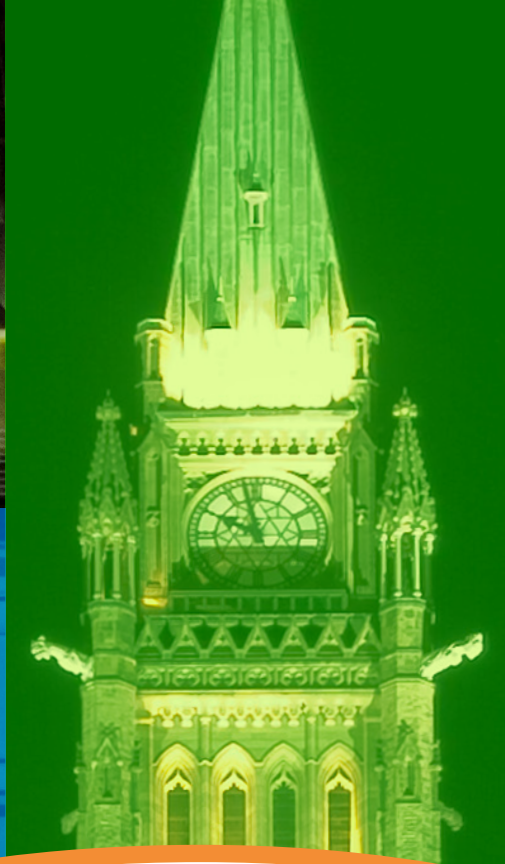
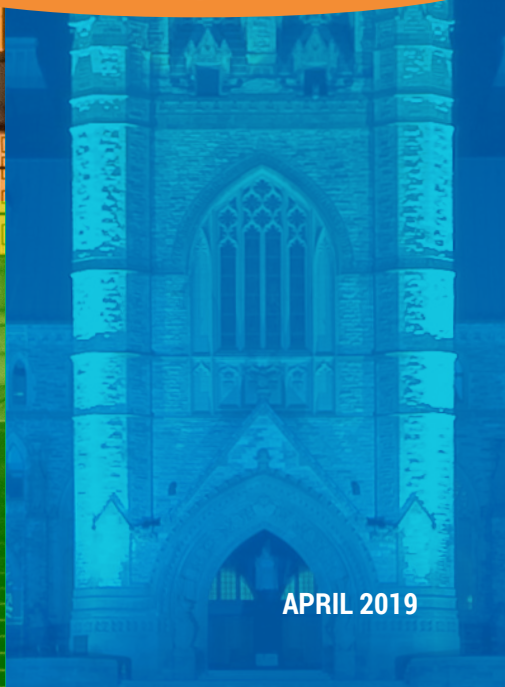


MODERNIZING THE OFFICIAL LANGUAGES ACT

The Views of the Justice Sector



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Interim Report of the Standing Senate Committee on Official Languages

The Honourable René Cormier, Chair
The Honourable Rose-May Poirier, Deputy Chair

APRIL 2019

SENATE | SÉNAT
CANADA

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The Honourable René Cormier, Chair*

The Honourable Rose-May Poirier, Deputy Chair*

The Honourable Mobina S.B. Jaffer*

THE HONOURABLE SENATORS:

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OTHER SENATORS WHO HAVE PARTICIPATED IN THE STUDY:

The Honourable Senator Josée Forest-Niesing

STAFF MEMBERS:

Marie-Ève Hudon, Analyst, Parliamentary Information and Research Service, Library of Parliament
François Michaud, Committee Clerk, Committees Directorate
Stéphanie Pépin, Legislative Clerk, Committees Directorate
Angus Wilson, Legislative Clerk, Committees Directorate
Marcy Galipeau, Head, Strategic Communications, Communications Directorate
Odette Labarge, Graphic Designer (Publications), Communications Directorate

ORDER OF REFERENCE

Excerpt from the *Journals of the Senate*, Thursday, 6 April 2017:

The Honourable Senator Tardif moved, seconded by the Honourable Senator Jaffer:

