

Comments and Observations from the Barreau du Québec

Canadians' Views about Modernizing the *Official Languages Act* – The Justice Sector's Views

Presented to the Standing Senate Committee on Official Languages

23 November 2018

## Mission of the Barreau du Québec

To ensure the protection of the public, the Barreau du Québec oversees the professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

## Acknowledgements

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## INTRODUCTION

The Standing Senate Committee on Official Languages (hereinafter the “Senate Committee”) is mandated to study all matters concerning official languages in general. This inevitably includes studying the application of the *Official Languages Act* (hereinafter the “Act”). The Committee is currently seeking a portrait of Canadians’ views on the modernization of that Act in different segments of the Canadian population.

The Barreau du Québec has reviewed the consultation document entitled *Canadians’ Views about Modernizing the Official Languages Act – The Justice Sector’s Views* and hereby submits its comments to you.

Broadly speaking, the Barreau du Québec’s mission<sup>1</sup> also has an important social aspect that extends to all participants in the legal system. The Barreau du Québec therefore protects the public by defending the rule of law and intervening publicly on a variety of legal issues, particularly with respect to the rights of vulnerable persons and minority groups.

As such, the Barreau du Québec intervened before the Supreme Court of Canada in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*<sup>2</sup> to argue the importance of the complementary roles of judges and counsel in ensuring respect for the language rights of the parties and witnesses. On 16 November 2018, the Supreme Court of Canada issued an important decision concerning the violation of language rights. In a unanimous judgment, the Court recalled that:

[27] Furthermore, this Court held in *Beaulac* that these rights must be interpreted in light of their objective, which is described in s. 2 of the *OLA*:

*The objective of protecting official language minorities, as set out in s. 2 of the Official Languages Act, is realized by the possibility of all members of the minority to exercise independent, individual rights which are justified by the existence of the community. Language rights are not negative rights, or passive rights; they can only be employed if the means are provided.* [para. 20]

Thus, the rights provided for in the *OLA* will not help achieve the *OLA*’s objectives unless all members of the community can exercise them and are provided with the means to do so. These language rights must be understood as individual and personal rights. They must also be interpreted as guaranteeing access to services of equal quality, as this is the only interpretation that allows their objective to be fully achieved. The federal courts to which ss. 14 and 15 of the *OLA* apply must therefore provide the resources and procedures that are needed in order to respond to requests from parties and witnesses under these sections. Moreover, given the quasi-constitutional nature of the *OLA*, ss. 14 and 15 apply even to a hearing in one of those courts that is conducted in accordance with an informal or simplified procedure.

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<sup>1</sup> *Professional Code*, RLRQ, c. C-26, art. 23.

<sup>2</sup> 2018 SCC 50.

[28] From this perspective, ss. 14 and 15(1) of the *OLA* restate the essence of the right guaranteed in s. 19(1) of the *Charter*. *Beaulac* requires nothing less. Language rights are not procedural rights related to the dispute that brought the parties before the court in question. Rather, they are fundamental rights related to access of the parties and their witnesses to that court in the official language of their choice. Absent vigilance on the judge's part, this bilingual status is purely symbolic. A purposive reading of s. 19(1) of the *Charter* requires that the court attach the utmost importance to the protection of each person's right to speak in the official language of his or her choice.

[31] That being said, the absence of rules to facilitate the exercise of the rights provided for in the *OLA* does not mean that those rights do not exist. On the contrary, the *OLA* requires that in every case the TCC, a federal court, provide interpretation services at the request of a party and allow every person to speak in the official language of his or her choice. It is of course desirable for the rules of procedure of the federal courts that have such duties to provide litigants with the tools needed to facilitate the assertion and exercise of the rights in question. But when potential language-related difficulties are not identified and managed ahead of time by way, for example, of an adequate proactive institutional infrastructure, the roles of the judge and of counsel for the parties in protecting the language rights of individuals participating in a hearing become particularly important.

[37] It is also true that lawyers have certain ethical duties, such as that of acting in the best interests of their clients. These duties could be violated should the lawyer fail to inform his or her client and the witnesses who are called of their rights, or to insist personally on arguing in the official language in which he or she can serve the client properly. However, these duties, which are complementary to that of the judge, do not relieve the judge of his or her responsibilities in this regard. The language rights of a party or a witness as well as the corollary duty of the court and the judge to uphold them come into play even before anyone intervenes in that regard. While it is true that lawyers are encouraged to intervene should a violation occur, a lawyer's failure to formally object to the violation of a person's language rights does not excuse a failure by the court to discharge its duties. Nor can a failure to intervene constitute a form of implicit waiver of the right to make an informed personal choice of language. (Our underlining, references omitted)

We are particularly concerned about respect for language rights in the justice system. Given its experience in this area, the Barreau du Québec has focused on the questions posed by the Senate Committee with respect to the administration of justice.

