Commissioner of
Official Languages

Commissaire aux
langues officielles

APR 0 8 2016

IEMS No.: 2010-0047
CITS (WebCIMS) No.: 85575

Mr. Rafael Adam Wugalter
755 Montpellier Boulevard, Unit 208
Saint-Laurent, Quebec H4L 4R1

Dear Mr. Wugalter:

Please find enclosed a copy of the report to Governor in Council that follows up my Office's investigation of the Courts Administration Service (CAS) regarding the language in which federal court decisions are posted on their Web site. This is further to the correspondence I sent you regarding complaint 2010-0047, which you brought to my Office's attention. In this correspondence, I informed you of my intention to submit a report to Governor in Council if CAS decided not to implement the recommendation in my final report sent in February 2015.

The investigation report found that CAS had failed to meet its obligations under Part IV of the *Official Languages Act* (the Act) by not posting federal court decisions on their Web site in both official languages simultaneously. In its response to our investigation report, CAS reiterated its commitment to reducing translation times while indicating that my recommendations could not be implemented due to the legal dispute between our two organizations on the interpretation of Part IV of the Act and its application to decisions posted on federal court Web sites.

Because of this legal dispute on the interpretation of the obligations set out in Part IV of the Act, I have decided to use my powers under section 65(1) of the Act and submit a report to Governor in Council so it may take one of the two measures recommended in the enclosed report. This provision also sets out the possibility of making a report to Parliament if I am not satisfied with the Governor in Council's response.

In my report, I recommend to the Governor in Council to take one of the two following actions:

1) table a bill to clarify the obligations of federal courts pursuant to Part IV of the *Official Languages Act* with respect to the language in which their decisions are posted on their websites;

or

2) apply for a reference to the Supreme Court of Canada for a ruling on the interpretation of the obligations of federal courts pursuant to parts III and IV of

the *Official Languages Act* with respect to the language in which federal court decisions are handed down and published through their websites.

Consequently, I have asked the Clerk to inform me by June 15 of the government's decision regarding the measure it intends to implement to clarify CAS's obligations under Parts III and IV of the Act.

Yours sincerely,

Graham Fraser

Encl.

Office of the Commissioner of Official Languages
Commissariat aux langues officielles

REPORT OF THE COMMISSIONER OF OFFICIAL LANGUAGES TO THE GOVERNOR IN COUNCIL ON THE INVESTIGATION INTO THE COURTS ADMINISTRATION SERVICE UNDER SUBSECTION 65(1) OF THE OFFICIAL LANGUAGES ACT

APRIL 2016

Executive Summary

The purpose of this report is to clarify the linguistic obligations of the Courts Administration Service (CAS) with respect to the language of federal court decisions that are published on their site. It is a follow-up to an investigation report that found that CAS had failed to meet its obligations under Part IV of the *Official Languages Act* (the Act) – Communications and Services – by not posting federal court decisions on their website simultaneously in both official languages. This issue, which has persisted in one form or another long before the creation of CAS in 2003, constitutes a major obstacle to access to justice in both official languages and merits being treated diligently by the Governor in Council.

Access to justice in both official languages before the federal courts is a fundamental right that is protected by constitutional and quasi-constitutional guarantees through provisions that Parliament incorporated in the *Official Languages Act,* 1969, then in the *Official Languages Act*, 1988. All the commissioners studied the issues related to compliance with the obligations of federal courts. One of these issues is the language in which their decisions are published, especially since the emergence of the Internet, when the decisions are published mainly through the court websites.

In 1984, Commissioner Fortier published a report on the linguistic situation of the Federal Court Administration and noted the significant delay in the decisions being translated. The delays were attributed at the time to the lack of necessary resources for translation, specifically the Translation Bureau's difficulties in recruiting qualified legal translators. This was at a time when the Internet was not part of the operations of the courts and the decisions of public interest of the Federal Court and the Federal Court of Appeal were published in both official languages in law reports.

More than 35 years later, the problems noted in the 1984 report have taken on a whole new dimension because of the fact that all decisions made by the four federal courts are published by CAS on their websites. However, the vast majority of these decisions are posted in one official language only, with the translation posted several months or even years after the decision was issued.

It is therefore not surprising that since 2007, there have been a number of complaints from both English-speaking and French-speaking members of the public. As a result, my office conducted an investigation of CAS to determine whether it was fulfilling its linguistic obligations with respect to communications and services in both official languages (Part IV of the Act). We explored options with CAS to enable it to meet its linguistic obligations under Part IV while ensuring access to all federal court decisions. Since these efforts were not successful, we completed our investigation and made recommendations.

Essentially, I found that to comply with the requirements of Part IV of the Act, CAS must post decisions of federal courts on their websites simultaneously in both official languages. If both versions are not posted simultaneously, this service or communication is not of equal quality in both official languages and does not comply with the standard of substantive equality. I therefore recommended to CAS to "take all the measures necessary to ensure that decisions posted on federal court websites are posted in both official languages simultaneously."

