The Honourable René Cormier  
Chair  
Senate Standing Committee on Official Languages  
Senate of Canada  
Ottawa ON K1A 0H8

Dear Senator Cormier:

I would like to express my sincere thanks for the invitation to appear before you on April 1, 2019, on the modernization of the Official Languages Act (OLA). Unfortunately, we were unable to find a mutually agreeable time for me to appear before you in person prior to the completion of your Committee’s important study.

Nonetheless, I wish to contribute to the work of your Committee by submitting this written brief, in which I will explain my role and that of my department with respect to this quasi-constitutional Act. This brief will also provide the Committee with information about some important initiatives of our Government and of my department with respect to official languages.

It is an honour, in my new position as Minister of Justice and Attorney General of Canada, to have the opportunity to provide the Committee with this brief about an issue that is of great importance to our Government, especially considering that the OLA will celebrate its 50th anniversary on September 9th, 2019.

It should be noted that several official languages milestones have just celebrated important anniversaries.

In 2017, Canadians celebrated not only Canada’s 150th anniversary but also the 150th anniversary of the first constitutional language rights provided for in the Constitution Act, 1867. This same year also marked the 35th anniversary of the Canadian Charter of Rights and Freedoms and the language rights contained therein.

Finally, 2018 marked the 40th anniversary of the language rights of accused persons contained in the Criminal Code, and the 30th year of the current OLA, adopted in 1988.

My department marked these anniversaries in different ways, including by launching in 2017 the Annotated Language Laws of Canada, which is a comprehensive and evergreen legal reference tool. It inventories all constitutional, federal, provincial and territorial
legislation and regulations relating, in whole or in part, to the use of languages with and within government institutions and in commercial or private activities. The publication covers a large variety of legislative and regulatory provisions and relevant case law excerpts relating to the official languages of Canada, Indigenous languages and the language rights of those who speak neither French nor English.

This tool is available to the public free of charge on the Open Government portal, as well as on CanLII. It has even caught interest in Australia, which is working on implementing a similar tool for its purposes.

It is also in 2017 that our Government adopted the Action Plan on Enhancing the Bilingual Capacity of the Superior Court Judiciary. The measures contained in this Action Plan aim at building on reforms to the superior courts appointments process introduced in October 2016, notably by enhancing tools to verify and assess the bilingual capacity of judicial applicants. These measures also address many of the Commissioner of Official Languages’ 2013 Report: Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary. On the whole, this multi-faceted approach will ensure that people interacting with Canada’s court system have improved access to justice in both of Canada’s official languages.

Our changes to the judicial appointments process have increased transparency and accountability, strengthened bilingual capacity of the judiciary, and promoted greater diversity amongst its members. An unprecedented 56% of our appointments have been women, and we have made more appointments from historically under-represented populations than ever before. Over 30 percent are functionally bilingual (able to fulfil four core competencies in both official languages), while a further 10% can understand written materials, but not converse with counsel. Canadians can be assured that we will remain committed to appointing exceptionally qualified judges who reflect Canada’s diversity.

In the same vein, another significant development of note is the new process to select Supreme Court of Canada Justices. In my predecessor’s mandate letter, the Prime minister asked her to “[e]ngage all parties in the House of Commons to ensure that the process of appointing Supreme Court Justices is transparent, inclusive and accountable to Canadians. Consultations should be undertaken with all relevant stakeholders and those appointed to the Supreme Court should be functionally bilingual”.

Since that announcement, our Government has put in place a new process for appointing Supreme Court of Canada Justices which assesses the bilingual capacity of candidates. This new process was followed for the appointment of Justices Malcolm Rowe and Sheilah Martin. The Commissioner for Federal Judicial Affairs is responsible for supporting this process, including the assessment of the bilingual capacity of candidates.

We are proud of the progress to date, and our Government has publicly committed to appoint only qualified and functionally bilingual candidates from a diversity of backgrounds and with a diverse range of experiences to the Supreme Court of Canada.
We are aware that some stakeholders are of the view that a legislative amendment is desirable to ensure that Supreme Court of Canada Justices are bilingual. We think that our selection process is a more efficient mechanism to achieve this outcome. In fact, such a legislative amendment would risk requiring a constitutional amendment, as it concerns the composition of the Supreme Court of Canada, which, according to that Court in the Reference Re Supreme Court Act, ss. 5 and 6 (2014) 1 SCR 433, is protected from unilateral amendment by section 41 of the Constitution Act, 1982. Such an amendment would then require the authorization of the Senate, the House of Commons and all ten provincial legislative assemblies.