## SHOULD THE REQUIREMENT FOR FEDERAL COURT JUDGES TO UNDERSTAND BOTH OFFICIAL LANGUAGES BE EXTENDED TO THE SUPREME COURT?

Being understood by a judge in English or French is a fundamental right and ensures equal status of the two official languages. In addition, doing so without the help of an interpreter increases public confidence in the rule of law and in justice and improves the quality of the services provided, since information is not being conveyed by a third party.

In the past, the Barreau du Québec has supported a number of bills to amend the *Supreme Court Act*<sup>3</sup> to render the appointment of bilingual judges mandatory. These interventions took place in 2011, 2014, 2016 and 2017.<sup>4</sup>

Another possibility is to amend the *Official Languages Act*<sup>5</sup> in order to subject the Supreme Court of Canada to the obligation of federal courts to ensure that the person hearing a case understands the language or languages of the trial. A new section would then also be added to the *Official Languages Act* in the form of a commitment by the federal government to appoint only bilingual judges to the Supreme Court.

Regardless of the vehicle chosen, the Barreau du Québec supports any measures to ensure that bilingualism is a requirement for appointment to the Supreme Court of Canada. Functional bilingualism must be one of the skills required of a Supreme Court judge to ensure equal access to justice for all.

### What are the advantages and disadvantages of including such a requirement in the Act?

The Barreau du Québec is satisfied with the new process introduced by the current government for appointing judges to the Supreme Court of Canada that provides for the bilingualism of judges. This change meets a number of the demands we have made over the last few years.

However, we still believe that the *Official Languages Act* or the *Supreme Court Act* should be amended to ensure that future governments are also required to meet this criterion.

### Could an amendment to section 16 of the Act be considered unconstitutional?

Some argue that amendments to the *Supreme Court Act* or the *Official Languages Act* could affect the notion of “composition of the Court” as interpreted by the Supreme Court in the *Reference re Supreme Court Act, ss. 5 and 6*,<sup>6</sup> following the appointment of Justice Nadon. This would mean that adding such a requirement to the Act would necessitate following the constitutional amendment process (seven Canadian provinces with at least 50% of the population).

Without taking a position on this constitutional issue, however, we would like to point out that it does deserve careful thought in order to ensure that any amendments to make bilingualism mandatory for Supreme Court judges are successful and not counterproductive.

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<sup>3</sup> R.S.C., 1985, c. S-26.

<sup>4</sup> [Letter to the Right Honourable Stephen Harper](#), 21 June 2011 (French only); [Letter to Mr. Yvon Godin, MP](#), 20 February 2014, (French only); [Letter to the Honourable Jody Wilson-Raybould](#), 15 August 2016, (French only); [Brief of the Barreau du Québec on Official Languages in Judicial and Legislative Matters](#), April 2017 (French only).

<sup>5</sup> R.S.C., 1985, c. 31 (4th Supp.)

<sup>6</sup> 2014, SCC 21.

## SHOULD THERE BE A REQUIREMENT FOR ALL FEDERAL COURT JUDGMENTS TO BE PUBLISHED SIMULTANEOUSLY IN BOTH OFFICIAL LANGUAGES?

Currently, not all federal court judgments are published simultaneously. Section 20 of the *Official Languages Act* provides as follows:

### **Decisions, orders and judgments that must be made available simultaneously**

- **20(1)** Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where
- **(a)** the decision, order or judgment determines a question of law of general public interest or importance; or
- **(b)** the proceedings leading to its issuance were conducted in whole or in part in both official languages.

### **(2) Where**

- **(a)** any final decision, order or judgment issued by a federal court is not required by subsection (1) to be made available simultaneously in both official languages, or
  - **(b)** the decision, order or judgment is required by paragraph (1)(a) to be made available simultaneously in both official languages but the court is of the opinion that to make the decision, order or judgment, including any reasons given therefor, available simultaneously in both official languages would occasion a delay prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings leading to its issuance, the decision, order or judgment, including any reasons given therefor, shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective.
- **Oral rendition of decisions not affected**
    - **(3)** Nothing in subsection (1) or (2) shall be construed as prohibiting the oral rendition or delivery, in only one of the official languages, of any decision, order or judgment or any reasons given therefor.
  - **Decisions not invalidated**
    - **(4)** No decision, order or judgment issued by a federal court is invalid by reason only that it was not made or issued in both official languages.