Although it is committed to reducing translation delays, CAS indicated that it could not implement my recommendation because of the legal dispute on the interpretation of Part IV and its application to decisions posted on federal court websites.

Given the CAS decision to not implement our recommendations, I considered the options set out by the Act in such circumstances.

Section 65 of the Act grants me the power to submit a report so that the Governor in Council may take such action as the Governor in Council considers appropriate to follow up on my investigation report. This provision also provides for, in a second step, the possibility to make a report to Parliament if the Commissioner is not satisfied with the response of the Governor in Council.

In this case, the report to the Governor in Council is the only possible avenue that could clarify the obligations of all federal tribunals, including the Federal Courts, with respect to the language in which decisions are posted on their websites.

Consequently, I recommend to the Governor in Council to take one of the following actions:

1) table a bill to clarify the obligations of federal courts pursuant to Part IV of the *Official Languages Act* with respect to the language in which their decisions are posted on their websites;

   or

2) apply for a reference to the Supreme Court of Canada for a ruling on the interpretation of the obligations of courts pursuant to parts III and IV of the *Official Languages Act* with respect to the language in which federal court decisions are handed down and published through their websites.

In a country that proudly adheres to linguistic duality as a fundamental value and which, in 2017, will celebrate the 150th anniversary of judicial bilingualism, the Government of Canada must take the necessary measures to clarify the linguistic obligations of federal courts with respect to the language in which their decisions are posted.

1. Introduction

Between 2007 and 2011, the Office of the Commissioner of Official Languages (the Office of the Commissioner) received seven (7) complaints on the language of decisions posted by the Courts Administration Service (CAS) on federal court websites. These complaints were the subject of an investigation report (enclosed) that was sent to CAS on February 25, 2015, after several attempts to find a mutually acceptable solution. Since the investigation was closed, a number of similar complaints were filed with the Office of the Commissioner.

The investigation showed a strong disagreement between my office and CAS on the interpretation of the obligations under Part III (Administration of Justice) and those under Part IV (Communications with and Services to the Public).

Essentially, I am of the view that CAS is not fulfilling the obligations under Part IV when it does not simultaneously post the English and French versions of decisions on the federal court websites. For its part, CAS claims that the obligations under Part IV of the Act do not apply to the posting of federal court decisions and that its obligations with respect to the language of decisions are solely legislated by Part III of the Act, specifically section 20.

2. Commissioner's investigation

a. Measures taken to attempt to resolve the dispute

As part of the investigation, we took various measures to attempt to resolve the complaints filed against CAS. In 2010, three meetings were held between Office of the Commissioner representatives and CAS representatives to discuss their positions on parts III and IV of the Act. I also met with the Chief Justice of the Federal Court in 2010, and the following year, the chief justices of the Tax Court of Canada, the Federal Court of Appeal and the Federal Court.

The discussions with CAS continued until 2014, but given that the discussions did not result in the complaints being resolved, the investigation was completed and my final investigation report was sent in February 2015.

b. Commissioner's investigation report

The investigation sought to determine whether CAS, which is responsible for posting federal court decisions on their websites, fulfilled its obligations under Part IV of the Act, which deals with the right of members of the public to obtain communications and services from federal institutions in both official languages.

CAS and the Tax Court of Canada claimed that the posting of a decision handed down by a federal court on the Internet is an activity that is directly related to the administration of justice. It therefore falls under Part III of the Act, which deals with the administration of justice, and not Part IV, which deals with communications with and services to the public.

At the end of the investigation, I concluded that Part IV of the Act and not Part III legislates CAS' obligations with respect to the posting of federal court decisions on the Internet. This activity does not fall under judicial authority, but is an administrative activity that falls under CAS' authority and is carried out once the judicial process has been completed.

Although certain more administrative functions fall under judicial powers, such as assigning judges to cases and establishing sittings of the court, the function of publishing decisions in law reports or posting them on the Internet is not related to judicial functions, because it is not part of the adjudicative process.

Therefore, to meet the requirements of Part IV of the Act, CAS must post the legal decisions of federal courts simultaneously on the websites in both official languages. If both versions are not posted simultaneously, this service or communication is not of equal quality in both official languages and does not meet the standard of substantive equality. In fact, when a federal court decision is posted on their site in one language only, even if this is only for a limited time, the members of the community of the other official language do not have equal access to information in their language and cannot participate in public debate in the same manner. The vast majority of decisions posted on federal court sites are posted in one of the two official languages, most often in English, and the translation follows several months after the date of the decision, in some cases even several years later[1].

