STUDY OF THE OFFICIAL LANGUAGE OBLIGATIONS OF FEDERAL CROWN AGENTS IN THE PROVINCE OF NEW BRUNSWICK

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1. Background

1.1 Aim and purpose of this study

This study reviews the sufficiency of current administrative procedures applied by the federal Department of Justice in New Brunswick to ensure full compliance by Crown agents with official language obligations in the administration of justice. The need to conduct a study of the situation emerged in the course of a review, by our office, of problems brought to our attention (from both New Brunswick and Ontario) concerning difficulties encountered by accused persons or their representatives, and parties involved in civil procedures, in exercising language rights guaranteed under federal law and regulations. Although this study focuses on the province of New Brunswick, its general observations will no doubt have relevance to the manner in which the system of Crown agents is managed by the Department of Justice in other parts of the country.

In both civil and criminal matters, the federal Department of Justice periodically relies upon lawyers in private practice to act as official Crown agents. In essence, such agents provide professional services that would otherwise be provided by Crown counsel working full-time for the Department of Justice. In previous studies we made reference to the official language obligations of the federal Department of Justice, whether it operates by means of full-time Crown counsel or by means of lawyers in private practice acting as Crown agents.[1]

In civil matters heard by federal courts, these obligations include the duty, under Part III of the *Official Languages Act* (OLA), to ensure that the official language used in oral and written pleadings by legal counsel representing a federal interest corresponds to that used by the other parties involved. With respect to criminal matters, full-time federal prosecutors, as well as Crown agents acting on behalf of the federal Department of Justice, are obliged to respect the official language rights of accused persons set out in Part XVII of the *Criminal Code*; i.e., the accused's right to be tried in his or her own official language.

Previous studies by the Office of the Commissioner of Official Languages (Office of the Commissioner) also pointed out the relationship that exists between language rights applicable to the court process per se and the rights of members of the public to receive services from federal institutions, and to communicate with them, in their preferred official language.[2] As we then indicated, the right to engage the court process in either official language would be inhibited by an administrative framework unable to provide necessary ancillary services in both languages. This problem is also reflected in complaints that we have received dealing with the difficulties experienced by accused persons and their agents, as well as the parties in civil proceedings, in exercising their language rights.

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1 *The Equitable Use of English and French Before the Courts in Canada*, Commissioner of Official Languages, November 1995; Supply and Services Canada 1995: Cat. No. SF31-32/1995SE; ISBN: 0-662-23938-5; *The Equitable Use of English and French Before Federal Courts and Administrative Tribunals Exercising Quasi-judicial Powers*, Commissioner of Official Languages, May 1999; Supply and Services Canada 1999: Cat. No. SF31-37/1999; ISBN: 0-662-64056-X.

2 *Ibid*. In particular, see the study of the Office of the Commissioner, *The Equitable Use of French and English Before Federal Courts and Administrative Tribunals Exercising Quasi-judicial Powers*, p. 23.

1.2 Problems pertinent to this study brought to the attention of the Office of the Commissioner

Administrative deficiencies were initially alleged with regard to a complaint from Ontario. This complaint alleged that a Francophone accused and his legal counsel (who was informally assisting him) had experienced difficulties in communicating with and receiving a response in French from the Crown agent responsible for the prosecution. More specifically, a letter written in French to the Crown agent by legal counsel informally representing the accused, detailing the failure of the docket court to inform the accused of his language rights under Part XVII of the *Criminal Code*, resulted in the Crown agent sending a letter written in English to both the accused and legal counsel who had intervened on his behalf.

Our investigation of this complaint showed that there had been a lack of comprehension of the language rights of the accused under the *Criminal Code*, as well as a failure to respect provisions in the OLA regarding the right of a member of the public to receive communications in either official language wherever reasonable demand exists. With respect to the latter, section 22 of the OLA and the *Official Languages (Communications with and Services to the Public) Regulations*[3] oblige the regional office of the Department of Justice, which has administrative responsibilities within the area where the case arose, to provide services to and communicate with the public in either official language. While the regional office was not itself directly involved in the disputed communications, section 25 of the OLA was clearly applicable to persons acting on its behalf:

> Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

In response to our investigation and report to it, the federal Department of Justice agreed that a letter addressed in French to a Crown agent acting on its behalf in the area where this particular case arose should have received a response in French in accordance with the provisions of section 25 of the OLA.

The Department also wrote to the agent in question to remind him of official language obligations and to draw his attention to directions contained in a document entitled *General Instructions to All Crown Agents*. While the latter document purportedly included instructions regarding the scope of section 25 of the OLA, our examination of it revealed no such reference. The Commissioner therefore recommended that in future all Crown agents acting on behalf of the Department be informed more formally of legal requirements regarding the provision of services to and communications with the public in both official languages.

In August 1997 the Commissioner was informed by letter that the Department of

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[3] *Official Languages (Communications with and Services to the Public) Regulations* SOR/92-48, *Canada Gazette*, Part II, Vol. 126, No. 1 (January 1, 1992).

Justice was in the process of revising the *Terms and Conditions of Appointment of Crown Agents* and that specific reference to the requirements of section 25 of the OLA would be included. In the spring of 1999, representatives of the Department of Justice informed us that an initial revision of this document had been made, but that the question of section 25 of the OLA had not yet been dealt with. More recently, in his letter of October in reply to our request for comments on the draft of this study, the Deputy Minister of Justice reiterated that his Department expected to complete these revisions in November 1999 and that he would forward us a copy of this document. As we finalized this study, we had not yet received a copy of the document.