Author Karine McLaren describes the situation well in her article *La Langue des décisions judiciaires au Canada*:

Section 20 of the *Official Languages Act* does not impose any specific method on the various federal courts. As a result, the latter have come to meet their respective obligations in different ways.

Since every decision of the Supreme Court of Canada can be considered to be of interest or importance to the public, the obligation imposed by the *Official Languages Act* to publish final decisions in both official languages applies to all its decisions. In any case, this is the practice that has been followed by the Court since 1970. The Court renders approximately 75 decisions per year.

Pursuant to subsection 58(4) of the *Federal Courts Act*, all decisions of the Federal Court of Appeal and the Federal Court included in the Federal Courts Reports are published in English and French. It should be noted, however, that this represents only a small sampling of the decisions rendered by these courts, as “only the decisions or the parts of them that, in the editor’s opinion, are of sufficient significance or importance” are published in the *Reports*. As a result, only about 5% of the decisions rendered by the Federal Court of Appeal and the Federal Court are considered sufficiently important to warrant publication in the *Reports* in both official languages. Section 20 of the *Official Languages Act* requires publication in both official languages of *all* decisions of these courts, but as Michel Bastarache explains, it does not impose stricter obligations on decisions that meet the *simultaneous* bilingual publication criterion. As a result, very few federal court decisions are published simultaneously in both official languages, most of them being published at the earliest possible time, as required by subsection 20(2).

As illustrated in *Devinat v. Canada (Immigration and Refugee Board)*, it would appear that not all federal courts comply with their obligations under section 20 of the *Official Languages Act*. This case challenged the validity of the on-request translation policy established by the Immigration and Refugee Board (IRB) to meet these obligations. The IRB had developed criteria to determine which of its decisions were of interest or importance to the public and should therefore be made available to the public simultaneously in both official languages. This was the case where (1) the decision concerned an original and compelling point of law; or (2) the resolution of that point of law was likely to have a significant impact on the evolution of the substantive and procedural rules of the division concerned. Apart from the narrow range of decisions that met these criteria, IRB decisions were only translated upon request, although unilingual decisions were made available to the public. As confirmed by the Federal Court of Appeal, this policy of on-request translation was of course contrary to section 20, since it meant that most decisions would never be made public in the other official language. Section 20 had to be interpreted with the purpose of the *Official Languages Act* in mind, and it was therefore the IRB’s responsibility to comply with it and to have all its decisions translated.

Given the explicit wording of section 20 in this respect, any other decision would naturally have been surprising. However, the reasons for this decision suggest the existence of tension between the application of section 20 of the *Official Languages Act* and the budgetary considerations faced by the courts. It is clear from the reasons that the Court’s refusal to grant the requested mandamus order was entirely motivated by financial considerations, since such an order would have resulted in the translation of



“thousands of decisions of little or no interest” and translation costs that would be “thirteen times the current translation budget.” The Court therefore concluded that it would not be justified in issuing a “*mandamus* order covering the entire scope of section 20 of the OLA...since the money spent on translation services would have no practical result.” [our underlining]. There are two comments to be made regarding this conclusion. First, as the Court itself states, and the Commissioner of Official Languages has confirmed, the scope of section 20 is broad enough to require the public to be informed of all final decisions, regardless of their relevance to evolving legal principles. The fact that many of these decisions did not have “value as precedents” was therefore immaterial and did not justify in law the IRB’s failure to comply with its express obligations in this regard. Second, the merits of this decision are questionable, given that nowhere does the Court rule on the validity of the restrictive criteria established by the IRB itself to determine which of these decisions were sufficiently important to warrant their simultaneous publication in both official languages. Without examining the validity of these criteria, how could the Court then decide on the value of the “precedent” that should or should not be attributed to these decisions? Is the adoption of such restrictive criteria itself not contrary to the spirit and intent of the *Official Languages Act*?