[1] For example, decisions that were rendered over 10 years ago are posted on federal court websites in only one language. In addition, 82 of the 100 most recent decisions posted on the Federal Court websites are in English only (March 22, 2016).

After concluding that CAS breached the obligations under Part IV of the Act, I recommended that CAS take all the measures necessary to ensure that decisions posted on federal court websites are posted in both official languages simultaneously. The final investigation report can be found in Appendix A of this report.

c. Follow-up to the final investigation report

In response to the final investigation report, CAS indicated that it acts in full compliance with the Act and that it maintains its position on the fact that the complaints are not founded. However, it also confirmed that it was exploring new translation tools and a different service model, which could, it hopes, improve current translation times.

The Office of the Commissioner has continued to receive complaints about the language in which federal court decisions are posted on their websites. In fact, a number of complaints have been filed since 2015 about the language in which the decisions of the Federal Court, the Tax Court of Canada and the Federal Court of Appeal are posted. Given that these complaints were identical to those that were the subject of the investigation report and that CAS is maintaining its position on the interpretation of Part IV of the Act, these complaints were deemed founded.

3. Obligations with respect to the translation of decisions and obligations with respect to the language in which decisions are posted: separate obligations

It is important to note that the investigation dealt only with the issue of the language in which decisions are posted on court websites and not on the issue of the translation of decisions when they are handed down, which falls under section 20 of the Act. The obligations with respect to the translation of decisions when they are handed down by courts and those related to the language in which decisions are posted on the Internet are separate and legislated by two different parts of the Act. The federal courts maintain that these obligations fall exclusively under Part III of the Act.

As part of the investigation, I acknowledged that the interpretation of these two parts of the Act and their application to federal court decisions raise ambiguities. I also recognize that posting decisions on the Web is an effective method to increase the transparency of courts. Furthermore, posting decisions on federal court websites is without a doubt an effective way of disseminating the case law of these courts and also less costly than publishing decisions in law reports. An increasing number of federal institutions use their websites to publish many types of information that they want to communicate to the public.

However, posting decisions on the Web in only one language creates a problem with access to justice in both official languages. Posting decisions simultaneously in both official languages is the only way to provide equal access to federal court case law to all members of the public.

4. Ambiguity in the interpretation of the obligations requiring clarification

The various federal courts subject to the Act have adopted a different interpretation from that of CAS with respect to posting their decisions on their websites. The vast majority of tribunals that post their decisions on their websites do so in both official languages.

This differing understanding of the linguistic obligations, highlighted by the different practices by federal courts with respect to the language in which decisions are posted on their websites, reveals an ambiguity in the Act that needs to be clarified one way or another. Parliament could not have predicted when the *Official Languages Act* of 1988 was drafted that federal court decisions would be posted on websites. In this context, legislators did not believe it would be useful to add provisions in Part III or Part IV of the Act dealing specifically with the language in which decisions are published. In fact, the only legislative provision that deals with this issue is found in the *Federal Courts Act.* Subsection 58(4) stipulates that decisions that are published in the official reports of the Federal Court of Appeal and of the Federal Court are published in both official languages. It is interesting to note that legislators have already dealt with the language in which federal court decisions are published and did not leave any room for judicial discretion by requiring decisions to be published in both official languages.

Should this bilingualism requirement for decisions that are published in federal court law reports continue to apply, regardless of the method of communication used? It is up to the government to answer this important question. Two options are available.

5. Two options to consider to clarify the obligations of federal courts with respect to the language in which their decisions are posted

When a statute contains ambiguities and its provisions are the subject of contradictory interpretations, there are two options to clarify the meaning. The first is pursuing the matter in court and the second is calling on Parliament to take action.

In the specific circumstances of the investigation that examined federal court decisions posted on their websites by CAS, a court remedy that would make it possible to rule on this dispute in the most effective and timely manner possible should take the form of a reference directly to the Supreme Court of Canada, in accordance with section 53 of the *Supreme Court Act.* Under the second option, legislative amendments should be adopted by Parliament.

6. Conclusions

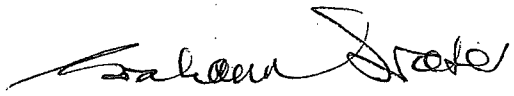
In light of the foregoing, I recommend to the Governor in Council to take one of the two following actions:

1) table a bill to clarify the obligations of federal courts pursuant to Part IV of the *Official Languages Act* with respect to the language in which their decisions are posted on their websites;

or

2) apply for a reference to the Supreme Court of Canada for a ruling on the interpretation of the obligations of federal courts pursuant to parts III and IV of the *Official Languages Act* with respect to the language in which federal court decisions are handed down and published through their websites.