During the period when the complaint from Ontario was being examined, our Office was also reviewing similar complaints received from New Brunswick. Representations made to the Commissioner by the Association des juristes d'expression française du Nouveau-Brunswick indicated that there may also be administrative inadequacies with respect to the ability of federal Crown agents in that province to respond appropriately to demands for services and communications in the preferred official language of members of the public. Moreover, the manner in which French is accommodated as a language of procedure at all stages of court processes raised concerns relevant to the full respect and implementation of language rights under Part XVII of the *Criminal Code*. In light of such representations, and our investigation of the complaint from Ontario, we undertook to review the existing framework within which federal Crown agents in New Brunswick are managed, the means by which official language obligations of the federal Department of Justice are integrated into that framework, and the current capacity of federal Crown agents in New Brunswick as a whole to respond to the use of both official languages in criminal and civil procedures.

1.3 Gathering information for this study

In order to gain an understanding of the manner in which the system of federal Crown agents operates in New Brunswick, we consulted a number of legal counsel: three French-speaking lawyers who practise most of the time in French (although all indicated they were bilingual and were able to conduct legal proceedings in English) and three English-speaking lawyers (who are not bilingual and practice law exclusively in English). All six lawyers currently act as Crown agents or have so acted in the past. While the interviews conducted do not permit us to draw definitive conclusions regarding the degree to which members of the public can receive legal services in either official language from federal Crown agents across the province, they provide useful insights into administrative procedures now in place. Interviews were also conducted with three full-time legal counsel at the Halifax regional office of the Department of Justice, which has management responsibilities with respect to Crown agents operating in the Atlantic provinces.

After analyzing the information received, we prepared a draft of this study and forwarded it to Justice Canada in September 1999 to obtain the Department's comments. The Deputy Minister of Justice responded to us in October 1999 in a letter in which he assured us that "the Department of Justice remains committed to respecting the right of the public to communicate with agents of the Department in either official language" and that his

"Department takes seriously the right of an accused person that the plaintiff speak the same language as he, as well as the right of parties to proceedings before a court subject to section 18 of the OLA" [our translation]. He also included some specific comments, which we took into account when finalizing this study.

2. Statutory Rights and Obligations in Federal Laws

It is useful at the beginning to present an overview of the federal statutory provisions and pertinent regulations that apply to the use of our two official languages in court processes involving the federal Department of Justice.

2.1 Language obligations applicable to criminal proceedings under Part XVII of the *Criminal Code*

As alluded to above, accused persons have the right under Part XVII of the *Criminal Code* of Canada to be tried before a judge, or judge and jury, who speak their official language, as well as the right to have a prosecutor who speaks their official language assigned to the case. In essence, the guarantees under Part XVII are designed to ensure that accused persons anywhere in Canada may, at their option, be tried in their preferred official language.[4] Respect for the rights under Part XVII clearly obliges the federal Department of Justice, when conducting prosecutions to which Part XVII applies, to choose full-time Crown counsel or Crown agents (to act as prosecutors) willing and able to speak the language of accused persons. To fulfil this obligation, the pool of available counsel must include a sufficient number of individuals possessed of the requisite language capabilities, although the proportion of prosecutors able to speak the minority official language will obviously vary as a function of the demand for minority language trials in any given area.

The types of prosecution undertaken by federal Crown agents vary considerably. While matters falling under the *Food and Drugs Act* or the *Narcotics Control Act* come quickly to mind, other areas include the *Customs Act*, the *Excise Act*, the *Fisheries Act*, the *Income Tax Act*, the *Employment Insurance Act* and the *Immigration Act*, to name but a few. Regulations adopted under various federal statutes may also constitute the basis upon which prosecutions are commenced.

The ability of a federal prosecutor to speak the official language of the accused obviously facilitates the use of that language in communications which take place outside the formalities of the courtroom itself. Requests for information by the accused or counsel prior to trial are not unusual occurrences, a fact that makes it important that the federal Crown be able to respond in the official language in which such requests are transmitted. The use of an accused's official language is also important with respect to communications initiated by the federal Crown relevant to pending court proceedings.

2.2 Language obligations applicable to civil proceedings in federal courts under Part III of the *Official Languages Act* (OLA)

Part III of the OLA also contains provisions relevant to the use of official languages in legal proceedings conducted before all federal courts.[5] Of particular importance is section 18, which imposes the duty on the federal Crown (where it is a party to civil proceedings before federal courts) to use the official language of the other parties in any oral or written pleadings. In

[4] For a more detailed and complete description of the provisions of Part XVII of the *Criminal Code*, see the study of the Office of the Commissioner, *The Equitable Use of English and French Before the Courts in Canada*, pp. 16-23, *op. cit*., Note 1.

[5] For further details, see the study of the Office of the Commissioner, *The Equitable Use of English and French Before Federal Courts and Administrative Tribunals Exercising Quasi-judicial Powers*, pp. 21-23, *op. cit*., Note 1.

choosing Crown agents to act in civil proceedings before federal courts, the Department of Justice must therefore be sensitive to the linguistic requirements of any given case. An agent's ability to use the official language of other parties in oral and written pleadings also facilitates the use of that language in all communications between parties and their counsel which take place outside the courtroom itself. Indeed, arguments advanced above suggest that requirements under Part IV of the OLA oblige federal Crown agents to respect the right of other parties to civil proceedings before federal courts to communicate with them and receive information from them in their preferred official language.

2.3 Language obligations applicable to communications with the public and the provision of services under Part IV of the OLA

As a federal institution, the Department of Justice is subject to the requirements of Part IV of the OLA. In this regard, the right of any member of public to communicate with and receive available services from such institutions is clearly set out in section 21 of the Act. This right applies with respect to all head or central offices of federal institutions, to all offices or facilities within the National Capital Region, and to all other offices and facilities situated in regions where a significant demand exists for services and communications in either official language (section 22).