Regardless of the Federal Court of Appeal’s decision in *Devinat*, it appears that the IRB has since found another way to circumvent its obligations under the *Official Languages Act*. For example, in a recent article in *La Presse*, Louis Fortier reported that the IRB has adopted a policy of no longer publishing its decisions, which allows it to avoid having them translated—at least according to its interpretation of the *Official Languages Act*—thereby depriving potential refugee claimants and their lawyers and advocates, anglophone or francophone, of the jurisprudence that is the very foundation of the age-old common law legal system. It is clear that such a policy violates the letter and spirit of the *Official Languages Act*, but in the absence of federal government directives on the matter, it will apparently take another judicial challenge to force the IRB to review its policy on this subject.<sup>7</sup> (References omitted) [Translation]

Only the Supreme Court of Canada simultaneously publishes all its judgments in English and French.

For the Barreau du Québec, the publication of judgments simultaneously in both official languages would necessarily contribute to better access to justice, particularly in a common law system in which the authority of precedent plays such an important role. This obligation would make it possible to achieve real equality of all participants in the legal system with regard to federal court judgments.

If certain constraints render it impossible to simultaneously publish all decisions of all federal courts, it would be appropriate to:

- Prioritize appellate courts such as the Supreme Court of Canada (which is already the case) and the Federal Court of Appeal;
- Review the situations provided for in subsection 20(1) of the *Official Languages Act* in order to extend this obligation to more decisions, including all decisions dealing with a question of principle, a new question or a contentious point of law;

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<sup>7</sup> Karine MCLAREN, “[La langue des décisions judiciaires au Canada](#),” (2015), 2 R.D.L. 358.

- Review subsection 20(2) of the *Official Languages Act* to ensure that this exception to the simultaneous publication of decisions is used very sparingly and does not become the rule.

We should use the opportunity that is now before us to clarify the issue of posting decisions on the websites of federal courts. In November 2016, the Commissioner of Official Languages, while acknowledging the debate over the interpretation of section 20 of the *Official Languages Act*, made the following 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 websites.<sup>8</sup>

The Barreau du Québec is particularly concerned with the translation of judgments rendered by Quebec courts. Under section 133 of the Constitution Act, 1867,<sup>9</sup> judges in Quebec may write their decisions in French or English. Section 7 of the *Charter of the French Language*<sup>10</sup> also provides the right for anyone to have judgments translated free of charge into English or French.

The vast majority of judgements in Quebec are rendered in French. Although some requests for translation under the *Charter of the French Language* are received, most decisions are not translated.

However, many judgments are rendered in Quebec in matters that are common to all provinces and territories in Canada, such as family, criminal, constitutional and commercial law. Unfortunately, this wealth of legal information is accessible only to people who understand French. Real access to justice requires that all legal documentation and jurisprudence be available in both of Canada's official languages.

This is why the Société québécoise d'information juridique (SOQUIJ), the Quebec Ministry of Justice and various Quebec courts, including the Court of Appeal in 2003 and the Superior Court and the Quebec Court in 2005, reached an agreement to translate into English 1 350 pages of jurisprudence with Canada-wide interest, which is about 450 pages per court.

Between 2010 and 2012, a grant provided by Justice Canada to the SOQUIJ allowed for the translation of an additional 1 350 pages a year of judgments by the Quebec Court of Appeal. Because the grant was not renewed, the number of pages of judgments translated annually by the SOQUIJ has returned to 1 350, or 450 pages per court. These translation costs are covered entirely by the SOQUIJ.

This paucity of translated judgments greatly affects the visibility and influence of decisions rendered by Quebec courts.<sup>11</sup> A good example is the Quebec Court of Appeal, which has a similar number of judges to the Ontario Court of Appeal. In 2017, and providing for the fact that there is a Divisional Court in Ontario, the Quebec Court of Appeal rendered twice as many judgments as the Ontario Court of Appeal.

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<sup>8</sup> [\*Report to Parliament of the Commissioner of Official Languages on the investigation into the Courts Administration Service under subsection 65\(3\) of the Official Languages Act.\*](#)

<sup>9</sup> *Constitution Act 1867*, 30 & 31 Vict., c. 3 (UK)

<sup>10</sup> RLRQ, c. C-11

<sup>11</sup> The statistics that follow were all obtained from the CanLII database.

That same year, however, decisions of the Ontario Court of Appeal were cited more than 2 000 times by Canadian jurisprudence in other jurisdictions, while the Quebec Court of Appeal was only cited about 300 times.