Appendix A: Final Investigation Report



Graham Fraser
Commissioner of Official Languages

Appendix A: Final Investigation Report

COMPLAINTS CONCERNING THE UNILINGUAL POSTING OF CERTAIN DECISIONS

COURTS ADMINISTRATION SERVICE

FEBRUARY 2015

Final Investigation Report

Introduction

Between March 2007 and April 2011, six complaints were filed concerning the unilingual posting of certain decisions of the Federal Court, the Tax Court of Canada (TCC) and the Federal Court of Appeal on their Web sites.

1. Allegations

Complaint received in 2007

This complaint relates to the TCC and involves several decisions that were available in English only, even though the decisions had been rendered several years earlier.

Complaint received in 2008

This complaint relates to the Federal Court and involves the posting of the decision in *Amnesty International Canada v. Canada (Armed Forces)*, T-324-07, 2008 FC 162, on the Court's Web site in English only. The English judgment was rendered by the Court and posted by the Courts Administration Service (CAS) on the Web site in February 2008, while the French version was posted in June of that year.

Complaints received in 2009

These two complaints concern the Federal Court and involve decisions that are available only in English on the Web site. One decision concerns a very high-profile case: *Omar Khadr v. Prime Minister of Canada et al.*

Complaint received in 2010

This complaint relates to the Federal Court and involves two judgments posted by CAS on the Web site that were not available in English.

Complaint received in 2011

This complaint relates to the Federal Court of Appeal and involves information found on the Decisions tab of the Court's Web site, which notifies the public that in some cases, the translation of a decision of the Court may not be available on the Web site until months after it is rendered. For example, the French version of the decision in *Saputo Inc. v. Canada (Attorney General)*, rendered in February 2011, was not available at the time of the complaint in May 2011.

2. Issue

The purpose of the investigation was to determine whether CAS, which is responsible for posting decisions of the federal courts on their Web sites, complied with its obligations under Part IV of the *Official Languages Act* (the Act), which deals with the public's right to communicate with and receive services from federal institutions in both official languages.

3. Background

To resolve the issues raised by the posting of decisions in only one official language, the Office of the Commissioner of Official Languages (the Office of the Commissioner) contacted CAS, which handles the translation of decisions of the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the TCC. CAS is also responsible for posting decisions on the Web sites of these courts. There is a dispute over the interpretation of the Act with respect to CAS's obligation to post the English and French versions of federal courts' decisions simultaneously on the courts' Web sites.

4. Legislative basis

Part III of the Act, entitled "Administration of Justice," states that English and French are the official languages of the federal courts. The requirements of Part III relate to the conduct of proceedings in federal courts. Part III governs the language that participants, particularly witnesses, may use in federal courts (sections 14, 15 and 17), simultaneous interpretation services at hearings (section 15 and 17), the ability of judges to understand cases heard in both official languages (sections 16 and 17), the language used by Her Majesty in right of Canada in oral or written pleadings (section 18), and the language of any form used in proceedings and required to be served by a federal institution (section 19).

Under section 20, any final decision, order or judgment issued by any federal court must be made available 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 issuance were conducted in whole or in part in both official languages (subsection 20(1) of the Act). However, there is an exception to the default rule: where the court is of the opinion that to make the decision, order or judgment available simultaneously in both official languages would cause a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings, the decision, order or judgment may be issued first in one language and then, at the earliest possible time, in the other (subsection 20(2) of the Act).

Part IV of the Act, entitled "Communications with and Services to the Public," gives members of the public in Canada the right to communicate with and to receive available services from federal institutions in the official language of their choice, where the communications or services come from a federal institution's head or central office or from its offices in the National Capital Region or a region where there is significant demand, or where the nature of the office requires this to be done. This includes communications and services delivered through electronic networks or digital platforms.

In section 3 of the Act, the definition of "federal institution" includes any federal court.

The investigation also took the *Courts Administration Service Act* and the *Federal Courts Act* into account.

5. Methodology

During the investigation, the complainants' allegations were considered, as well as the decisions they refer to. Also taken into account were the numerous meetings, telephone conversations and e-mail exchanges between the Office of the Commissioner and CAS since the beginning of the investigation and in response to the preliminary report, as well as the four meetings with the chief justices of the courts, held between March and June 2011.

The Web sites of the federal courts mentioned in the complaints were reviewed, as well as the TCC's response and CAS's response regarding the complaints about the Web sites of the Federal Court and the Federal Court of Appeal.

The comments made by CAS, the TCC and one of the complainants in response to the preliminary investigation report were taken into consideration during the conclusion of the investigation.

6. Presentation of positions

The purpose of this part of the report is to summarize the positions expressed by the parties during the investigation. In their responses to the notice of intent to investigate, CAS and the TCC asked that their positions be reproduced in their entirety. Given the specific circumstances of this investigation, the outcome of which depends essentially on the interpretation and interaction of Part III and Part IV of the Act, it was considered appropriate to agree to this request.