That the Standing Senate Committee on Official Languages be authorized to examine and report on Canadians' views about modernizing the *Official Languages Act*. Considering that the Act will be turning 50 in 2019 and that it affects various segments of the Canadian population, that the committee be authorized to:

a) Examine and report on young Canadians' views about the advancement of both official languages, how they identify with the languages and related cultures, the motivations for learning the other official language, the employment opportunities and future of bilingual youth, and what can be done to enhance federal support for linguistic duality;

b) Identify the concerns of official language minority communities — and their sector-based organizations (e.g., health, education, culture, immigration) — regarding the implementation of the *Official Languages Act,* and what can be done to enhance their vitality and to support and assist their development;

c) Examine and report on the views of stakeholders who have witnessed the evolution of the *Official Languages Act* since it was enacted 50 years ago, with a focus on success stories, its weaknesses, and what can be done to improve it;

d) Identify issues specific to the administration of justice in both official languages, potential shortcomings of the *Official Languages Act* in this regard, and what can be done to ensure respect for English and French as the official languages of Canada;

e) Identify issues specific to the powers, duties and functions of federal institutions with respect to the implementation of the *Official Languages Act* — particularly the roles of the departments responsible (e.g., Canadian Heritage, Treasury Board Secretariat, Department of Justice, Public Service Commission of Canada) and the Office of the Commissioner of Official Languages — and what can be done to ensure the equality of both official languages in the institutions subject to the Act; and

That the committee submit interim reports on the aforementioned themes, that it submit its final report to the Senate no later than June 30, 2019, and that it retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

The question being put on the motion, it was adopted.

Charles Robert

Clerk of the Senate

ACRONYMS

AESJQ	Association of English Speaking Jurists of Quebec
AJEFNB	*Association des juristes d'expression française du Nouveau-Brunswick*
AJEFO	*Association des juristes d'expression française de l'Ontario*
CAS	Courts Administration Service
CBA	Canadian Bar Association
CCNB	*Collège communautaire du Nouveau-Brunswick*
CTTJ	*Centre de traduction et de terminologie juridiques*
FAJEF	*Fédération des associations de juristes d'expression française de common law*
IOLR	International Observatory on Language Rights
IRBC	Immigration and Refugee Board of Canada
LANG	House of Commons Standing Committee on Official Languages
OCFJA	Office of the Commissioner for Federal Judicial Affairs
OCOL	Office of the Commissioner of Official Languages
OLLO	Standing Senate Committee on Official Languages
NOLR	National Observatory on Language Rights
QCGN	Quebec Community Groups Network
REGS	Standing Joint Committee for the Scrutiny of Regulations
RNFJ	*Réseau national de formation en justice*

GLOSSARY

BIJURALISM

In the Canadian context, refers to the coexistence of two legal systems: French civil law traditions and British common law traditions. In accordance with the two legal systems in force, one in Quebec and the other in the rest of the country:

- Parliament's statutes must be available to all Canadians in both English and French; and
- the law can be practised in both English and French across Canada.

LEGISLATIVE BILINGUALISM

Refers, in the federal context, to:

- the right to use English and French in the debates and proceedings of Parliament;
- the obligation to enact, print and publish laws in both official languages, both language versions being equally authoritative; and
- the obligation to make, print, publish and table the journals and other records of Parliament in both official languages, both language versions being equally authoritative.

JUDICIAL BILINGUALISM

Refers, in the federal context, to the right to use English and French in matters before the federal judiciary – federal courts, specialized courts and administrative tribunals – and in the legal decisions, orders, judgments, forms and rules of procedure.

CO-DRAFTING

A method of drafting federal statutes that takes into account Canadian bijuralism and legislative bilingualism, whereby the English and French versions are drafted jointly by two law clerks, a francophone generally trained in civil law and an anglophone generally trained in common law. Both language versions are equally authoritative. This practice has been in effect since 1978 at the federal level.

JURILINGUISTICS

A field specializing in the study of the language of law, in particular semantic, syntactic, stylistic and terminological issues related to legal texts, and in improving the quality of legal texts at the time of their drafting, translation and revision.

TEXTS INCORPORATED BY REFERENCE

A document or part of a document incorporated into an Act or regulation by reference to its title. A text incorporated by reference into an Act or regulation is an integral part of it. In *Reference re Manitoba Language Rights*, the Supreme Court of Canada recognized that texts incorporated by reference may require translation.

PREFACE

The tabling of this fourth interim report marks the end of the penultimate phase of our study on modernizing the *Official Languages Act* (the Act). Members of the Senate Committee have already reported on the proposals of young Canadians, official language minority communities and stakeholders who have witnessed the evolution of the Act.