Thus, although it renders many more decisions each year, the Quebec Court of Appeal seems to be forgotten by other Canadian courts, mainly due to the fact that the majority of its judgments are in French. The following table shows this trend over the past few years:

**Number of judgments from other jurisdictions citing the Quebec and Ontario courts of appeal, by year**

	Quebec Court of Appeal	Ontario Court of Appeal
2015	403	601
2016	320	1 864
2017	309	2 012

While additional funding would help raise the profile of Quebec courts, including the Court of Appeal, that is not our purpose today. Rather, we wish to draw attention to the significant loss to Canadian litigants of relevant and prolific jurisprudence in areas such as the *Canadian Charter of Rights and Freedoms*,<sup>12</sup> criminal law, the *Divorce Act*<sup>13</sup> and the *Bankruptcy and Insolvency Act*.<sup>14</sup>

We call on Justice Canada to work with the various stakeholders in Quebec , including its Ministry of Justice, the courts and the SOQUIJ, and provide financial assistance to develop a strategy to promote the translation of French jurisprudence in Quebec so that it may be known throughout Canada.

If not, what should be a reasonable interval between publishing a judgment in one language and then publishing the translation in the other?

In 1999, the Federal Court of Appeal recognized in *Devinat*<sup>15</sup> that the Immigration and Refugee Board was not complying with the obligations of section 20 of the *Official Languages Act*:

[71]The appellant further acknowledged that the earlier decisions rendered by the respondent from its creation to the date the originating motion was filed, September 17, 1996, do not all have value as precedents. The issuing of a *mandamus* order that would apply to all earlier decisions would therefore not satisfy the appellant's objectives, as he would only be concerned with consulting those which have such value. Issuing a *mandamus* order covering the entire scope of section 20 of the OLA would thus not be justified, since the money spent on translation services would have no practical result. Further, as indicated in the record, there is no question as to the respondent's good faith. From the outset, it has made every effort to co-operate in the

<sup>12</sup> Part I of the *Constitution Act, 1982* (Schedule B to the *Canada Act 1982* (UK), 1982, c. 11).

<sup>13</sup> R.S.C. 1985, c. 3 (2nd Supp.)

<sup>14</sup> R.S.C. 1985, c. B-3

<sup>15</sup> *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 F.C. 212 (C.A.).

investigation by the Commissioner of Official Languages and has complied promptly with the latter's recommendations.

[72]The difficulty in the case at bar is to determine which of the decisions rendered by the respondent have value as precedents and to ensure that those which do are available to researchers and the public in both official languages. That is the true purpose of the proceedings at bar, and this can ultimately only be achieved if the respondent develops relevant administrative standards, subject to approval by the intervener, to resolve this dispute in keeping with the aims of the OLA.

[73]In the circumstances, in view of the practical effect which the granting of a *mandamus* would have, especially on the thousands of decisions which there is no interest in translating, and bearing in mind the balance of convenience, we feel that it would not be advisable to make a *mandamus* order for the past.

[74]That being said, it is clear that the present policy followed by the respondent is a departure from the Act and that, as of the date of this judgment, it will have no choice but to comply with the Act, unless legislative amendments are made to section 20 of the OLA.

The Commissioner of Official Languages recently released an investigation report in which he concluded that the Courts Administration Service had not complied with the obligations of section 20 of the *Official Languages Act*:

According to the *Courts Administration Service Policy on Translation and Distribution*, court decisions are translated in the following order of priority:

Priority 1 applies to all decisions that are simultaneously available to the public in both official languages, i.e., decisions for which the proceedings were conducted, in whole or in part, in both official languages, or final decisions dealing with a question of law of interest or importance to the public. CAS has indicated that these decisions go through the expedited translation process, and take precedence over the translation of other decisions.

Priority 2 applies to all other decisions that will be posted on court websites. The time frames for translating these decisions range from six weeks to three months and depend on the number of pages in the judgments.

Priority 3 applies to all other final decisions that will not be posted on courts' websites, but must be translated under the Act. These decisions include final orders without reasons and oral decisions. CAS indicated that, although no specific deadline exists for the translation of decisions classified under this priority, a list of priority 3 decisions to be translated is maintained and priority is given to the oldest decisions.

CAS indicated that all the decisions mentioned in the complainants' allegations are priority 2, and should have been translated within three months, in accordance with the policy described above. CAS acknowledged that there had been delays in translating the

decisions that had been given as examples. CAS made it clear that it works in a context of limited resources, which sometimes results in translation delays. In addition, although monitoring processes are in place, CAS only controls certain steps of the process. Once the requests for translation of the court decisions have been received, CAS sends them for translation and then for legal revision before they can be made available to the public. The number of actors involved makes it more difficult for CAS to control the entire process.