Regulations adopted in December 1991, pursuant to section 23 of the OLA, establish parameters for determining significant demand.[6] In general terms, the regulations distinguish between large urban centres of 100,000 people or more (census metropolitan areas – CMAs) and smaller cities, towns and rural regions (census subdivisions – CSDs), establishing different threshold levels for the minority population in each category necessary to warrant 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 a least one of their offices. The same rule applies if the minority population within the CMA falls below 5,000 but the minority population of the service area of the federal office is equal to or above that figure. When these regulatory standards[7] are applied, we find that federal institutions operating in the following cities are required to provide services in both official languages in accordance with the rules just mentioned: Saint John's, Halifax, Quebec, Sherbrooke, Montreal, Sudbury, Toronto, Hamilton, St. Catharines-Niagara, London, Windsor, Winnipeg, Calgary, Edmonton and Vancouver.

With respect to the smaller CSDs, two-language 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 5 percent of the CSD population. The same is required 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[8] are applied, we find that federal institutions with

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6 *Official Languages (Communications with and Services to the Public) Regulations*; *op. cit*., Note 3.

7 For more detail on the rules applicable to CMAs see subsection 5 (1) (a) through (g) of the *Official Languages Regulations*, *op. cit*., Note 3.

8 For more detail on the rules applicable to CSDs see subsection 5 (1) (h) through (r) of the *Official Languages Regulations*, *op. cit*., Note 3.

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 Department of Justice serves the New Brunswick public, for the purposes of Part IV of the OLA, from its office located in Halifax for criminal and civil matters, and from its office in Ottawa, in part, for civil matters. It also provides its services through Crown agents who act on behalf of these two offices, within the meaning of section 25 of the OLA. The Ottawa office, as a head or central office, is subject to section 22 of the OLA. The Halifax office is subject to section 22 of the OLA under the definition of "significant demand" found in paragraph 5(1)(a) and subparagraph 11(a)(i) of the Regulations referred to above. The list of offices of federal institutions subject to the language obligations set out in the OLA and its Regulations is prepared by the Treasury Board Secretariat of Canada, which publishes it on its Web site. This list, updated on March 11, 1998, states that, in Ontario, the offices of the Department of Justice located in Ottawa and, in Nova Scotia, the offices located in Halifax are both subject to section 22 of the OLA (see ss. 5(1)(a) and 11(a)(i) of the Regulations). It is thus clear that communications and services provided to the public by the Department of Justice in its Ottawa and Halifax offices that serve New Brunswick satisfy significant demand requirements and must be provided in both official languages.

The OLA 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 their availability. 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.[9] Treasury Board has also adopted an official policy regarding an active offer of service, which states that "in designated offices or service points, federal institutions or third parties acting on their behalf must:

- make it clear to all members of the public that they can communicate with and be served in the official language of their choice; and
- provide services of comparable quality in either official language."

In other words, a passive response to the requirements of the OLA is not sufficient, and federal institutions subject to section 22 must reach out with an active offer of service in both official languages.

While all these provisions apply to the Department of Justice, a further requirement of the OLA of particular relevance concerns the delegation of institutional responsibilities to non-governmental organizations and individuals. As already mentioned in the Background to this study, the OLA (section 25) imposes the duty upon federal institutions to ensure that, where third parties are authorized to provide services on their behalf, members of the public can communicate with and receive such services from them in either official language, at least to the same extent as would have been the case had the institutions themselves directly provided the services in question. Since Crown agents appointed by the Department of Justice fall within the scope of section 25, it is important that the Department apply administrative rules that ensure adequate protection of the rights of members of the public under Part IV of the OLA.

The right to services in either official language

[9] See section 28 of the OLA.

under Part IV does not require, of course, that all public servants be bilingual. Neither does it impose any such obligation on all third parties engaged by federal institutions within the meaning of section 25 of the OLA. However, it does create an institutional obligation to ensure that adequate human resources are in place to allow for services to be offered, and communications made, in either English or French wherever reasonable demand exists or within the National Capital Region or at head offices of federal institutions. This would naturally affect the over-all composition of Crown agents appointed by the Department of Justice in any given province and their regional distribution.

Accordingly, the Department has a statutory duty to ensure that third parties acting on its behalf (i.e., federal Crown agents) are in a position to respect the right to service provisions found in the OLA.

3. Federal Crown Agents in New Brunswick

3.1 Appointment of agents and information available to them about language rights

The appointments coordinator in the Department of Justice in Ottawa maintains an up-to-date list of lawyers who are available to act, on an ad hoc basis, as federal Crown agents in both civil and criminal cases. Inclusion on this list is a prerogative of the federal government (specifically, of the Minister of Justice). In this regard, the Department of Justice has informed us that the names appearing on this list have always been checked in advance by the Minister of Justice's office. However, if a client department proposes the appointment of a lawyer whose name does not appear on this list, the proposal can also be submitted on an ad hoc basis to the Minister's office for checking and possible approval.

The Halifax regional office of the Department of Justice has general responsibilities regarding the appointment and management of Crown agents who act for the Department in the province of New Brunswick. However, the manner in which Crown agents are selected to act in any given case varies as a function of its civil or criminal nature.

A) CIVIL CASES

In civil cases, the head office of the Department of Justice in Ottawa chooses the lawyer who will represent the federal interest, after considering the case requirements transmitted to it by its Halifax office. These requirements constitute the particulars of any given case, assembled by government departments or other federal institutions which are, or may become, involved in court proceedings and have sought the advice and assistance of the Halifax regional office of the Department of Justice. The Halifax office relies on its client departments to report the official language needs of any given case, and this information is included in the case requirements sent to Ottawa.

