra, note 1.
4. With respect to the courts of Manitoba see s. 23 of the *Manitoba Act (1870)*, S.C. 1870, c. 3.
5. See ss. 19(2) of the *Canadian Charter of Rights and Freedoms*, adopted in 1982. See *Canada Act, 1982,* c. 11 (U.K.), Sch. B *in* R.S.C., 1985, App.II, No 44.
6. These provisions were found originally in s. 133 of the *British North America Act, 1867*, 30 and 31 Victoria, c. 3 (now called the *Constitution Act, 1867*) and s. 23 of the *Manitoba Act, 1870*. The relevant provisions of s. 133 (similar to those in s. 23 of the *Manitoba Act, 1870*, supra, note 4) read as follows:

"Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses..."
Sections 17 and 18 of the *Charter* recapitulate these original provisions, in so far as they apply to the Parliament of Canada, and extend them to cover the legislature of New Brunswick.

7. The Supreme Court of Canada has interpreted the term "*Act*" as applied to these legislatures in a broad fashion. In *A.G. Quebec* v. *Blaikie* [1979] 2 S.C.R. page 1027, the court ruled that, "[d]ealing now with the question whether "regulations" issued under the authority of Acts of the Legislature of Quebec are "Acts" within the purview of s. 133, it is apparent that it would truncate the requirement of s. 133 if account were not taken of the growth of delegated legislation." Two years later the Supreme Court provided further clarification of what was included in delegated legislation (*A.G. Quebec* v. *Blaikie* [1981] 1 S.C.R. 312 at 333): "Section 133 of the *British North America Act* applies to regulations enacted by the Government of Quebec, a minister or a group of ministers and to regulations of the civil administration and of semi-public agencies...which to come into force, are subject to the approval of that Government, a minister or a group of ministers. Such regulations are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management." A subsequent decision further clarified that government orders in council of a legislative character, as well as documents incorporated by reference, in legislative instruments are, in principle, also covered by the rule of mandatory bilingualism: *Re Manitoba Language Rights (A Special Hearing)*: [1992] 1 S.C.R. 212. See also *A.G. Quebec* v. *Brunet* [1990] 1 S.C.R. 260 and *Sinclair* v. *A.G. Quebec* [1992] 1 S.C.R. 579.
8. This history can be traced in a series of judgments of the Supreme Court of Canada. See: *Attorney General of Manitoba* v. *Forest* [1979] 2 S.C.R. 1032; *Attorney General of Quebec* v. *Blaikie et al*, supra, note 7; *A.G. Quebec* v. *Blaikie et al.* (No. 2), supra, note 7; *MacDonald* v. *City of Montreal* [1986] 1 S.C.R. 460; *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Bilodeau* v. *Attorney General of Manitoba* [1986] 1 S.C.R. 449; *Société des Acadiens et des Acadiennes du Nouveau-Brunswick* v. *Association of Parents* [1986] 1 S.C.R. 549; *R.* v. *Mercure* [1988] 1 S.C.R. 234; *Re Manitoba Language Rights (A Special Hearing)*, supra, note 7. See also the *Brunet* and *Sinclair* decisions, supra, note 7.
9. See *Bilodeau* v. *A.G. Manitoba*, supra, note 8; *MacDonald* v. *City of Montreal*, supra, note 8.
10. *Société des Acadiens et des Acadiennes du Nouveau-Brunswick* v. *Association of Parents*, supra, note 8.
11. See cases, supra, note 7; as well as the *Forest* and *Mercure* decisions, supra, note 8.
12. This narrow view of the scope of s. 133 is reflected in the Supreme Court's ruling that the language rights protected thereunder "...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 writers or issuers of written pleadings and processes, not those of the recipients or readers thereof." *MacDonald* v. *City of Montreal*, supra, note 8.
13. *MacDonald* v. *City of Montreal*, supra, note 8, at p. 496.
14. With respect to the Human Rights Tribunal see Section 50 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, which provides that the Tribunal will accord to the parties involved and other interested parties "...a full and ample opportunity, in person or through counsel, to appear before the Tribunal, present evidence and make representations to it." With respect to the Refugee Division of the Immigration and Refugee Board, see ss. 69.1(5)(a) of the *Immigration Act*, R.S.C. 1985, c. I-2 which requires that the applicant be given "...an opportunity to present evidence, interrogate witnesses and make representations."
15. See ss. 50(2) of the *Canadian Human Rights Act* and ss. 67(2) and 68(3) of the *Immigration Act*.
16. *A.G. Quebec* v. *Blaikie* [1979], supra, note 7, p. 1028.
17. *A.G. Quebec* v. *Blaikie* [1979], supra, note 7, p. 1028.
18. *A.G. Quebec* v. *Blaikie* [1979], *ibid.*, p. 1029. While the Supreme Court was addressing the issue of possible provincial curtailment of Section 133, the same reasoning would apply to Parliament.
19. *Ibid.*, p. 1030.
20. Take for example the National Energy Board. Although it has broad powers to make specific decisions and orders which are enforceable as orders of the Federal Court or any superior court of a province, the *National Energy Board Act*, R.S.C. 1985, c. N-7 also gives it extensive advisory functions under Part II and the authority to publish various studies and reports. These activities are clearly distinguishable from the determination of applications for licences or permits, or the issuance of orders regarding the fulfilment of obligations pursuant to such licenses or permits. For further discussion of this distinction as it applies to the