The review of the OLA

As you are aware, the Prime Minister announced, in June 2018, his intention to modernize the OLA.

The 50th anniversary of the OLA and its modernization provide us with a special opportunity to reach out to communities. I recently took advantage of this opportunity to travel to Edmonton and Winnipeg, where I had the privilege of meeting people and organizations dedicated to the development of their official language minority communities, including the Associations des juristes d’expression française of Manitoba and Alberta, the Fédération des associations de juristes d’expression française de common law inc., the Centre canadien de français juridique and the Société de la francophonie manitobaine.

The commitment of these individuals is absolutely remarkable; my officials and I are certainly looking forward to meeting with similarly dedicated organizations in other parts of the country. In fact, my officials will, for the first time, be holding the annual meeting of the Advisory Committee on Access to Justice in Both Official Languages outside of Ottawa. It will be held in Regina, in the aforementioned spirit of community outreach, and also to mark another important event, namely, the 30th anniversary of the Association des juristes d’expression française de la Saskatchewan.

Our Government has been consistent in showing its commitment towards official languages in various ways, including financially. While we announced, in March 2018, the Action Plan for Official Languages – 2018–2023: Investing in Our Future, which represents a 2.7 billion investment over 5 years, Budget 2019, tabled on March 19, contains two measures with respect to official languages.

First, Budget 2019 proposes to provide $21.6 million in new funding over 5 years to improve access to bilingual family justice services and to support legislative amendments, notably those proposed in Bill C-78, which aims, among other things, at granting all Canadians the right to use either official language in any proceedings at first instance under the Divorce Act. This funding would be delivered through my department.

This builds on Budget 2018, in which our Government provided an additional
$10 million in funding over five years, and $2 million per year ongoing in support of access to justice in the official language of one’s choice with funding for the Access to Justice in Both Official Languages Support Fund.

Second, Budget 2019 includes investments of $8.5 million over 5 years to increase capacity to translate federal court decisions in compliance with section 20 of the OLA. This follows a previous commitment of $2 million over two year announced in Budget 2017.

As you know, the Prime Minister has given my colleague, the Honourable Mélanie Joly, Minister of Tourism, Official Languages and La Francophonie, the mandate to begin a review of the current OLA with a view to modernizing it.

Jurists from my department already provide legal advice and guidance to officials who support Minister Joly in the review of the legislation. As Minister of Justice, I will of course also support Minister Joly.

As part of this review, Minister Joly recently announced five discussion forums to be held across the country in March and April. These forums are now underway, and they address the following themes:

- Official languages and Canada in the digital age;
- Promotion of culture and bilingualism;
- Federal institutions that embody official languages;
- Official languages and Canada’s place in the world; and
- Mobilization, development and vitality of official language minority communities.

My colleague has also announced that the conclusions of these forums will be shared at the National Symposium on the 50th anniversary of the OLA to be held in Ottawa on May 27 and 28, 2019. During the symposium, experts from various backgrounds will debate the issues identified during the discussion forums.

The Symposium is being organized by a committee composed of representatives from the Department of Justice, Canadian Heritage and the Treasury Board Secretariat.

In reviewing the OLA, Minister Joly will consider, among other things, the results of the respective studies of the House of Commons Standing Committee on Official Languages and of your Committee, in addition to the results of the consultation conducted by the Commissioner of Official Languages, once they are known.

In addition, various initiatives by non-governmental organizations will also be considered, including the draft bill proposed by the Fédération des communautés francophones et acadienne on March 5.
I have no doubt that all of the public consultations conducted to date and those to come will be very enlightening to our Government's policy development to modernize the OLA.

**Role of the Department of Justice with respect to the OLA**

I would now like to turn to my role with respect to the OLA. Although the functions of the Minister of Justice and Attorney General of Canada are not explicitly set out in the OLA, my officials and I have several responsibilities flowing from this Act.

**Representation before the courts**

Litigators from my department represent the government and its departments and agencies before the courts when these entities are subject to legal proceedings initiated by the Commissioner of Official Languages, organizations or individuals for alleged violations of the various rights and obligations guaranteed by the OLA. Most parts of the OLA provide for the possibility of a specific remedy through summary proceedings in the Federal Court.