6.1 Initial position of the Courts Administration Service in response to the notice of intent to investigate

The position reproduced below was provided to the Office of the Commissioner in both official languages.

The Courts Administration Service (CAS) response is that the complaint is unfounded.

Posting a judicial decision of a federal court established pursuant to section 101 of the Constitution Act on the Internet is an activity related directly to the administration of justice. It therefore falls squarely under Part III of the Official Languages Act (OLA), which deals with the administration of justice, rather than Part IV of the OLA, which deals with communications and services to the public.

More specifically, CAS maintains that posting a decision on the Internet constitutes the 'making available' of that decision as provided for in Part III of the OLA. Whether the decision may be posted in a single official language is to be determined exclusively by this provision.

Part III of the OLA governs the use of official languages in proceedings before a federal court. It provides that all final decisions made by a federal court must be translated into the other official language. It further states that, in certain cases, federal courts must

make their decisions available to the public in both languages simultaneously. This requirement applies if the proceedings were conducted in whole or in part in both official languages, or if it determines an issue of general public interest or importance. Decisions that are not subject to this rule may be made available to the public in one language only, pending their translation.

Part III of the OLA also states that exceptions may be made to the simultaneous publication rule in certain cases. A federal court may, at its discretion, exempt a decision from this requirement if it deems that the resulting delay in releasing the decision would be prejudicial to the public interest, or would result in injustice or hardship to a party to the proceedings.

Whether or not it is appropriate to proceed with publication in one language only is left entirely up to the discretion of the federal court and falls under its judicial functions.

Part IV of the OLA, by contrast, imposes a general obligation on federal institutions to provide their services to and communicate with the public in both official languages. It does not apply to the judicial functions of the federal court, as these functions are governed by Part III of the OLA.

Parts III and IV of the OLA are based respectively on sections 19 and 20 of the Canadian Charter of Rights and Freedoms *("Charter"). It is important not to confuse or conflate the respective scope of these provisions, which are considered "watertight compartments." The use of the Internet in the exercise of a judicial function falls exclusively under Part III of the OLA.*

As a result, in cases where Part III of the OLA authorizes a federal court's decision to be made public in a single official language (that is, before the decision has been translated) CAS is allowed to post that decision on the court's website without having to wait for the translation.

Importantly, the concept of 'making available' a federal court decision, as provided for in Part III of the OLA, necessarily extends to posting that decision on the Internet. The activity contemplated by Part III is not limited to the filing of the decision with the registrar of the court. Pursuant to the principle of judicial independence, federal courts must enjoy a degree of autonomy in their choice of administrative methods when exercising the judicial discretion granted by Part III of the OLA. This is precisely what is provided for by the CAS translation and distribution policy.

In that connection, it is important to keep in mind the underlying reason for the exception provided for in subsection 20(2) of the OLA. Federal courts are granted a discretionary power to bypass the simultaneous publication rule when it would [be] prejudicial to the public interest to wait for the decision to be translated. Thus, cases in which a decision is published in one language only are cases where the court has determined that it would be prejudicial to the public interest to defer the release of a decision until it has been translated. This is an example of the implementation of the constitutional principle of open courts, which, as stated by the Supreme Court of Canada, is "a principal component of the legitimacy of the judicial process." *The Supreme Court of Canada has also stated that this principle is a rule* "required by the rule of law" *and increases the likelihood that the court will* "be an independent and impartial court."

Publication via the Internet is without a doubt the most effective and least costly way to achieve this objective. In addition, it is the only method that offers equal access to all members of the public. Although CAS has registry offices across the country, they can offer only partial coverage of Canada's vast territory. Posting information on the Internet is the only way to overcome this obstacle.

Finally, it should be noted that the mere fact that a federal institution has decided to post a document on the Internet does not generate an obligation to have the document translated if it was properly produced in one official language. Posting on the Internet, in and of itself, does not constitute the delivery of a new "service" that would be subject to the requirements of Part IV.

6.2 Tax Court of Canada's position

At the request of the TCC, its position is reproduced below in its entirety and without modification:

As set out below, the TCC believes that its current translation policy complies with s. 20 of the OLA which deals specifically with the public release of final decisions and the requirements that some but not all decisions be immediately available in French and English. The TCC believes that the legislator's deliberate choice to address the release and availability of judicial decisions in s. 20 of the OLA demonstrates a clear intent to differentiate this function of the Court from the more general "government services" contemplated by s. 22 of the OLA.

1) The TCC policy on the translation of decisions

The CAS' current translation policy applies to decisions of the Federal Courts, including the TCC. The policy sets out three (3) different priority levels with respect to translation of decisions.