National Energy Board see page 30 of this study.

21. *A.G. Quebec* v. *Blaikie*, supra, note 7, p. 1028.
22. See *MNR* v. *Coopers and Lybrand* [1979] 1 S.C.R. 495, and subsequent case law.
23. In reviewing the importance of rules of court and justifying the imposition of a rule of mandatory publication in both official languages, the Supreme Court said: "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 Section 133, be written in either language. Rules of practice may also prescribe and do prescribe specific forms for proceedings and processes... All litigants have the fundamental right to choose either English or French and would be deprived of this freedom of choice should such rules and compulsory forms be couched in one language only." *A.G. Quebec* v. *Blaikie et al. (No.2)*, supra, note 7, at p. 332.
24. Constitutionally entrenched in 1982, s. 19(1) of the *Charter* provides: "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."
25. The Supreme Court of Canada has emphasized that the enhancement of official language equality is tied to the legislative process: "I think it is accurate to say that s. 16 of the *Charter* does contain a principle of advancement or progress in the equality of status or use of the two official languages. I find it highly significant however that this principle of advancement is linked with the legislative process referred to in ss. 16(3)... The legislative process, unlike the judicial one, is a political process and hence particularly suited to the advancement of rights founded on political compromise." See *Société des Acadiens et des Acadiennes du Nouveau-Brunswick* v. *Association of Parent*, supra, note 8, at 579.
26. The possibility that s. 20 of the *Charter* might effectively broaden the language rights of an individual in court proceedings was raised in a judgment of the New Brunswick Court of Queen's Bench in 1989. At issue was the validity of a summons which had been filled out by a police officer in his, rather than the accused person's, preferred official language. The case law is clear that a summons may be issued in the official language of choice of a court officer (or policeman) without violating s. 133 of the *Constitution Act, 1867* (or, by extension, s. 19 of the *Charter*). Indeed, s. 133 protects the right of the issuer of a summons to use either English or French. However, the presiding judge determined that the issuance of a summons was a service offered by a provincial government institution and was therefore caught by the requirements of s. 20(2) of the *Charter*. The policeman therefore had an obligation to fill out the summons in the preferred official language of the accused. See *R.* v. *Gautreau* (1989) 101 N.B.R. (2d) 1. This decision was overturned on procedural grounds by the New Brunswick Court of Appeal, *R.* v. *Gautreau* (1990) 560 C.C.C. (3d) 332, and a further decision of the Court of Queen's Bench in a case raising similar questions refused to follow the reasoning in *Gautreau*. See *R.* v. *Boudreau* (1989) 103 N.B.R. (2d) 104; as well as the Court of Appeal decision at *R.* v. *Boudreau* (1990) 107 N.B.R. (2d) 298. While a provincial police force in New Brunswick may be obliged to respect constitutional obligations to serve the public in both official languages with respect to some of its activities, actions taken which are related to actual judicial proceedings, and to which the language freedom set out in s. 19 of the *Charter* apply, will most likely not be considered services within the meaning of ss. 20(2) of the *Charter*.
27. Considerable discretion was given to the courts at s. 11(3) of the *Act of 1969* to determine if it were possible to hold a criminal trial in the official language of the accused:
    "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, any court in Canada may in its discretion, at the request of the accused or any of them if there is more than one accused, and if it appears to the court that the proceedings can effectively be conducted and the evidence can effectively be given and taken wholly or mainly in one of the official languages as specified in the request, order that, subject to Subsection (1), the proceedings be conducted and the evidence be given and taken in that language."
28. See *Jones* v. *A.G. New Brunswick et al*, [1975] 2 S.C.R. 182, at 192.
29. In this regard, the Supreme Court declared: "Certainly, what s. 133 itself gives may not be diminished by the Parliament of Canada, but if its provisions are respected there 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." *Ibid.*, at p. 193.
30. This duty was found in ss. 11(1) of the *Act of 1969*: "Every judicial or quasi-judicial body established by or pursuant to an Act of Parliament, has, in any proceedings brought or taken 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 that the person will not be placed at a disadvantage by not being or being unable to be heard in the other official language."

