



June 7, 2023

[TRANSLATION]

By email: ollo@sen.parl.gc.ca

The Honorable René Cormier
Chair, Standing Senate Committee on Official Languages
The Senate of Canada
Ottawa, ON K1A 0A4

Mr. Senator Cormier,

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

I am writing to you on behalf of the French Speaking Common Law Members Section of the Canadian Bar Association (the CBA Section) regarding Bill C-13, *An Act for the Substantive Equality of Canada's Official Languages*, which was introduced to the House of Commons on March 1, 2022. While this bill does address certain concerns that the CBA Section has been raising for several years now, we are of the opinion that significant problems remain and must be resolved.

The CBA is a national organization with a membership base of over 37,000 lawyers, notaries, academics and law students from across Canada. Its primary objectives include improving the law and the administration of justice. The CBA has demonstrated a deep and abiding commitment to official bilingualism in the realm of the law. Furthermore, it accords special importance to the linguistic duality underpinning the core values of our national identity and our legal system. The members of the CBA Section represent French-speaking members of the CBA who practice in common-law provinces and territories and defend the values of bilingualism, bijuralism and access to justice in French.

In January 2022, the CBA Section shared concerns with Minister Petitpas Taylor, Minister Lametti and Minister Fortier regarding the modernization of the *Official Languages Act* (OLA) proposed in Bill C-32, introduced to the House of Commons in June 2021 (submitted letter in appendix). The CBA Section asked that the next iteration of the bill to modernize the OLA:

- i. Strengthen and expand the role of the Treasury Board;
- ii. Address the gaps in Part VII of the Act;
- iii. Guarantee access to justice in French in the area of bankruptcy and insolvency;
- iv. Increase the judiciary's bilingual capacity by assessing the linguistic abilities of candidates;
- v. Create the obligation to adopt the French version of the Constitution; and
- vi. Clarify the proposed new criteria for publishing court decisions in both official languages.

The CBA Section is pleased that some important changes proposed in Bill C-32 have been preserved in Bill C-13, notably the removal of the Supreme Court of Canada’s exemption from bilingualism in subsection 16(1) of the OLA¹ and the entrenchment of the Court Challenges Program.

The CBA Section also appreciates the fact that Bill C-13 is a clear improvement over Bill C-32. Nonetheless, there are some serious concerns raised in our January 2022 letter that Bill C-13 addresses only partially or not at all.

A stronger role for the Treasury Board

Bill C-13 makes the Treasury Board’s discretionary powers into obligations, which is an important step forward in terms of protecting the status of French. However, this remains too weak, given that the Treasury Board’s ability to delegate its powers is maintained (paragraph 42(2)(c) and subsection 46(3)).

Furthermore, contrary to promises made in the government’s white paper,² responsibility for coordinating implementation of the OLA will remain shared between the Treasury Board and the Department of Canadian Heritage if Bill C-13 is adopted without amendment (section 2.1). In our view, the Treasury Board should be solely responsible for coordinating implementation of the OLA, and should perform that role for the whole of the Act (rather than merely a portion of it).

Clearer language in Part VII of the OLA

Part VII of the OLA as it currently stands has been criticized on numerous occasions for not being clear enough. Bill C-13 proposes improvements to Part VII, but it should go further in eliminating ambiguity regarding the federal government’s obligations.

For example, Bill C-13 proposes that the expression “positive measures” in subsection 41(5) be replaced by the expression “the positive measures that [every federal institution] considers appropriate.”³ This change would more clearly define the positive measures that must be taken, but expressly grants too great a discretion to federal institutions to determine what positive measures are “appropriate” in a given situation. The CBA Section is of the opinion that employing the expression “the **necessary** positive measures” would add the appropriate level of clarity and restrict the discretionary ambiguity proposed under Bill C-13.

Access to justice in French is still not guaranteed in the area of bankruptcy and insolvency

Different federal legislation lead to “mixed” regimes where Parliament sets out substantive rules and confers upon provincial and territorial courts the power to instruct dispute resolution bodies regarding the interpretation and application of those rules. The areas in question—including criminal law, divorce, bankruptcy and insolvency—remain entirely under federal legislative jurisdiction, while the provincial and territorial courts perform the judicial function in these areas. Since dispute resolution bodies under the legal regime in question fall constitutionally under federal jurisdiction, then, it is essential that they should be capable of functioning in both official languages throughout Canada, in accordance with subsections 16(1), 19(1) and 20(1) of the *Canadian Charter of Rights and Freedoms*.

¹ Canadian Bar Association, [Access to Justice in French and English in the Context of Modernizing the Official Languages Act](#), October 2018, recommendation 3 on p. 8. See also Canadian Bar Association, Resolution 10-03-A, [Institutional Bilingualism at Supreme Court of Canada](#), 2010:

“BE IT RESOLVED THAT the Canadian Bar Association: [...] (d) urge the Parliament of Canada to adopt the following measures to achieve institutional bilingualism in the Supreme Court of Canada: amend subsection 16(1) of the *Official Languages Act* to apply the duty to ensure understanding without an interpreter to the Supreme Court of Canada [...]”.

² Canada, [English and French: Towards a substantive equality of official languages in Canada](#), 2021, p. 26.

³ Bill C-13, *An Act to amend the Official Languages Act, to enact the Use of French in Federally Regulated Private Businesses Act and to make related amendments to other Acts*, 1st session, 44th parl, 2022, sec 21 (first reading March 1, 2022).

Over the years, Parliament has created two types of guarantees to achieve the overarching objective of access to justice in French. One is that Part XVII of the *Criminal Code* grants citizens the right to a preliminary hearing and a criminal trial conducted in the official language of their choice. The other is that section 23.2, recently added to the *Divorce Act*, grants citizens the right to use the official language of their choice in proceedings under that Act. In both cases, this protection applies throughout Canada.