Once one or more legal counsel have been identified by the head office as potentially able to act in a given case, based on the list of lawyers available on an ad hoc basis established by the appointments coordinator, the regional office makes inquiries to confirm availability. If availability is confirmed, the regional office prepares a letter of appointment setting out specific instructions with respect to the particular mandate assigned to the legal counsel and indicating what types of reports and information should be transmitted to the Halifax office throughout the course of the legal proceedings. Included with the letter is a document entitled *General Instructions to All Crown Agents (Instructions)*. Point 18 of these instructions states:

> Crown agents must ensure that the following provisions are undertaken concerning both official languages in all locations in Canada:
>
> Proceedings before Courts, Commissions and other bodies:
>
> 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 party(ies) concerned. If this requires that the case be referred to another agent, steps should be taken to do so. 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.
>
> When the Crown initiates proceedings that result in an advertisement being published

(or legal notices are otherwise published by the Crown) the agent must ensure that such notices are published in a bilingual format. If assistance is required, agents are requested to contact the instructing officer or Justice Regional Office.

The *Instructions* make no distinction as to the province where a Crown agent works. However, the phrase "where proceedings or pleadings may be conducted in either official language" effectively incorporates a variable into the scope of an agent's official language obligations, based on province of practice. The right to use both English and French before the courts in Canada varies considerably from one province to the next, as a function of constitutional guarantees and specific statutory provisions enacted by various provinces.[10] (The impact this has in the province of New Brunswick will be discussed below.) Accordingly, proceedings may, depending on the provincial legislation, be conducted in either official language before provincial courts. This does not necessarily mean that federal language provisions apply or, conversely, that they do not apply. Without necessarily making separate instructions for each province and bearing in mind the fact that these instructions are, as the Department of Justice informed us, national in scope, it would, however, be preferable to specify that, regardless of the provincial right, federal language obligations should always be respected when applicable.

With respect to civil matters, the *Instructions* are also vague, unlike the instructions on criminal matters, regarding what steps should be taken to ensure that a file is transferred to another agent in accordance with the preferred official language of private parties. On a perusal of the *Instructions*, it would appear that the statutory duties of the Department to ensure that applicable language rights are respected have been transferred, in civil matters, to Crown agents.

There does not appear to be any requirement to notify the Department of Justice of the need to transfer a file because of the preferred official language of the private parties. The Deputy Minister of Justice, in his letter of October 1999 responding to the draft of this study, wrote that "it must be borne in mind that one agent does not have the authority to transfer a file to another agent," that "only the Minister of Justice may make an appointment," and that consequently, "when an agent finds it impossible to act in any file, whether for linguistic or other reasons, the agent has no choice but to contact the Department of Justice to have the file transferred to another agent" [our translation]. There is, however, no obligation of this kind included in the *Instructions* as regards civil matters. If the intention is to make agents responsible for notifying the Department in this regard, the *Instructions* should expressly provide for this with respect to civil matters, as they do with respect to criminal matters. This would ensure that, in all cases, the Department of Justice could be informed and could put procedures in place to appoint another agent if necessary.

B) CRIMINAL CASES

With respect to criminal cases, the Department of Justice maintains, in addition to the list of lawyers available on an occasional basis, an up-to-date list of standing Crown agents for New Brunswick. These agents are appointed by letter signed by the regional office on the advice of the Minister of Justice. The letter of appointment indicates the federal statutes under which the

[10] See the study of the Office of the Commissioner, *The Equitable Use of English and French Before the Courts in Canada*, *op. cit.*, Note 1.

Crown agent is authorized to prosecute and the region within which the authorization is effective. The letter also identifies a supervisor within the Halifax regional office to whom the Crown agent reports. Among other things, the supervisor is responsible to monitor the work of the Crown agent, keep him or her abreast of Justice Department policy, and provide advice and assistance where required. It should be noted that, when the lawyer is hired on an occasional basis, the details of the case are included in the specific letter of appointment.

In general, appointment is governed by a document entitled *Terms and Conditions of Appointment for Legal Agents for Standing and Ad Hoc Criminal Appointments* (hereinafter *Conditions of Appointment*). When we conducted this investigation, this document, unfortunately, existed only in English. It seems, however, that in revising the document, the Department has prepared both an English and a French version. We have not yet obtained a copy of the revised document, however, since the revision process is not complete. The version of these *Conditions of Appointment* currently in force, which we examined, includes a reminder that the appointment "is at the pleasure of the Minister of Justice and Attorney General of Canada and may be terminated at any time."

Also included in the standard *Conditions of Appointment* (amended in 1998) is a reference to the impact of the OLA and language rights found in Part XVII of the *Criminal Code*. Paragraph 3.4.1 of the *Conditions of Appointment* provides:

> In proceedings before courts, tribunals, commissions and other bodies where proceedings may be conducted and pleadings or process issued in either official language, legal agents should use the official language chosen by the private party or parties concerned in both oral and written pleadings. Where a legal agent initiates communications or proceedings on behalf of the Crown and the language preference of the other party or parties is known, that official language should normally be used. Where any legal notice is required to be published it must be in bilingual format.

With respect to criminal proceedings, the same paragraph of the *Conditions of Appointment* reminds Crown agents that "Part XVII of the *Criminal Code* on the language rights of the accused and subsection 841(3) on bilingual forms are especially important." It also underscores what legal agents are required to do when it becomes necessary to assign the case to another agent. They must ensure:

> … where the accused has elected under section 530 of the *Criminal Code* to be tried before a judge (or a judge and jury) who speaks the official language that is the language of the accused, that Crown counsel also speaks the language of the accused (the Agent Supervisor should immediately be advised where any of the above duties would require that the case be referred to another agent) … .