The first priority indicates that where a decision needs to be issued in French and English pursuant to s. 20(1)(a) or (b), it will be translated immediately so that both versions are issued together. The two (2) other priority levels apply to those decisions that need not be immediately translated. These two levels include decisions that will be posted on the TCC's website and decisions that will not be posted. The TCC translation policy provides that decisions that will be posted are to be translated within six (6) weeks for decisions that are less than 25 pages, and three (3) months for decisions of more than 25 pages. All other decisions that require translation pursuant to s. 20 of the OLA but will not be posted are to be translated at the earliest possible time.

2) The current translation policy complies with s. 20 of the OLA

S. 20 of the OLA sets out a specific and complete code with respect to the availability of judicial decisions in French and English. S. 20(1)(a) and (b) identifies only two categories of decisions that require simultaneous availability in French and English. S. 20 explicitly provides that for other decisions, some reasonable delays in the availability of translated version is permissible. S. 20 requires that all final decisions be translated "at the earliest possible time" and that all decisions "issued" must be "made available" to the public.

On a plain reading, s. 20 must be interpreted as meaning that the TCC has some discretion on the timing/priority of the majority of its translations, that "earliest possible time" does not mean "simultaneous" and that the availability and release of the translation can be subject to the availability of resources. The current translation policy is fully compliant with s. 20.

3) The posting on the Internet of a decision does not transform the issuance of the decision (through the Registry) into a "service" as contemplated by s. 22 or Part IV of the OLA

Part IV of the OLA provides, at s. 22, that the federal government and federal institutions must provide "services" in both official languages if the demand is from the head office or if there is a significant demand for them. This is a general application section of the OLA. As mentioned above, it does not apply to the release of judicial decisions (whether through the Registry or online) as this is specifically addressed in s. 20.

The TCC recognizes that the OLA must be interpreted in a broad and purposive manner. This approach does not, however, displace the normal principals of statutory interpretation. The OLA must be interpreted in a coherent manner, avoiding internal conflicts, and in a manner allowing a specific provision to take precedence as an exception over a more general provision. In cases of genuine ambiguity as to the meaning of a provision, the Charter values may be helpful. However, if the statute is unambiguous, the court must give effect to the clearly expressed legislative intent.

In the context of the OLA, s. 20 requires the TCC to issue its decisions simultaneously in both official languages in only a limited number of cases, and provides that all other decisions should be translated "at the earliest possible time". In those cases where the decision must be issued simultaneously in both languages, it is "posted" on the TCC's website in both languages at the same time the decision is "issued" and made available through the Registry. However, where there is no obligation to translate the decision immediately, there is also no obligation on the TCC to withhold access to the public by not posting the decision on the website in its original language until a translation is available.

The COL's position, as we understand it, draws an artificial distinction between the issuance and the posting of decisions. In the modern era of the Internet, the "posting" of a decision is directly related to its issuance and s. 20 of the OLA, along with its specific obligations and exceptions, is properly applicable to both concepts. Any other interpretation could lead to legally and practically absurd results.

The TCC's interpretation is supported by the Federal Court's decision in Picard v. Commissioner of Patents, where the Court held that "publication of certain components of patents on the Patent Office web site is not a distinct "service" that, in itself, must be provided in both official languages." The COL had itself come to the same conclusion on the applicant Mr. Picard's complaint, and the COL found in January 2009 that Part IV of the OLA had not been breached by the Commissioner of Patents.

Moreover, the "posting" of the decision on the Internet cannot be a "service" that is distinguished from the "issuance" of the decision to the parties and filed with the Registry. If that was the case, then it would mean that some individuals, who are located closer to a TCC office, would have access to a greater number of cases because many

decisions, in fact the majority, could only be accessed on site on the basis that they have not yet been translated. Such interpretation would lead to undue delays in the issuance of final decisions. This would also restrict access to justice in that recent judgments would not be available to taxpayers who are prosecuting an appeal or negotiating a possible settlement with the tax authority. Surely, this is not the intent of the OLA.

4) Conclusion

A coherent interpretation of the OLA as a whole does not require the TCC to issue all its decisions in both languages simultaneously and does not require the TCC to wait until a decision is translated before posting it. Rather, s. 20 specifically provides for the various obligations of the TCC to translate the decisions. To the extent that the TCC complies with s. 20 and that decisions are translated in accordance with this section, the posting of untranslated decisions that are not subject to s. 20(1) and the subsequent posting of the translation of these decisions at the earliest possible time, does not contravene the OLA.

6.3 Position of the Courts Administration Service in response to the preliminary investigation report

Asked to comment on the preliminary investigation report, CAS produced a response and requested that it replace the one provided in response to the notice of intent to investigate.

After analyzing this second response, it was considered to be more appropriate to summarize the main points of the new arguments presented, which add to those made in the initial response.