Such a right to proceedings in French still does not exist in the area of bankruptcy and insolvency (nor in criminal appeals, which also must change). Despite the CBA Section's requests,⁴ Bill C-13 does not propose legal guarantees to ensure judicial bilingualism regarding bankruptcy and insolvency, even though that area falls exclusively under the federal government's jurisdiction.

The proposed modernization of the OLA says nothing regarding the nomination of bilingual judges to lower courts and appellate courts and assessing the linguistic skills of candidates for those positions

In order to ensure that the courts have appropriate bilingual capacity, the CBA Section requested in January 2022 that the government commit to legislating a new mandatory and rigorous assessment of the linguistic abilities of candidates interested in becoming trial judges or appellate court judges who have chosen to identify the level of their language skills on their application form. The CBA Section has been pushing for this for a long time now.⁵ Access to justice in French requires a judiciary that is capable of serving the entire population in the official language of their choice.⁶

Bill C-13 is silent on this. It does not require the federal government to take the concrete measures necessary to ensure that a sufficient number of bilingual judges are named to lower courts and appellate courts.

The CBA Section is of the opinion that the long-term survival of French requires Bill C-13 to create a system for assessing the language skills of candidates to the judiciary and to create an obligation for the federal government to: 1) ensure, via nominations to the judiciary that pertain to its jurisdiction, that federal courts are able to fulfill their language obligations; and 2) consider the importance of equal access to justice in both official languages when appointing judges to superior courts.

The French version of the Constitution, another huge oversight in the OLA reforms

In January 2022, the CBA Section also reminded the government that the vast majority of Canada's constitutional texts, including the *Constitution Act, 1867*, have the force of law in English only. In 2018, the CBA adopted a resolution "urg[ing] the Government of Canada to fulfill the obligations imposed by section 55 of the *Constitution Act, 1982*, to give full force and effect to the entirety of the Constitution in both official languages."⁷ More recently, our Section and the Constitutional and Human Rights Section of the CBA asked that Parliament "add an enforceable section to the *Official Languages Act* requiring the Minister of Justice of Canada to undertake the best efforts to implement section 55 of the *Constitution*

⁴ French Speaking Common Law Members Section, [Garanties linguistiques dans le domaine de l'insolvabilité](#) [Linguistic guarantees in the area of insolvency], December 10, 2020; **Appendix A**, p. 4 [in French]

⁵ Canadian Bar Association, [Access to Justice in French and English in the Context of Modernizing the Official Languages Act](#), October 2018, recommendation 4, p. 9. See also Canadian Bar Association, Resolution 14-02-M, [Bilingual Capacity of Superior and Appeal Court Judiciary](#), 2014.

⁶ The Supreme Court of Canada will hear an appeal on the inability of a court of justice to assign a sufficient number of bilingual judges (*Commission scolaire francophone des Territoires du Nord-Ouest, A.B., et al. v. Minister of Education, Culture and Employment of the Northwest Territories, et al.* (39915)). The Canadian Bar Association has applied for intervener status in this appeal.

⁷ Canadian Bar Association, Resolution 18-04-A, [Bilingual Constitution of Canada](#), 2018.

Act, 1982”⁸ and another section “requiring the Minister of Justice of Canada to submit a report every five years detailing the efforts made to implement section 55 of the *Constitution Act, 1982*, which will be sent to committee.”⁹

The CBA Section is disappointed to find that Bill C-13 does not mention this matter, which has been stalled since 1982, and urges that it be modified accordingly.

Clarification of the proposed new criteria for publishing court decisions in both official languages

Bill C-13 adds no further clarity or detail regarding the criteria for federal courts’ obligation to publish their decisions in both official languages, despite the CBA Section’s arguments presented in January 2022. The CBA Section must therefore reiterate that, just like its predecessor, section 12 of Bill C-13, which amends section 20 of the OLA, is still not clear enough and is likely to weaken the status of French in federal courts.

The criteria laid out in subsection 20(1) of the OLA as modified by Bill C-13—criteria concerning the importance of a question of law, the precedential value and the process for procedures in both official languages—are, in fact, ambiguous. Unanswered questions include who will be responsible for judging the applicability of these criteria and what oversight mechanisms will be put in place to ensure that those choices are well founded. The CBA Section is of the opinion that such a measure should be carefully reviewed and prudently considered.

Conclusion

The CBA Section urges you to take advantage of Bill C-13’s proposed major reforms to incorporate much-needed amendments to the OLA. The consideration in committee stage and report to the House of Commons stage are excellent opportunities to amend Bill C-13 in ways that achieve substantive equality of English and French.

The CBA Section would welcome an opportunity to appear before your committee and present its perspective and real-world cases.

Sincerely,

(original letter signed by Julie Terrien for Pierre Permingeat)

Pierre Permingeat
Chair, French Speaking Common Law Members Section

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The Honourable David Lametti, Minister of Justice and Attorney General of Canada: mcu@justice.gc.ca
The Honourable Mona Fortier, President of the Treasury Board: president-presidente@tbs-sct.gc.ca

Encl: **Appendix A:** (Letter of January 31, 2022, from the Canadian Bar Association’s French Speaking Members Section, raising concerns about the modernization of the *Official Languages Act* as laid out in Bill C-13, introduced to the House of Commons in June 2021. (Available only in French).

⁸ Canadian Bar Association, [Access to Justice in French and English in the Context of Modernizing the Official Languages Act](#), October 2018, Recommendation 1, p. 8.

⁹ Canadian Bar Association, [Access to Justice in French and English in the Context of Modernizing the Official Languages Act](#), October 2018, Recommendation 2, p. 8.