The *Conditions of Appointment* also contain provisions (added in 1998) that address the issue of communications with the public. Paragraph 3.4.2 provides:

> The legal agent must be able to provide services and communications (such as correspondence and telephone calls) in the official language of the parties and the Agent Supervisor must be notified immediately if a legal agent is unable to provide those services or if the legal agent requires assistance in preparing a legal notice in bilingual format.
>
> In addition, any member of the public, apart from the parties and counsel to a given case, has the right to communicate with the legal

agent in the official language of their choice, both in oral and written communications.

The same paragraph also establishes the principle that "if the matter is referred to the Agent Supervisor, it must be done in a fashion that ensures that the quality and expediency of service provided are comparable, whether it is offered in English or French." While this part of the paragraph is vague, it would seem to envisage the transfer back to a regional office of the Department of Justice of requests for information or services from the public in general.

The same paragraph makes reference as well to the notion of an active offer of service in both official languages:

> In all communications, the legal agent should alert the caller to the availability of services in either official language. For example, this may be accomplished by answering the telephone by identifying the legal agent's firm in one official language and greeting the person in the other. The receptionist could answer by saying, "Firm name, bonjour."

Paragraph 3.4.2 ends by referring the legal agent to Schedule J for further information regarding the OLA. Schedule J contains both a brief commentary and verbatim transcripts of provisions in Part XVII of the *Criminal Code* and relevant provisions of the OLA. With regard to the latter, the schedule explains the scope of provisions regarding communications and services provided by federal institutions or third parties acting on their behalf. It points out that the application of statutory and regulatory rules effectively establishes that "all regional offices of the Department of Justice, except for the office situated in Yellowknife, are located in regions where there is significant demand and where consequently they fall under the scope of application of s. 20 of the Charter and Part IV of the OLA."

3.2 Agents' knowledge of language rights

Interviews conducted with six Crown agents in New Brunswick suggested that the manner in which information regarding official languages was transmitted in the past to Crown agents may have been ineffective. Although all agents consulted were aware that an accused or civil litigant could request legal proceedings in either English or French, very few could identify legal and policy requirements regarding an active offer of service in either official language. There was also a tendency to link language rights in the administration of justice to the operation of provincial law and provincial rules of court, with little or no reference to requirements found in federal law. Regarding the prosecution of provincial offenses, the *Official Languages Act* of New Brunswick provides:

> Subject to subsection (1), a person accused of an offence under an Act or a regulation of the Province, or a municipal by-law, has the right to have the proceedings conducted in the official language of his choice, and he shall be advised of the right by the presiding judge before his plea is taken.[11]

The New Brunswick *Official Languages Act* also recognizes the right of a party to civil litigation to be heard by a court that understands, without the need for translation, the official language in which he or she intends to proceed.[12] The rules of civil procedure require the use of specific bilingual forms when filing and serving notice of legal action that advise the defendant of the following:

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[11] See subsection 13 (1.1) of the *Official Languages Act* of New Brunswick, S.N.B., ch. 0-1.

[12] *Ibid*. subsection 13 (1.2).

You are advised that:

(A) you are entitled to issue documents and present evidence in the proceeding in English or French or both;

(B) the applicant intends to proceed in the.....language; and

(C) if you require the service of an interpreter at the hearing you must advise the clerk at least seven days before the hearing.[13]

While the above provisions regarding the conduct of provincial prosecutions effectively complement provisions in the *Criminal Code* of Canada (applicable only to federal prosecutions), those that apply to civil proceedings include no obligation similar to that found in the OLA requiring the federal Crown to use the official language of the other parties involved in civil litigation (before federal courts).

This could very well lead to misapprehension respecting the policies of the federal Department of Justice that apply to its Crown agents in New Brunswick. For example, the *Instructions* for agents of the Attorney General of Canada (quoted above) provides 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." Since both English and French may be used before all courts in New Brunswick (by virtue of provincial statute and the terms of the Constitution), it would follow that the duties set out in the *Instructions* apply to federal Crown agents in the province appearing before provincial courts. This would also be the case anywhere else in the country where either statutory law or the Constitution allows the use of either official language before provincial (as well as federal) courts, notably in Quebec, Ontario and Manitoba.[14] Consequently, the *Instructions* should instead specify that, regardless of provincial law, federal language obligations must always be respected when applicable.

3.3 Determining the language of file

In consultations with the Halifax regional office, we learned that the official language used in the preparation of a file submitted to it for review and consideration is determined by the client department or agency. It is assumed that measures have been taken by the client department or agency to identify the preferred official language of the individuals involved. Where the file involves a prosecution under a federal statute, the investigating officer (RCMP or other federal enforcement officer) prepares the background information to be forwarded to Justice officials.

In civil matters, the majority of cases involve a federal department or agency responding to legal action in the role of defendant. As such, the official language in which legal action is commenced by the plaintiff would, presumably, accurately establish the language of the file and subsequent legal proceedings in civil cases. However, if the plaintiff is not aware of these language rights, he or she may not file the action in his or her preferred official language; hence the importance of active offer (see below, section 3.6 of this study).

[13] See Rule 4.08 of the *New Brunswick Rules of Court* and forms 16A and 16D.

[14] See a previous study by the Office of the Commissioner entitled *The Equitable Use of English and French Before the Courts in Canada*, *op. cit*., Note 1.

In criminal or quasi-criminal matters, there does not appear to be any formal process (such as the completion of a form) that is used by all federal investigating officers to establish the preferred official language of individuals subject to possible charges. The initial stages of an investigation begin, so it would seem, in the official language of the investigating officer. Where no obvious difficulties of comprehension are evident, the investigation simply proceeds without any further inquiries being made regarding the language preference of the individual or individuals involved. As a result, the official language in which an investigating officer normally works becomes the language of the file in the vast majority of cases.