Essentially, CAS maintains that posting federal court decisions on the courts' Web sites falls directly under the exercise of the judicial functions of the courts and that a distinction cannot be made between the activities related to posting decisions and the administrative duties of the registrar under section 20. CAS supports its position with a contextual and historical analysis of section 20 of the Act, an analysis of the terms used in subsections 20(1) and 20(2) of the Act and a comparative analysis of section 20 of the Act and section 24 of the New Brunswick *Official Languages Act.*

6.4 Position of one of the complainants in response to the preliminary investigation report

One of the complainants also provided comments on the preliminary investigation report and asked for them to be reproduced in their entirety in the final investigation report. His response raised several points and presented extensive arguments for each of the points. In particular, the complainant asserted that CAS is part of a government translation system, of which certain parts are violating Canadians' constitutional and quasi-constitutional rights. However, several of the points raised by the complainant do not relate specifically to the subject of the investigation, but rather to other problems that he considers systemic and that are related to the translation of judgements, including the quality of translations and the resources dedicated to translation. As the investigation does not seek to rule on these points, it was considered to be more appropriate to summarize the main points of the complainant's arguments that relate directly to the subject of the complaint.

The complainant believes that Part IV applies to the posting of federal court decisions. He also believes that the translation and posting of federal court decisions are not judicial functions but rather constitute an institutional service to the people of Canada.

The complainant maintained that when decisions are posted on the courts' Web sites in only one of the two official languages, the members of the other official language community do not have equal access to information in their language and cannot participate equally in the public debate.

7. Analysis

Careful consideration was given to the positions of CAS, the TCC and the complainant, as well as to all of the arguments presented regarding the interpretation and application of Part III and Part IV of the Act.

However, the Commissioner is of the opinion that it is Part IV of the Act, not Part III, that governs CAS's obligations with regard to the posting of federal court decisions on the Internet. The analysis below details why the posting of federal court decisions on the Internet is not an exercise of judicial power, but an administrative activity that falls within CAS's authority and is performed after the judicial process has been completed. The Commissioner is not convinced by CAS's and the TCC's arguments that the distinction between the issuance and the posting of decisions is an artificial one, and maintains that these two functions are based on the distinct language guarantees set out in Part III and Part IV of the Act and in sections 19 and 20 of the Charter.

As previously mentioned, Part III of the Act relates to the conduct of proceedings in federal courts and governs, among other things, the language of decisions at the time they are made available to the public through their filing with the registrar after having been rendered by the judges. This step marks the end of the judicial process with regard to the decisions rendered.

Part IV, meanwhile, is generally applicable to the administration of federal institutions and imposes on them an obligation to ensure that the public can communicate with them and receive services from them in either official language under certain conditions. The administration of the federal courts is the responsibility of CAS, a federal institution established under the *Courts Administration Service Act*. CAS is therefore subject to Part IV in respect of all the administrative services and communications for which it is responsible.

The *Courts Administration Service Act* states that the Chief Administrator "has all the powers necessary for the overall effective and efficient management and administration of all court services" (subsection 7(2)). It stipulates that the Chief Administrator's powers "do not extend to any matter assigned by law to the judiciary" (subsection 7(4)). According to the Supreme Court of Canada, matters assigned to the judiciary include the assignment of judges, sittings of the court and court lists, as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions.[1] The Court also states that the essentials of the institutional independence of the courts with regard to administrative issues are limited to

[1] *Valente v. The Queen*, [1985] 2 S.C.R. 673, at page 709.

"administrative decisions that bear directly and immediately on the exercise of the judicial function."[2] The jurisprudence cited in CAS's second response does not support the position that the flow of information on the Internet regarding a legal proceeding falls under the judicial functions of the court.

The posting of decisions on the Internet, or their publication in law reports, comes under CAS's administrative authority and is not is an exercise of judicial powers. Although some functions of a more administrative nature fall under judicial powers, such as the assignment of judges and sittings of the court, the function of publishing decisions in law reports or posting them on the Internet is not related to judicial functions, as it is not part of the adjudicative process.

The division between strictly judicial matters and public administration matters that is found in the structure of the Act reflects the various language guarantees provided in the Charter, which treats the use of official languages in court proceedings separately from communications and services delivered by the administrations of institutions of Parliament or the Government of Canada.

Section 20 of the Act sets out the way in which federal court decisions are to be "made available." In the context of Part III of the Act, which governs the use of official languages in judicial matters, section 20 must be understood as imposing requirements regarding the way in which federal court decisions are rendered and made available to the public through their filing with the registrar. The filing of a decision with the registrar is indeed a judicial matter and can properly be seen as completing the conduct of a proceeding.

Whereas the filing of a decision with the registrar is related to judicial functions, insofar as it guarantees the transparency and integrity of court proceedings, the publication of decisions in law reports or their posting on the Internet is a subsequent step that is not an exercise of judicial powers, but a communication with or service to the Canadian public that is purely an administrative responsibility. Consequently, communications or services provided to the public by the administration of the federal courts are governed by Part IV of the Act, as is the case with any federal institution.