...

## 8. Conclusions

In order to meet the obligations under subsection 20(2) of the Act, CAS must ensure that final decisions that are not made available to the public in both official languages simultaneously, pursuant to subsection 20(1), are translated at the earliest possible time into the other official language.

The investigation revealed that several final decisions cited as examples by the complainants had not been made available to the public “at the earliest possible time,” as defined by CAS in its Translation and Distribution Policy.

As a result, CAS did not translate these decisions “at the earliest possible time,” and therefore did not comply with its obligations under subsection 20(2) of the Act. Each of the eight complaints included one or more decisions that were not translated at the “earliest possible time,” specified in CAS policy. The complaints are therefore founded.  
[Translation]

The report shows that the Courts Administration Service does not translate judgments in a timely manner. Consequently, the Barreau du Québec believes that the expression “at the earliest possible time” in section 20 of the *Official Languages Act* is not sufficiently restrictive to ensure that decisions that are not simultaneously accessible in both official languages are made available within an acceptable interval that allows participants in the legal system to read, understand and make use of them. In this regard, we suggest that different time limits be established depending on the nature of the judgment. What may be considered reasonable in one situation may be unreasonable in another. The Quebec legislature made this choice to impose different time periods for deliberation depending on the nature of the judgment to be rendered:

324 For the benefit of the parties, the judgment on the merits in first instance must be rendered within

(1) six months after the matter is taken under advisement in contentious proceedings;

(2) four months after the matter is taken under advisement in small claims matters under Title II of Book VI;

(3) two months after the matter is taken under advisement in child custody or child support matters and non-contentious cases;

(4) two months after the matter is taken under advisement if the judgment is to determine whether a judicial application is abusive; and

(5) one month after the case is ready for judgment if a judgment is to be rendered following the defendant's failure to answer the summons, attend the case management conference or defend on the merits.

The time limit is two months after the matter is taken under advisement in the case of a judgment in the course of a proceeding, but one month after the court is seized when it is to rule on an objection raised during a pre-trial examination and pertaining to the fact that a witness cannot be compelled, to fundamental rights or to an issue raising a substantial and legitimate interest.

The death of a party or its lawyer cannot operate to delay judgment in a matter taken under advisement.

If the advisement period has expired, the chief justice or chief judge, on their own initiative or on a party's application, may extend it or remove the judge from the case.<sup>16</sup>

## SHOULD THE CRITERIA FOR WHAT CONSTITUTES A DECISION "OF IMPORTANCE" WITHIN THE MEANING OF SECTION 20 OF THE ACT BE MADE EXPLICIT?

As mentioned above, the Barreau du Québec believes that it would be preferable to review the situations provided for in subsection 20(1) of the *Official Languages Act* in order to extend this obligation to more decisions, including all decisions dealing with a question of principle, a new question or a contentious point of law. By extending the rule, we would ensure that the vast majority of important decisions are simultaneously available in both official languages.

## SHOULD JUDICIAL APPOINTMENTS TO SUPERIOR COURTS AND PROVINCIAL COURTS OF APPEAL, A FEDERAL RESPONSIBILITY, BE GOVERNED BY THE ACT?

As stated above, the Barreau du Québec supports all measures to ensure that bilingualism is a requirement for appointment to the Supreme Court of Canada. Functional bilingualism must be one of the skills required to be a Supreme Court judge to ensure equal access to justice for all.

We believe that bilingualism should be considered an asset in the selection process for judges of provincial courts of appeal. Indeed, provincial courts of appeal make important decisions that establish principles.

In many cases, these are final decisions. For example, 696 decisions on the merits were rendered by the Quebec Court of Appeal in 2016.<sup>17</sup> Of these, 134 were the subject of an application for leave to appeal

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<sup>16</sup> *Code of Civil Procedure*, RLRQ, c. C-25.01

<sup>17</sup> Court of Appeal of Quebec, [Statistics and Publications](#).

to the Supreme Court, and 12 of them were heard on the merits by the Supreme Court of Canada.<sup>18</sup> In more than 600 cases, therefore, the decision rendered by the Court of Appeal was final.

With respect to superior courts, we believe that bilingualism should also be considered an asset in the selection process. In addition, we propose that bilingualism be required of judges appointed in certain regions and judicial districts, based on regional realities and the linguistic communities present.