Depending on the circumstances, I may also, as Attorney General of Canada, be called upon to represent federal institutions in proceedings initiated under the *Federal Courts Act*, such as applications for judicial review or appeals.

Part III of the OLA (Administration of Justice) sets out the language rights and obligations applicable in Federal Court proceedings. For example, my representatives acting on behalf of Her Majesty in right of Canada or federal institutions must use the official language chosen by the other parties in any oral or written pleadings.

**Legislative drafting**

The drafting of regulations and legislation in both official languages is carried out by specialized jurists in my department in accordance with Part II of the OLA (Legislative and Other Instruments), which requires that federal statutes and regulations be enacted, printed and published in both official languages.

My officials from the Legislative Services Branch draft laws and regulations in both official languages harmoniously with both legal systems (civil law and common law), contributing to the general effort to recognize and promote bilingualism and bijuralism.

The purpose of this method is to allow, by means of a close and constant collaboration between two legislative counsel, a Francophone and an Anglophone, the elaboration of bills and regulations in two original and authentic versions. Each version must reflect the comprehensiveness of the drafting instructions in full compliance with the specific rules applicable in each language, as well as the Canadian bijural reality.

This brings me to other efforts regarding official languages that my officials and I are pursuing with respect to crucial pieces of legislation: our constitutional texts.
Section 55 of the *Constitutional Act, 1982* specifies that a French version of the portions of the Constitution mentioned in the schedule, including the *Constitutional Act, 1867*, "shall be prepared by the Minister of Justice of Canada as expeditiously as possible" and thereafter, "shall be put forward for enactment by proclamation of the Governor General", in accordance with "the procedure then applicable to an amendment of the same provisions of the Constitution of Canada".

A French Language Drafting Committee, including constitutional experts, linguists and departmental officials, was established on behalf of the Minister of Justice in 1984, and the Committee's final report was tabled in both Houses by then-Minister of Justice Kim Campbell in December 1990. That, in my view and that of my Department, satisfied the first part of the duty set out in section 55. However, the duty to put the French version forward for enactment by proclamation of the Governor General cannot be fulfilled without the approval of the two Houses of Parliament, the provincial governments and the provincial legislatures.

This is because the enacting procedure is the same that would be used for a constitutional amendment to the same provisions of the Constitution of Canada. For example, to enact the French version of the *Constitutional Act, 1867* would require at least the application of the general amending procedure (the Senate, House of Commons and two-thirds of the provincial legislative assemblies representing at least 50% of the population of the provinces) and in the case of some provisions (such as those dealing with the use of the English and French languages in Parliament and the courts of Canada, set out in section 133), the unanimous consent procedure, requiring the approval of all ten provincial assemblies.

That said, important parts of the Constitution of Canada do exist in authoritative English and French versions. These include the *Canada Act 1982*, and with it, the *Constitutional Act, 1982* and thus the *Canadian Charter of Rights and Freedoms*, as well as the *Manitoba Act, 1870* and the *Saskatchewan and Alberta Acts*, for example.

Some stakeholders interested in the modernization of the OLA have suggested that the Act be amended to ensure that efforts are made to implement section 55. I am happy to report that my officials are currently exploring ways to make the French version of the *Constitutional Act, 1867* proposed by the French Language Drafting Committee more readily available to the public.

**Administrative functions**

Finally, as the OLA applies to all federal institutions and assigns responsibilities to specific Ministers, my department works closely with their officials in various administrative functions to coordinate our efforts to implement the OLA in as optimal a manner as possible, and to share our best practices.

One example of such administrative functions is the Committee of Assistant Deputy Ministers on Official Languages, which brings together about 20 federal institutions and is co-chaired by an Assistant Deputy Minister from my department.
Other examples are my department's continuing involvement in the Interdepartmental Council of the Network of Official Languages Champions and the Interdepartmental Network of Coordinators for the Implementation of Section 41 of the OLA.

In conclusion, I would like to assure you of our Government's ongoing commitment to official language minority communities, in ensuring that Canadians have access to justice in the official language of their choice, and to the modernization of the OLA. I sincerely thank you for your own work in this regard.

Respectfully,

The Honourable David Lametti

The Honourable David Lametti, PC, MP
Minister of Justice and Attorney General of Canada