31. This was found in ss. 12(2) of the *Act of 1969*:
"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 official 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."
No federal bilingual districts were ever proclaimed under the *Act of 1969*, thus effectively restricting this provision to proceedings conducted in the National Capital Region.
32. Subsection 5(1) of the *Act of 1969* set out the basic principles concerning bilingual issuance of decisions:
"All final decisions, orders and judgments, including any reasons given therefor, issued by any judicial or quasi-judicial body established by Parliament shall be issued in both official languages where the decision, order or judgment determines a question of law of general public interest or importance or where the proceedings leading to its issue were conducted in whole or in part in both official languages."
However, ss. 5(2) recognized a tribunal's over-riding discretion to issue a final decision, etc. in only one official language [even where ss. 5(1) applied] where it was of the opinion "...that to issue the decision, order or judgment, including any reasons given therefor, 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 issue..." In such cases, a translation was to be made available "within such time as is reasonable in the circumstances". This latter principle applied as well to all other final decisions, etc. which were not subject to ss. 5(1) of the *Act of 1969*.
33. Section 14 of the Act declares: "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." See also in regard of this Section: Beaudoin v. Canada, [1993] 3 F.C. 518, p. 525-526: "But the right to a hearing in her own official language for the applicant must take precedence. One does not need to be a linguist to recognize that mere comprehension of words in a second language is entirely different from the full ability to express oneself so as to advance a persuasive case. The respondent succeeded in having added to the record at the hearing before us the original statutory declaration under the Canada Pension Plan which the applicant had made in English. Quite apart from the fact that her use of English in that uncontroverted context could not preclude her later option to have her hearing before the board in French, her egregious errors in spelling and grammar in that form make clear her serious disadvantage in expressing herself in the English language... An unrepresented party's bona fide request, on notice, for a hearing in the other official language must always be respected in full, and its denial amounts to a denial of natural justice, since it fetters the requesting party's ability to present a case in his or her own way. In the case at bar, the decision not to adjourn also entailed in the circumstances an infelicitous fiasco in which a mute applicant functioned only as a result of the generosity of another party's counsel."
34. The *Official Languages Act* adopts the notion found in the case law interpreting s. 133 that administrative tribunals which have adjudicative functions must respect the right to use either English or French in their proceedings. Thus, the term "federal court" (used throughout Part III of the *Act*) is defined as meaning "any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament." The *Act* would therefore appear to give the same meaning to the word "court" as was given to it by the Supreme Court of Canada in interpreting s. 133.
35. See s. 16 of the *Act*.
36. It remains an open question as to whether or not the institutional duty to ensure that a judge or adjudicator be able to understand a party's official language (set out in s. 16 of the *Act*) implies the further requirement that they also be able to speak it. Some support for interpreting s. 16 so as to include this requirement can be found in the underlying purpose of the *Official Languages Act* "to ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and

privileges as to their use in all federal institutions, in particular with respect to their use... in the administration of justice..." (ss. 2(a) of the *Act*)