In addition, the Barreau du Québec proposes that the federal judiciary provide training to judges to ensure that when orders and judgments are issued from the bench in the official language chosen by the parties, they are delivered in quality language that is free of errors.

This training could focus on how to issue judgments or orders orally or during a hearing, and would ensure the highest quality of court decisions.

### SHOULD THE ACT STATE THAT THE ENGLISH AND FRENCH VERSIONS OF FEDERAL COURT JUDGMENTS HAVE THE SAME FORCE AND EFFECT, MIRRORING THE OBLIGATIONS SURROUNDING FEDERAL LEGISLATION?

According to author Michel Doucet, this issue has not yet been decided by the courts:

While the equality of the two language versions of a legislative text is accepted, particularly because of section 18 of the *Canadian Charter of Rights and Freedoms*, what about judgments published in English and French by the courts? What is the authority of the two versions of these judgments? Does one version take precedence over the other? These are questions that have not yet been answered by the courts.<sup>19</sup> (References omitted) [Translation]

However, several authors argue in favour of this real equality. The Honourable Michel Bastarache justifies it as follows:

... call for normative notions of bilingualism, as we have done for the rule of equal legislative authority. The requirement that authoritative legal texts be equally accessible to English-speaking and French-speaking Canadians is an important one given Canada's commitment to ensuring that both languages are of equal value and given their importance to personal growth. We therefore argue that, regardless of the method used to prepare bilingual judgments and regardless of the applicable legislative framework, it is undeniable that the English and French versions of the judgments of the Federal Court, the Federal Court of Appeal and above all, the Supreme Court of Canada are equally authoritative. The same applies to judgments of the Tax Court of Canada and federal tribunals.... For New Brunswick, this is the case for decisions published after the adoption of the new *Official Languages Act*, which are referred to as the "French version" or the "English version."<sup>20</sup> (References omitted) [Translation]

The Barreau du Québec agrees with this. When participants in the legal system read either version of a judgment, they should be able to rely on it. Moreover, this seems to already be a common practice

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<sup>18</sup> Supreme Court of Canada, *Statistics 2006 to 2016*, p. 8.

<sup>19</sup> Observatoire international des droits linguistiques, "[Le bilinguisme et les jugements](#)," 22 February 2016.

<sup>20</sup> Quoted by K. MCLAREN, *supra*, note 7.

given that judgments are regularly submitted to the courts in one version only, and there have not been any real problems to date.

### What would be the practical challenges of such an obligation?

For the Barreau du Québec, there are essentially three challenges:

- The government will have to provide funding to change how judgments are translated;
- The quality of the translation of judgments must be improved. The Supreme Court of Canada process should serve as a model. Author McLaren describes it as follows:

The Supreme Court of Canada, it must be said, has long been a leader in the field of the translation of judicial decisions. As Scassa noted in 1994, “translation facilities at the Supreme Court of Canada have evolved to the point where the quality of the translations is such that they could easily serve as authentic versions.”

Mr. Christian Després, Chief Jurilinguist in the Reports Branch of the Supreme Court of Canada, was kind enough to answer our questions, and it is from that interview that we derive the following information.

First, the Supreme Court of Canada has its own team of jurilinguists and translates its own judgments. This distinguishes it from all other courts subject to bilingual judgment obligations. The initial translation of the reasons is carried out by external suppliers chosen by the Court itself, with the Translation Bureau being only one of those suppliers. This initial translation is only a preliminary step in the integrated process of producing translated versions of Supreme Court of Canada judicial decisions. All initial translations performed by external suppliers are revised in great detail by the Court’s jurilinguistics service. Of the eight members of the jurilinguist team, all have legal training, and in some cases translation training, and all have considerable experience in their field. In addition to the jurilinguistic review, each decision undergoes a technical and legal review. Supreme Court of Canada technical reviewers verify all technical information contained in decisions (case names, citations, page numbers, references, etc.), while legal reviewers, as their name suggests, conduct a review of the reasons from a legal point of view. This entire process is integrated and all stakeholders communicate with each other as needed. If there is any ambiguity in the reasons, the issue is raised directly with the office of the judge who drafted them. The entire process and the physical proximity of those involved therefore facilitate interaction between the authors of the texts and those responsible for the translated version of these texts. Nor is it a question of waiting until the final version of the reasons is ready before beginning to translate a text that has been written in stone. The translation process begins as soon as the author of a judgment circulates the draft reasons to his or her colleagues, and the translated versions of the judgments are also circulated among the judges during the same period.