Given a high level of bilingualism among minority language speakers, it can be expected that a certain proportion of investigations conducted in the majority official language will not necessarily reflect accurately the official language preferences of the individuals involved. Lack of information, desire to resolve the matter quickly, or fear of receiving prejudicial treatment may all be factors that prevent an individual under investigation from expressing his or her official language preference.

In a previous study dealing with the equitable use of English and French before the courts in Canada, we referred to procedures used by law enforcement officials in New Brunswick (in applying the *Criminal Code*) to identify the preferred official language of an accused person. We made the following observations:

> At the level of law enforcement, police officers are expected to identify the language choice of accused persons and make any necessary summons returnable before an appropriate court capable of operating in the language chosen. Thus, where a crime or infraction occurs in a region in which one or more bilingual judges routinely sit, a summons will be made returnable before the court on a day when the presiding judge speaks the language of the accused. In regions where the minority language population is small, the summons is made returnable on the one or two days per month set aside to deal with cases in the minority language. The underlying aim of this policy is to ensure that accused persons make their first appearance before a judge who speaks their official language.[15]

The effectiveness of such a policy is of course dependent on the prosecuting counsel being bilingual as well. Our previous study found that the federal Crown is not always able to meet this requirement, no doubt due in part to deficiencies in administrative procedures used in assigning an appropriate Crown counsel or agent.[16] It is thus essential that effective procedures be in place to

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[15] See a previous study of the Office of the Commissioner, *The Equitable Use of English and French Before the Courts in Canada*, p. 28, *op. cit.*, Note 1.

[16] *Ibid*., p. 29, where the Commissioner's predecessor, Dr. Goldbloom, made the following observation:

> The limited number of Crown counsel (both at the federal and provincial levels) able to speak the minority official language would appear to impose cost burdens on accused persons who wish to proceed in French at pre-trial appearances. This occurs because it is often necessary to order an adjournment of proceedings in order to give the prosecution the opportunity to replace unilingual Crown counsel by someone able to speak French. Facing the prospect of delay and the resultant increase of costs, a French-speaking accused is often persuaded to agree to proceed in English. As a result, many pre-trial proceedings take place in English even where accused and counsel would prefer to proceed in French. Such proceedings include those where the accused intends to plead guilty and thus would probably like the matter to be settled as quickly as possible.

accurately determine the preferred official language of an accused charged with offences for which the federal Department of Justice has jurisdiction to prosecute.

In this regard, the Department of Justice has informed us that one of its groups "is now working to develop recommendations … to consolidate language rights in the administration of justice in Canada," that "these recommendations will be the end result of cross-Canada consultations conducted with the linguistic communities, your organization [the Office of the Commissioner of Official Languages], the provinces, territories, courts, bars and various other organizations, based on the working paper circulated by the Department of Justice in 1996 (*Towards a Consolidation of Language Rights in the Administration of Justice in Canada*) and the report published by your organization [the Office of the Commissioner] in 1995,"[17] and that "should the recommendations made by the Department of Justice be accepted by the Minister of Justice and the Cabinet and then take the form of legislative amendments and program changes, some of the concerns that are expressed in the draft report [this study] might be addressed" [our translation]. The Department has not, however, specified a timetable in this regard. Therefore, pending such legislative amendments, there is no effective procedure for accurately determining, at the start of proceedings, the language of file.

The frequency with which the language of file may not reflect the language preferences of the individuals faced with prosecution by federal officials cannot at present be accurately assessed by Justice officials at the Halifax regional office. As already pointed out, the Halifax office assumes that the official language in which a file is prepared and submitted will be the language in which legal procedures will be conducted. Given linguistic realities in New Brunswick, it is not unreasonable to presume that English will predominate as the language in which files are prepared. As a result, the possible under-representation of French as a language of file would have an impact on the perceived need to assign federal Crown agents able to speak it. Where the language preference of individuals subject to charges emerged at a later stage, the inability of the federal Crown agent acting for the prosecution to speak the other official language could interfere with the effective exercise of an accused person's language rights.

3.4 File transfers

The possibility that a file will be assigned to a Crown agent unable to speak the preferred official language of an accused is foreseen in the standard *Conditions of Appointment*. As already mentioned, that document advises a Crown agent that where an accused elects to be tried before a judge (or judge and jury) who speaks his or her preferred official language, and the agent is unable to proceed in that language, the appropriate supervisor in the Halifax office should be informed to enable the case to be assigned to another agent.

According to information received from the Halifax office, transfers to another Crown agent are rare; so much so that no recent case could be cited. It may very well be that inevitable delays (and hence increased legal expenses) which would be caused by a change of federal Crown agent work to convince individuals to forego their language rights under Part XVII of the *Criminal Code*. This is particularly true where plea

[17] *The Equitable Use of English and French Before the Courts in Canada*, *op. cit.*, Note 1.

bargaining may be a factor or where the accused is motivated to plead guilty in order to end the process expeditiously.

Letters of appointment of standing agents may designate several lawyers within the same law firm. Where the official language preferred by an accused (and counsel) is not spoken by the Crown agent handling the case, a transfer can be made within the same law firm to another agent able to proceed in the official language of the accused. How often such intra-firm transfers occur has not been accurately assessed. Nevertheless, the Halifax regional office should be notified of transfers within the same law firm, according to the standard *Conditions of Appointment*. The rarity of such cases would tend to suggest either that such transfers seldom occur or that notice is not always transmitted to the appropriate Justice official in the Halifax office.

3.5 Language capabilities of standing agents in New Brunswick

As mentioned above, standing agents in New Brunswick are engaged by letter of appointment signed by Justice officials at the Halifax regional office. The list of current standing agents maintained by that office for criminal prosecutions in New Brunswick identifies a number of them as responsible for French-language cases in specific regions of the province, or capable of conducting prosecutions in either official language. Where the language used by an agent (or law firm) is not specified on the face of the list it is assumed, so we were informed, that only English-language cases would be assigned to them.

