

Comments and observations of the Barreau du Québec

Bill C-13 — *An Act for the Substantive Equality of Canada's Official Languages*

May 2022

Mission of the Barreau du Québec

The Barreau du Québec protects the public, contributes to accessible and quality justice, and upholds the rule of law.

Acknowledgements

The Barreau du Québec wishes to thank Nicolas Le Grand Alary of the Secrétariat de l'Ordre et Affaires juridiques for this submission.

Published in May 2022 by the Barreau du Québec

ISBN (PDF): 978-2-924857-98-4

Legal deposit — Bibliothèque et Archives nationales du Québec, 2022

Legal deposit — Library and Archives Canada, 2022

INTRODUCTION

On March 1, 2022, the Minister for Official Languages, the Honourable Ginette Petitpas Taylor, tabled Bill C-13, *An Act for the Substantive Equality of Canada's Official Languages* (“the bill”).

The bill amends the *Official Languages Act*¹ and other Acts in order to protect and promote the French language, which the federal government recognizes as being in a minority situation in Canada.² To this end, the bill would require bilingualism in the Supreme Court of Canada and would require that final decisions of the federal courts that have precedential value be made available simultaneously in both official languages.

The Barreau du Québec closely monitors the use of English and French before Canadian courts. In this regard, we intervened before the Supreme Court of Canada in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*³ to support the importance of the complementary role of judges and lawyers in ensuring that the language rights of parties and witnesses are respected.

Given its experience in this area, the Barreau du Québec wishes to make certain comments on the bill with respect to the administration of justice, particularly the bilingualism of judges of the Supreme Court of Canada, the availability of final decisions of the federal courts, and the translation of Quebec court judgments.

¹ R.S.C., 1985, c. 31 (4th Supp.).

² Clause 2 amends paragraphs 7 and 8 of the preamble to the *Official Languages Act*.

³ 2018 SCC 50.

1. BILINGUALISM OF THE JUDGES OF THE SUPREME COURT OF CANADA

S. 16 of the *Official Languages Act* amended by clause 11

Duty to ensure understanding without an interpreter

16. (1) Every federal court, ~~other than the Supreme Court of Canada,~~ has the duty to ensure that

- (a) if English is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand English without the assistance of an interpreter;
- (b) if French is the language chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand French without the assistance of an interpreter; and
- (c) if both English and French are the languages chosen by the parties for proceedings conducted before it in any particular case, every judge or other officer who hears those proceedings is able to understand both languages without the assistance of an interpreter.

...

The bill proposes to amend the *Official Languages Act* to make the Supreme Court of Canada subject to the obligation of federal courts to ensure that the judge hearing a case understands the language or languages of the trial by removing the exception in section 16 of the Act.

The Barreau du Québec considers that the right to be understood by a judge in English or French before the Supreme Court and other federal courts is fundamental and ensures the equal status of both official languages. Moreover, hearing the proceedings without the assistance of an interpreter increases public confidence in the rule of law and in justice and improves the quality of services rendered, since the information is not transmitted via a third party.

In the past, on more than six occasions, the Barreau du Québec has supported various bills and consultations aimed at amending the *Supreme Court Act*⁴ to make the appointment of bilingual judges mandatory. Regardless of the vehicle chosen, the Barreau du Québec supports all measures intended to ensure that bilingualism is a requirement for appointment as a judge to the Supreme Court of Canada. Functional bilingualism must be part of the requisite qualifications of a Supreme Court judge to ensure equal access to justice for all.

We acknowledge that the current process for appointing judges to the Supreme Court of Canada put in place by the government requiring judges to be bilingual satisfies the Barreau du Québec and addresses several of our requests over the past few years. However, we still believe that the *Official Languages Act* or the *Supreme Court Act* should be amended to require future governments to respect this criterion, so we welcome the amendments proposed by the bill.

⁴ R.S.C., 1985, c. S-26.

1.1 Potential to raise a constitutional issue

It has been suggested 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 *Reference re Supreme Court Act, ss. 5 and 6*,⁵ further to Justice Nadon’s appointment. Thus, the addition of a bilingualism requirement to any of these statutes would, in their view, have to go through the constitutional amendment process (seven Canadian provinces with at least 50% of the population).

While we do not take a position on this constitutional issue, we would like to emphasize that it deserves particular attention to ensure that any amendments requiring bilingualism of Supreme Court judges are successful, not counterproductive.

1.2 Diversity in the composition of the Supreme Court of Canada

In addition, we wish to express our support for the objective of promoting diversity in the composition of the Supreme Court of Canada to make it more representative of the Canadian population. As the federal government recently stated in its paper *English and French: Towards a substantive equality of official languages in Canada*,⁶ with respect to the appointment of a First Nations, Inuit or Métis judge,

[I]t will be necessary to keep in mind the importance of the representativeness of Indigenous peoples in the highest institutions of our country. The growing presence of highly qualified Indigenous jurists leads the Government to actively envision the appointment of Indigenous judges to the Supreme Court of Canada.⁷

In so doing, we do not believe that requiring bilingualism in English and French will prevent the achievement of this important objective, since, as the government stated in the same paper, “[t]he last few decades have fostered the development of a pool of jurists that are competent in our two official languages in all regions of the country.”⁸

Therefore, the Barreau du Québec believes that it is entirely possible to appoint bilingual judges to the Supreme Court of Canada who also come from a diverse background, one not precluding the other, quite the contrary.

⁵ 2014 SCC 21.

⁶ Canadian Heritage, [English and French: Towards a substantive equality of official languages in Canada](#), Spring 2021.

⁷ *Ibid.*, p. 25.