It is interesting to note that this process is similar to dialogical translation, a process successfully used today in certain jurisdictions, including Ontario, to produce the French versions of legislative texts. In the case of Ontario laws, however, the French versions of the translated laws are recognized as having the same force of law as the original



versions written in English. To the extent that the quality of translations of Supreme Court of Canada judgments is such that they could easily serve as authentic versions, the question then arises as to why it is necessary to identify the translated versions of these judgments.<sup>21</sup> (References omitted) [Translation]

- Federal courts must be more involved in the translation process. Without their support for this new model, it will be virtually impossible to implement.

## SHOULD THE PRINCIPLE OF CO-DRAFTING FEDERAL LEGISLATION BE CODIFIED IN THE ACT, SIMILARLY TO WHAT WAS DONE IN NEW BRUNSWICK'S *OFFICIAL LANGUAGES ACT*?

The Barreau du Québec is an advocate of legislative co-drafting. We believe that this is the most effective way to meet the constitutional guarantees set out in section 133 of the *Constitution Act, 1867*.

Co-drafting is the best tool for ensuring that the legislator's intention expressed in the French version corresponds to the legislator's intention expressed in the English version and thus guarantees legal stability. Fuzzy and contradictory laws affect all citizens and can lead to unnecessary and avoidable debates.

At the legislative level, the Barreau du Québec agrees with the wording used by New Brunswick in section 12 of its *Official Languages Act*<sup>22</sup>:

12. The Acts of the Legislature shall be co-drafted, printed and published in both official languages.

Its addition to the federal Act would be desirable and would clarify and codify an existing practice, while respecting federal constitutional obligations.

## CONCLUSION

The Barreau du Québec would like to thank the Standing Senate Committee on Official Languages for allowing it to participate in this consultation, particularly with respect to the administration of justice.

In summary, the Barreau du Québec responds as follows to the questions set out in the document entitled *Canadians' Views about Modernizing the Official Languages Act – The Justice Sector's Views*:

- ✓ **Should the requirement for federal court judges to understand both official languages be extended to the Supreme Court?**

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<sup>21</sup> Quoted by K. MCLAREN, *supra*, note 7.

<sup>22</sup> S.N.-B. 2002, c. O-0.5.

- Yes, the Barreau du Québec supports any measures to ensure that bilingualism is a requirement for appointment to the Supreme Court of Canada. Functional bilingualism must be one of the skills required of a Supreme Court judge to ensure equal access to justice for all.
- ✓ **Should there be a requirement for all federal court judgments to be published simultaneously in both official languages?**
  - For the Barreau du Québec, the publication of judgments simultaneously in both official languages would necessarily contribute to better access to justice, particularly in a common law system in which the authority of precedent plays such an important role. This obligation would make it possible to achieve real equality of all participants in the legal system with regard to federal court judgments.
- ✓ **Should the criteria for what constitutes a decision “of importance” within the meaning of section 20 of the Act be made explicit?**
  - The Barreau du Québec believes that it would be preferable to review the situations provided for in subsection 20(1) of the *Official Languages Act* in order to extend this obligation to more decisions, including all decisions dealing with a question of principle, a new question or a contentious point of law. By extending the rule, we would ensure that the vast majority of important decisions are simultaneously available in both official languages.
- ✓ **Should judicial appointments to superior courts and provincial courts of appeal, a federal responsibility, be governed by the Act?**
  - The Barreau du Québec believes that bilingualism should be considered an asset in the selection process for judges of provincial courts of appeal and superior courts. In addition, we propose that bilingualism be required of judges appointed in certain regions and judicial districts, based on regional realities and the linguistic communities present.
- ✓ **Should the Act state that the English and French versions of federal court judgments have the same force and effect, mirroring the obligations surrounding federal legislation?**
  - Yes. When participants in the legal system read either version of a judgment, they should be able to rely on it. Moreover, this seems to already be a common practice given that judgments are regularly submitted to the courts in one version only, and there have not been any real problems to date.
- ✓ **Should the principle of co-drafting federal legislation be codified in the Act, similarly to what was done in New Brunswick's *Official Languages Act*?**
  - Yes. The Barreau du Québec is an advocate of legislative co-drafting. We believe that this is the most effective way to meet the constitutional guarantees set out in section 133 of the *Constitution Act, 1867*. We agree with the wording used by New Brunswick in its *Official Languages Act*.