37. Section 18 of the *Act* provides:
"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."
38. See ss. 15(1) of the *Act*.
39. This is found in ss. 15(2) of the *Act*. Subsection 15(3) further provides that a federal court or tribunal may in its discretion provide simultaneous interpretation for members of the public "...where it considers the proceedings to be of general public interest or importance or where it otherwise considers it desirable to do so..."
40. Subsection 19(1) provides: "The pre-printed portion of any form that is used in proceedings before a federal court and is required to be served by any federal institution that is a party to the proceedings on any other party shall be in both official languages."
41. Subsection 19(2) provides: "The particular details that are added to a form referred to in Subsection (1) may be set out in either official language, but, where the details are set out in only one official language, it shall be clearly indicated on the form that a translation of the details into the other official language may be obtained, and, if such a request is made, a translation shall be made available forthwith by the party that served the form."
42. See ss. 20(1) of the *Act*.
43. See ss. 20(2) of the *Act*.
44. See *Official Languages (Communications with and Services to the Public) Regulations*; SOR/92-48; Canada Gazette Part II, Vol. 126, No. 1 (January 1st 1992).
45. For more detail on the rules applicable to CMAs see paragraphs 5(1)(a) through (g) of the *Official Languages Regulations*.
46. For more detail on the rules applicable to CSDs see paragraphs 5(1)(h) through (r) of the *Official Languages Regulations*.
47. See s. 28 of the *Act*.
48. Section 30 provides:
"Subject to Part II, where a federal institution is engaged in communications with members of the public in both official languages as required in this Part, it shall communicate by using such media of communication as will reach members of the public in the official language of their choice in an effective and efficient manner that is consistent with the purposes of this Act."
49. The right to receive services and communicate with federal institutions is subject to various conditions set out in Part IV of the *Act*, such as geographical location, significant demand, the nature of the office or facility maintained by a federal institution (in particular whether the health, safety of security of the public is involved), and whether the travelling public is concerned. These factors have an impact on the duty of a federal institution to communicate with the public in both official languages insofar as that communication relates to the services it offers.
50. The vast majority of the tribunals studied were organized in such a way as to allow for hearings to be conducted in all regions of the country. Some maintain permanent regional offices, such as the Canada Industrial Relations Board (before, Canada Labour Relations Board), the CRTC, and the Immigration and Refugee Board, while others operate only from offices in the National Capital Region but hold hearings regionally according to need, such as the Public Service Staff Relations Board, the Canadian Artists' and Producers' Professional Relations Tribunal, the Pensions Appeals Board and the Human Rights Tribunal. In some cases the head office of a tribunal may be located outside the National Capital Region, such as the National Energy Board (located in Calgary but able to conduct hearings in other regions of Canada) and the Veterans' Review and Appeal Board (located in Prince Edward Island).
51. This was discussed more fully in Part 3.3 of the present study. In addition, s. 20(1)(a) of the *Charter*

guarantees the right to services in either official language where there is significant demand.

52. A good example here would be the Tax Court of Canada. Where individual taxpayers appear before this tribunal the opposing side would be counsel representing the federal government. Since other private parties are not involved, the general language of procedures can without difficulty correspond to that of the individual taxpayer. Indeed, the realities of such proceedings explain why the vast majority are conducted unilingually in either English or French.
53. Examples of this would include hearings conducted before the Canadian Radio-Television and Telecommunications Commission, before the Canadian Artists' and Producers' Professional Relations Tribunal, or before the National Energy Board.
54. There may of course be hearings considered of general public interest or importance where the availability of simultaneous interpretation is appropriate. The *Official Languages Act* [s. 15(3)] specifically recognizes the discretion of a federal court or quasi-judicial tribunal to cause simultaneous interpretation to be made available in such circumstances (or for any other reason where the court or tribunal considers it desirable to do so).
55. The relevant provision is:
    "Rule 314(2) A requisition referred to in Subsection (1) shall:
    (...)
    f) indicate whether the hearing will be in English or French, or partly in English and partly in French.
56. See Rule 347 of the *Federal Court Rules (1998)*.
57. Some quasi-judicial tribunals have valid policy reasons for favouring less formal procedural requirements than actual courts of record. For example, the Public Service Staff Relations Board does not generally record proceedings which take place before it because it wishes to promote alternative dispute resolution mechanisms. The Canada Industrial Relations Board has a similar policy, though it does record proceedings if issues raised are particularly important or significant (including constitutional issues). With respect to all proceedings, however, the Board ensures that proper minutes are prepared.
58. Enabling statutes may provide for relevant ministers to make recommendations to Cabinet regarding appointments, though there is little in the way of formal procedures. In point of fact, the Office of the Prime Minister exercises considerable authority in this regard, though how it is used varies from one government to another.
59. In order to assist the federal Minister of Justice regarding judicial appointments a system of advisory committees has been established. There is an advisory committee for each province and territory, with the possibility of regional committees within a province (Ontario currently having three and Quebec two). Persons who sit on the advisory committees are appointed by the federal Minister of Justice from a list of nominees submitted by the Minister, law societies, bar associations, provincial chief justices and provincial Attorneys General. Members of the committees are expected to reflect factors appropriate to the jurisdiction where they will sit, such as geography, multiculturalism, gender and language. While judicial appointments are the ultimate responsibility of the federal cabinet acting on the advice of the federal Minister of Justice, the system of advisory committees provides important guidance in the decision-making process. The advisory committee system is administered by the Office of the Commissioner for Federal Judicial Affairs.
60. See for example an extensive report of the Canadian Bar Association: Association du Barreau canadien, *Rapport du Groupe de travail de l'Association du Barreau canadien sur l'indépendance des tribunaux et organismes administratifs fédéraux au Canada*, September 1990, ISBN 0-920742-17-3; Mullan (D.J.), *Administrative Tribunals: Their evolution in Canada from 1945 to 1984, in Regulations, Crown Corporations and Administrative Tribunals*, Bernier and Lajoie, editors, University of Toronto Press, Toronto, 1985; Law Reform Commission of Canada, *Report on Independent Administrative Agencies*, (Report No. 26),Ottawa, 1985; Law Reform Commission of Canada, *Independent Administrative Agencies*, (Working Paper No. 25), Ottawa, 1980.
61. The Report of the Canadian Bar Association (supra, note 60), for example, quotes with approval from Report No. 26 of the Canadian Law Reform Commission (supra, note 60):
    "In particular, we think that each minister who is responsible for making a recommendation to Cabinet with respect to the filling of an appointed position should invite applications and nominations for that position. A minimum step, where a member is to be appointed, would be to consult the head of the agency.The process would be considerably more credible if each minister were to constitute an advisory committee to assist in the selection of appointees to agencies for which he is responsible. Testing and interviewing skills already developed for public service employment could be used by such a committee to produce a "short list" of the