⁸ *Ibid.*

2. TRANSLATION OF FEDERAL AND QUEBEC COURT JUDGMENTS

S. 20 of the *Official Languages Act* amended by clause 12

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~~

(a.1) the decision, order or judgment has precedential value; or

(b) the proceedings leading to its issuance were conducted in whole or in part in both official languages.

Decisions, orders and judgments available in both official languages at different times

(2) A decision, order or judgment issued by a federal court, including any reasons given for it, shall be issued first in one of the official languages and then, at the earliest possible time, in the other official language, with each version to be effective from the time the first version is effective, if

(a) it is a final decision, order or judgment that is not required under subsection (1) to be made available simultaneously in both official languages; or

(b) the decision, order or judgment is required to be made available simultaneously in both official languages under paragraph (1)(a) or (a.1) but the court is of the opinion that to make the decision, order or judgment, including any reasons given for it, 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.

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.

2.1 Decisions rendered simultaneously in both official languages

Currently, federal courts are not required to issue all their judgments simultaneously in both official languages. Only the Supreme Court of Canada renders all its judgments simultaneously in English and French.

The Barreau du Québec believes that rendering judgments simultaneously in both official languages would necessarily improve access to justice, especially in a common law system where the authority of precedents is very important. This obligation would help achieve real equality of litigants in relation to federal court judgments.

However, we do understand that, due to certain economic or time constraints, it may not be possible to issue all federal court decisions simultaneously in both official languages.

We acknowledge that the bill breaks new ground by adding that decisions that have “precedential value” will now have to be made available simultaneously in English and French. While this is a step in the right direction, the Barreau du Québec is calling for the bill to go further by

- reviewing the situations set out in subsection 20(1) of the *Official Languages Act* to extend the obligation to even more decisions, including all decisions dealing with a question of principle, an emerging issue or a controversial point of law;
- amending subsection 20(2) of the *Official Languages Act* so that the exception to simultaneous publication of decisions is used very sparingly and does not become the rule; and
- investing in and prioritizing appellate courts such as the Federal Court of Appeal.

2.2 Translation of Quebec court judgments

The Barreau du Québec is particularly concerned about the translation of judgments rendered by Quebec courts. Under section 133 of the *Constitution Act, 1867*,⁹ a Quebec judge may write their judgment in English or French. Section 7 of the *Charter of the French Language*¹⁰ also gives any party the right to have a judgment translated free of charge into English or French.

It appears that the vast majority of Quebec judgments are rendered in French. Although some requests for translation under the *Charter of the French Language* are received, the vast majority of decisions are not translated.

However, a large number of judgments are rendered in Quebec on matters that are common to all Canadian provinces and territories, such as family, criminal, constitutional or commercial law. We believe that true accessibility to justice requires that all legal and judicial documentation be available in both of Canada’s official languages.

We also believe that this lack of translation of judgments greatly affects the visibility and reach of decisions rendered in French by federally appointed Quebec courts.¹¹ Take, for example, the Quebec Court of Appeal, which has a similar number of judges to the Ontario Court of Appeal. In 2021, assuming that there is a Divisional Court in Ontario, the Quebec Court of Appeal rendered twice as many judgments as the Ontario Court of Appeal.

Despite that, in that same year, Ontario Court of Appeal decisions were cited more than 2,000 times in the Canadian jurisprudence of other jurisdictions. The Quebec Court of Appeal was cited only 400 times.

As shown by the data, although the Quebec Court of Appeal renders a much larger number of decisions each year, it appears to be overlooked by other Canadian courts, particularly because it renders most of its judgments in French. The following table shows this trend over the last few years:

⁹ *Constitution Act, 1867*, 30-31 Vict, c 3 (UK).

¹⁰ RSQ, c. C-11.

¹¹ All of the following statistics were taken from the CanLII database.

Number of judgments from other jurisdictions citing Quebec and Ontario Courts of Appeal, by year¹²

	Quebec Court of Appeal	Ontario Court of Appeal
2019	408	2,488
2020	378	2,388
2021	448	2,651

While additional funding would help expand the reach of Quebec courts, including the Court of Appeal, this is not the aim of our submission. Rather, we wish to draw attention to the significant loss to Canadians of relevant and prolific case law on matters such as the *Canadian Charter of Rights and Freedoms*,¹³ criminal law, the *Divorce Act*¹⁴ and the *Bankruptcy and Insolvency Act*.¹⁵

We therefore encourage the Department of Justice Canada, the Quebec Department of Justice, the courts and the Société québécoise d'information juridique to work together on a strategy to promote the translation of French-language case law from Quebec and to extend its reach across Canada.

¹² Number of decisions listed in CanLII that mention decisions of these respective appellate courts.

¹³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁴ R.S.C., 1985, c. 3 (2nd Supp.).

¹⁵ R.S.C., 1985, c. B-3.

CONCLUSION

The Barreau du Québec essentially welcomes the bill and supports its objective of protecting and promoting the French language, which the federal government recognizes as being in a minority situation in Canada. Specifically:

- ✓ The Barreau du Québec supports the amendment to the *Official Languages Act* ensuring that bilingualism is a requirement for appointment as a judge to the Supreme Court of Canada. Functional bilingualism must be part of the requisite qualifications of a Supreme Court judge to ensure equal access to justice for all.
- ✓ Rendering judgments simultaneously in both official languages would necessarily improve access to justice, especially in a common law system where the authority of precedents is very important. Amending the rules in the *Official Languages Act* will help achieve this objective in part; however, we recommend other measures that could improve them.
- ✓ The vast majority of Quebec judgments are rendered in French and a large number of them are rendered on matters that are common to all Canadian provinces and territories, such as family, criminal, constitutional or commercial law. To extend the reach of French-language jurisprudence in Quebec across Canada, funding should be provided to have these judgments translated.