It would appear that the appointment of bilingual federal Crown agents, or agents able to conduct proceedings in French, reflects the needs of each judicial district. These needs are apparently assessed as a function of past demand for proceedings in the minority official language. However, such demand may not be representative of needs. For example, it is clear that, if there is no agent on site who speaks the official language of the minority, there will be less demand for proceedings in the minority language. It should also be pointed out that some regions of New Brunswick (such as Edmundston) are majority French-speaking. In those regions the need to appoint Crown agents able to speak French is manifest. While it appears that English needs are assessed in such areas as a function of past demand, it is well known that legal counsel practising in districts such as Edmundston are virtually all bilingual and able to conduct legal procedures in English when required. However, in English-speaking regions where the French-speaking population is relatively small, the use of actual past demand for legal proceedings in French may not be an accurate assessment of the need for bilingual federal Crown agents.

As mentioned above, institutional barriers to the use of the minority official language, such as the establishment of the file language by reference to the normal language of work used by federal investigators, may very well diminish the demand for the use of French in legal proceedings. Interviews with various Crown agents suggest that the regions of the province which may need an increase in the two-language capability of available Crown agents are Saint John and Fredericton. It is also our understanding that Crown agents from Moncton are periodically called upon to act in French-language proceedings in those two areas of the province.

3.6 Active offer of service in either official language

Where the use of the minority official language may be inhibited by social and institutional factors, it is important that active measures be

taken to inform members of the public that services from federal institutions are available in either official language. A passive approach to the public's right to receive services from and communicate with federal institutions, and third parties acting on their behalf, will do little to overcome existing barriers.

Interviews conducted with persons within the Halifax regional office and with selected federal Crown agents indicate that the use of the minority official language is most often dependent upon members of the public making their wishes clear. There does not appear to be any conscious effort to reach out actively and encourage members of the public to use their preferred official language. Widespread bilingualism among French speakers is a factor which may allow the use of English as a lingua franca and hence diminish the possibility of the equitable use of French in the administration of justice. Although definitive conclusions cannot be reached in this regard, the limited scope of active measures currently in place that promote two-language services and communications probably has a detrimental effect on the enhancement of French as a language of legal procedures.

As stated at various junctures above, the Department of Justice has a duty to ensure that third parties acting on its behalf respect statutory provisions regarding the language of services and communications found in Part IV of the OLA. Seen as a functioning whole, the network of federal Crown agents operating in New Brunswick should be in a position to offer the same level of service in either official language as would be the case were those services offered directly by the Halifax regional office of the Department of Justice. This means that federal Crown agents should be managed in such a way as to fulfil the institutional obligations of the Department, including its duty to put in place an active offer of service in either official language. Concretely, at least the reception services of agents' offices should be able to provide active offer of service in the two official languages when the agent has agreed to handle files in these two languages on behalf of the Department of Justice. While these obligations are legally distinct from provisions found in Part III of the OLA concerning legal proceedings in federal courts, they should be seen as complementary to the effective implementation of language rights in the administration of justice.

Just as Part IV does not require all full-time Crown counsel in the federal Department of Justice to be bilingual, it does not require all standing Crown agents to be capable of providing legal services in either official language. However, it does impose on the Department the duty to ensure that its administrative procedures for selecting Crown agents to act on its behalf can respond effectively and accurately to the official language preferences of members of the public whom it serves. This would include an effective system of file transfers between standing agents, or agents acting on an ad hoc basis in civil cases, where official language preferences became clear after initial case assignments.

3.7 Language of communications between agents and the Department of Justice

An issue incidental to the appointment of federal Crown agents able to conduct legal proceedings in French, and relevant to the overall level of service offered in either official language by the Halifax regional office, is the question of ensuring that Crown agents are able to communicate with that office in their preferred official language and obtain documentation concerning their conditions of appointment in their preferred official language. Before

completing the preliminary version of this report, we had noted a problem, since the *Conditions of Appointment* existed in English only. This problem seems to have been corrected, however, as we have been informed that the document, currently undergoing revision, now exists in both official languages. The Department should ensure, however, that Crown agents have the option of reading it in their preferred language. While this aspect of the relationship with the Department of Justice may be analogous to language of work issues, it should be remembered that the standard *Conditions of Appointment* incorporate the principle that, when communicating with the Department, agents may use the official language of their choice. Issues relevant to the conduct of proceedings in French which require communications with the regional office in Halifax would best be dealt with, ideally, in that language as well. We found that this issue is not currently taken into consideration by the Department. This is a further example of institutional barriers that can have the effect of inhibiting the use of the minority official language in the administration of justice.

4. Conclusions

Consultations conducted in the course of preparing this study, and documents reviewed that were supplied by the Department of Justice, suggest a number of areas where improvements in administrative arrangements would help ensure the delivery of legal services in either official language. These relate primarily to institutional barriers which may in effect conceal the true preferences of individuals with respect to the official language in which legal procedures should be conducted and ancillary services offered.

Regarding standing Crown agents engaged by the Department, we have underscored the importance of an early identification of the language preference of persons under investigation. This necessarily involves active steps being taken when a file is being developed to establish the official language in which an individual wishes the process to be conducted. Given the broad range of federal government departments and agencies involved, the Department of Justice could play a useful coordinating role in ensuring that appropriate inquiries are made by client departments to determine accurately the official language preferences of individuals against whom legal proceedings are contemplated. By requiring that this information and the manner in which it was gathered be clearly indicated on any file submitted to it for consideration, the Department would be in a better position to take into account official language requirements in the selection of Crown agents.