best qualified potention appointees. We claim no monopoly on suggestions. There is room for experimentation." (pages 77-78 of Report No. 26 of the Law Reform Commission)

62. This position was adopted by the Federal Court of Canada in the case of *Lavigne* v. *Canada (Human Resources Development)*; [1995] F.C.J. No. 737; Action no. T-1077-94. The Court distinguished pleadings from evidence and concluded that neither the *Constitution* nor the *Act* obliged the Crown to present affidavit evidence in an official language other than the one in which is was prepared. See also the article of René Cadieux about the Court Remedy pursuant to s. 77 of the *Act* which reviews this question: Cadieux (R), « La *Loi sur les langues officielles* de 1988 -- Le recours en vertu de l'article 77 : Recours exclusif ? », Montreal, 1999.
63. Where simultaneous bilingual issuance is not required, the relevant paragraph of ss. 20(2) of the *Act* applicable to tribunal decisions reads as follows:
"...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."
By comparison, it is interesting to note that s. 13 of the *Official Languages Act of the Northwest Territories* - which deals with the language of decisions - provides a similar obligation to that of ss. 20(1) of the *Act*, but it does not provide a similar obligation to that found in ss. 20(2) of the *Act*.
64. The Immigration and Refugee Board (IRB) is divided into three sections: (i) refugee status division; (ii) adjudication division; and (iii) immigration appeal division. Data supplied by the IRB indicate that the three divisions combined held a total of 43,847 hearings in 1996, though the number of written decisions appears to be considerably below this figure. In this regard, it would appear that for the year 1994-95 the IRB issued 5,410 written decisions, 84% being initially issued in English and 16% in French. While data may not be complete, it is evident that the IRB issues many thousands of written decisions each year.
65. See *Devinat* v. *Commission de l'immigration et du statut de réfugié*, Federal Court, File No.: T-2062-96 (Mr. Justice Nadon, May 1, 1998). A Notice of Appeal filed on September 25, 1998 (No. A-336-98).
66. For the year 1996, *Reflex* published 295 summaries of decisions issued by the refugee division of the IRB, as well as 90 summaries of decisions issued by the immigration appeal division.
67. *Ibid.*, paragraph 26 of judgment issued May 1, 1998.
68. *Ibid.*, paragraph 28 of judgment: [translation] "In my opinion, if the plaintiff can apply, in this instance, for a remedy under Section 18.1 of the *Federal Court Act*, R.S C. 1985, c. F-7, this remedy must be a remedy related to the exercise by the federal office, in this instance the IRB, of a jurisdiction or of powers conferred on it by a federal statute."
69. *Ibid.*, paragraph 30 of judgment.
70. Prior to 1994, the IRB routinely translated decisions which were available in the *Quicklaw* data base. Decreased funding for translation resulted in the IRB exceeding its allotted budget by $373,391.19 in fiscal year 1992/93, a sum for which Treasury Board had to be reimbursed. In light of these constraints, the IRB introduced its policy of supplying a translation of such decisions only upon specific demand from a member of the public.
71. *Devinat* v. *Commission de l'immigration et du statut de réfugié*, supra, note 65, paragraph 52 of judgment.
72. Appeal filed September 25, 1998; *Devinat* v. *Commission de l'immigration et du statut de réfugié*, No. A-336-98; Federal Court of Appeal.
73. Various comments, some of them negative, concerning this part of the study were received by the Commissioner too late in the process of preparing this text for publication to be fully integrated into the text. However, insofar as possible, the Commissioner has taken them into account here and has modified the text so as to reflect all points of view, particularly with regard to the reasons that warrant, in the opinion of the tribunals, the use of a system of priorities for the translation of decisions to facilitate compliance with the requirements of Section 20 of the *Act*. In addition, he has responded to these late comments by sending a letter directly to the persons concerned.