Posting decisions on the Internet is undoubtedly an effective and inexpensive way to provide access to federal court decisions. However, decisions posted in only one official language are not accessible to all members of the public. Posting decisions simultaneously in both official languages is the only way to give all members of the public equal access to decisions of federal courts.

In short, CAS's posting of decisions on federal court Web sites is not an activity that comes directly under the authority of the judiciary. The phrase "made available" in subsection 20(1) of the Act means the moment that the court's decision (more specifically, its content) is publicly available, that is, the moment the decision has been rendered by the court and is no longer in the hands of the decision maker. This phrase ("made available") by necessity cannot include the dissemination of the decision, which is a completely separate step and has no direct or immediate connection with the exercise of judicial functions. Judicial independence and the autonomy of individual

[2] *Valente v. The Queen*, [1985] 2 S.C.R. 673, at page 712.

judges allow a court to exempt a decision from the requirement to be made available simultaneously in both official languages if that court is of the opinion that the time to translate the decision would cause a delay prejudicial to the public interest or result in injustice or hardship to any party to the proceedings. The exercise of this judicial power is provided for in subsection 20(2) of the Act. However, once this power has been exercised by a federal court judge and the decision has been rendered, CAS cannot then give itself that same power to disseminate the decision on a court's Web site in only one language.

An analysis of how Parliament resolved the issue of the language of publication of decisions in the *Federal Courts Reports* also shows that the publication of decisions is a step that is separate from the judicial process. Section 58 of the *Federal Courts Act* (FCA) stipulates that "[e]ach decision reported in the official reports shall be published therein in both official languages" (subsection 58(4)). This is another significant indication that Parliament does not consider the publication of federal court decisions (as opposed to their filing with the court registrar) to be a function within the powers of the judiciary. Subsection 58(4) of the FCA, which leaves no room for judicial discretion and states that decisions must be published simultaneously in both official languages, is much more closely analogous to Part IV of the Act, which states that federal institutions' communications with and services to the public must be in both official languages. Moreover, section 58 states that the responsibility for selecting the decisions to be published rests with an editor appointed by the Minister of Justice. Therefore, under the FCA, the dissemination of decisions, whether through a law report, a Web site or otherwise, is clearly an administrative decision that does not fall within the responsibilities of the judiciary.

8. Findings

To comply with the requirements of Part IV of the Act, CAS must post federal court decisions on Web sites simultaneously in both official languages. If the two versions are not posted simultaneously, this communication or service is not of equal quality in both official languages and does not meet the standard of substantive equality. When a decision is posted on the Internet in only one language, even if it is only for a limited time, the members of the other official language community do not have equal access to information in their language and cannot participate equally in public debate.

Given that the decisions at issue in the complaints were posted on the Internet in one language only, the complaints are founded considering the obligations under Part IV of the Act.

9. Recommendations

In its response to the preliminary investigation report, CAS maintained its disagreement with the Office of the Commissioner's interpretation of Part IV and the conclusions of the investigation, but indicated that it would explore new translation tools and models that could help reduce the current translation delays.

While recognizing CAS's commitment to take measures to reduce translation delays, the fact remains that federal court decisions issued in one language in accordance with subsection 20(2) of the Act will continue to be posted on the Web site in only one language and that the translation of these decisions will continue to be posted afterward.

As a result, the legal disagreement between CAS and the TCC, on the one hand, and the Office of the Commissioner, on the other, regarding the interpretation of Part IV, its interaction with Part III and its application to decisions posted on federal court Web sites will likely not be resolved through the usual methods available to the Commissioner under the Act, namely his power to issue recommendations.

When a law contains ambiguities on its application, and when its provisions are subject to contradictory interpretations, there are two options to clarify the meaning. The first is to turn to the courts, and the second is to call on Parliament.

In the specific case where the investigation deals with federal court decisions posted on the Internet by CAS, the quickest and most effective court remedy that would resolve the disagreement should be referred directly to the Supreme Court of Canada under section 53 of the *Supreme Court Act.* However, the judicial or legislative approach should only be considered if CAS decides not to implement the Commissioner's recommendation.

For this reason, it is recommended that CAS take all necessary action to ensure that decisions are posted simultaneously in both official languages on all federal court Web sites.

To determine CAS's intentions regarding the implementation of this recommendation, a follow-up will be conducted within 60 days of this report. If CAS says that it does not intend to implement the recommendation, the Commissioner has already indicated his intention to exercise his power under subsection 65(1) of the Act and send a report to the Governor in Council so that the Governor in Council may consider the appropriateness of referring the matter to the Supreme Court of Canada or tabling a bill to clarify Part III and Part IV of the Act with regard to their application to posting federal court decisions on federal court Web sites.