As it now stands, the Department assumes that the language of file (which may very well reflect the language preferences of investigating officials rather than those of individuals under investigation) will be the language in which legal proceedings will be conducted. This could have the effect of underestimating the potential for minority language proceedings. Armed with more accurate information gathered at an early stage of investigation (for example, by means of a form dealing, at the start of the procedure, with the issue of language), the Department could better ensure that Crown agents appearing on its behalf possess the language capabilities necessary to respond to anticipated demand.

In addition to early identification of language preference, Crown agents need to be fully apprised of official language rights and responsibilities. As noted above, in the most recent amendment by the Department of Justice to the *Conditions of Appointment* of Crown agents, such agents are informed that they are to ensure that "in proceedings before courts of criminal jurisdiction, where the accused has elected under s. 530 of the *Criminal Code* to be tried before a judge (or a judge and jury) who speaks the official language that is the language of the accused, Crown counsel also speaks the language of the accused (the Agent Supervisor should immediately be advised where this would require … the case be referred to another agent)." The *Conditions of Appointment* also now emphasize the responsibilities of Crown agents to provide services (such as correspondence and telephone calls) in the official language of the parties and to inform the Agent Supervisor immediately if such responsibilities cannot be fulfilled.

Where files are carefully assigned according to the official language preferences of accused persons, and Crown agents are apprised of the importance of early notification to the regional office of anticipated problems in respecting the full range of language rights, the Department of Justice is in a better position to ensure that the requirements of section 25 of the OLA are fully implemented. Indeed, it is only through the implementation of measures of this sort that the Halifax regional office will be able to assess

accurately its human resources needs in the various geographical regions under its jurisdiction.

With respect to the civil process in New Brunswick involving the federal Crown, an early and accurate identification of the language preferences of individuals is obviously important, especially when the federal Crown acts as the plaintiff. Where the federal Crown is responding to legal action taken against it (i.e., acts as the defendant), the official language in which the plaintiff engages the process is clear from the beginning. This is true whether a case is brought before a federal or provincial court.

As explained earlier, both English and French have official status before all courts in the province of New Brunswick by virtue of the Constitution and of provincial statutory law. This fact makes it important that the Department of Justice explain the impact of information on federal official languages legislation contained in the *Instructions* to Crown agents engaged to conduct civil cases in the province.

At present, that document instructs Crown agents 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. 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." Since the introductory condition of these *Instructions* is met in New Brunswick, i.e., since either official language may be used before any court in New Brunswick (under provincial legislative provisions and constitutional provisions), it can be concluded that the *Instructions* apply to Crown agents who appear in provincial courts. These *Instructions* apply when Part XVII of the *Criminal Code* is operative and in civil cases before a federal court. Consequently, the *Instructions* should instead specify that federal language obligations must be respected by agents when they are applicable.

The legal and policy requirements to use the official language of private parties naturally raise the issue of file transfers in the event that such requirements cannot be met. Currently the *Instructions* on civil matters direct only that, where an agent is unable to use the official language of the private parties, steps should be taken to see that the case is transferred to another agent. Rather than leave the responsibility for file transfers to the Crown agent, it would be more appropriate, as stated in the *Instructions* on criminal matters, that the *Instructions* on civil matters also clearly instruct agents that they must notify the regional office in a timely fashion so that it, in turn, can take the steps necessary to have the case transferred to another agent.

At present, it does not appear that counsel hired on an ad hoc basis to conduct civil cases are informed of the Department's legal duties respecting communications with and services to the public. Detailed information in this regard is provided to standing agents hired for criminal prosecutions (as contained in the standard *Conditions of Appointment*), and it would seem appropriate that the same information be made available to Crown agents acting for the Department in civil cases. In this regard, the Department of Justice has informed us that the "*Civil Litigation Deskbook* may be revised, in whole or in part," and that those responsible might examine "the advisability of making certain clarifications to the *Instructions* in this regard" [our translation]. These clarifications should, in our opinion, include a reference to enable agents to communicate with the

Department of Justice in their preferred official language and also to obtain pertinent documentation in that language.

We have noted the information that the Department of Justice sent to us to the effect that it is currently revising the *Instructions* and the *Conditions of Appointment* with which we dealt in this study. We hope that the comments and recommendations we made in their regard will be taken into account in the revision which is already under way.

5. Recommendations

For the reasons explained in this study, the Commissioner of Official Languages makes the following recommendations:

1. ***THAT the Department of Justice put in place an effective procedure for determining, at the start of proceedings, the official language of the file; that is, the preferred official language of the accused in criminal cases and that of the civil party before a federal court in civil cases (for example, by using a form). The purpose of this would be to enable the Department to appoint a Crown agent who can proceed with the file in that language.***

2. ***THAT the Department of Justice amend the existing* Instructions *in order to fully inform Crown agents of the specific rights and obligations relating to official languages in connection with legal proceedings; that is, the rights and obligations set out in Part XVII of the* Criminal Code *and in Parts III and IV of the* Official Languages Act*. When this amendment is made, the Department should emphasize to all Crown agents the importance of respecting the language obligations of Part III of the* OLA *and Part XVII of the* Criminal Code *and the language obligations arising thereby with regard to service to the public, as set out in Part IV of the* OLA*, as well as the need for Crown agents to respect all these federal language obligations when they are applicable, regardless of provincial law.***

3. ***THAT the Department of Justice, more specifically, amend the wording of its* Instructions *to ensure that, in the case of file transfers in civil matters, Crown agents are clearly informed of their obligation to advise the Department when they cannot proceed with the file for linguistic reasons.***

4. ***THAT the Department of Justice put in place an effective procedure to enable Crown agents to communicate with the Department of Justice in their preferred official language and obtain pertinent documentation in that language, specifically, documentation concerning the* Conditions of Appointment *of Crown agents.***