In this report, we wanted to take a closer look at the issues related to judicial bilingualism, which are closely linked to those of legislative bilingualism. Our members heard from judicial experts to identify possible shortcomings in the Act in these two areas.

Our report presents the views of lawyers; community, legal and government organizations; researchers; and those who train justice workers. Our committee would have liked to hear the views of judges and the organizations responsible for providing their training and assessing their language skills. Unfortunately, none of those who were invited to appear were available.

Three key messages emerged from the testimonies and briefs. First, greater consistency is needed between the provisions of the Act dealing with legislative and judicial bilingualism. Second, measures need to be taken to ensure equal access to justice in both official languages. This requires, among other things, clear objectives, defined responsibilities, ongoing collaboration and effective remedy. Third, the Act's implementation mechanisms need to be reviewed, which was also underscored by witnesses in our first three interim reports.

The Supreme Court of Canada recognized in *R. v. Beaulac* that the Act must be given a large and liberal interpretation by the courts and that the principle of substantive equality applies to the judicial system. At the time of writing, the Supreme Court had issued its decision in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*. This decision confirms the right to equal access to justice in the official language of one's choice – for parties, witnesses and counsel – in cases before federal courts. However, recent events in other legislatures show that constant vigilance is needed to protect acquired language rights across Canada.

Our study will be completed in June 2019 with a final report that offers a series of recommendations for the federal government. We would like to thank the justice sector experts who shared their testimony and briefs with us. We encourage the federal government to take their views into account when modernizing the Act.

The Honourable
René Cormier
Chair

The Honourable
Rose-May Poirier
Deputy Chair

REPORT HIGHLIGHTS

This fourth interim report of the Standing Senate Committee on Official Languages presents the views of justice sector experts on what can be done to modernize the *Official Languages Act*.

During its public hearings in Ottawa and in New Brunswick, the committee heard testimony from stakeholders in the legal community, including lawyers, lawyers' associations, bars, bar associations, legal translation specialists, researchers and academics. It met with representatives from three federal institutions acting before federal courts. It also read briefs and follow-ups from about 10 stakeholders.

Having already reported on the testimony of young Canadians, representatives of official language minority communities and stakeholders who have witnessed the evolution of the Act, the committee took a closer look at the provisions of the Act as they relate to legislative bilingualism and judicial bilingualism.

At this penultimate phase of its study, the committee strongly believes that an in-depth review of the Act is needed to better protect Canadians' language rights. Justice sector experts support this belief. The proposals in this report echo previously heard ideas and present new ones that are more specific to the drafting of legislation and to access to justice in both official languages.

Set against a historical backdrop that traces the events that have marked the evolution of language rights in the federal context — from the *Constitution Act, 1867*, to today — the committee highlights current issues relating to the implementation of legislative bilingualism and judicial bilingualism.

Three key messages stand out from this fourth interim report.

First, greater consistency is needed between the provisions of the Act that deal with legislative bilingualism and judicial bilingualism. This means improving existing practices and defining new ones in the Act.

For example, a modernized Act could formalize the practice of co-drafting federal legislation or define the principle of bilingual interpretation for all legal processes.

Modernizing the Act would provide an opportunity to expand obligations relating to judicial bilingualism, including recognizing that federal court decisions are equally authoritative in English and French.

Many witnesses called for clearer criteria for translating and publishing court decisions. Others clamoured to add new sections to the Act that would require the adoption of an official French version of the Constitution.

Second, the Act must guarantee equal access to justice in both official languages. Achieving this ideal of equality requires clear objectives, defined responsibilities, ongoing collaboration among the various stakeholders and effective remedies.

Once again, the message regarding the mandatory bilingualism of Supreme Court judges is clear. The Act must require them to understand English and French at the time of their appointment without the assistance of an interpreter. Justice sector experts again stressed the importance of ensuring equal access to justice for all Canadians.

Witnesses also wanted to better set out in the Act the responsibilities of Justice Canada. They insisted on improving cooperation between the federal, provincial and territorial governments while respecting the existing constitutional and legislative framework. They proposed offering more direct support to organizations responsible for ensuring equal access to justice in both official languages.

It is clear that the court remedies under the Act must be changed. Additional proposals were made concerning the role of the Commissioner of Official Languages. Opinions on creating an administrative tribunal were again divided, however, there seemed to be consensus on recognizing the Court Challenges Program in the Act to ensure its continuity.

Once again, proposals were made to incorporate into the Act principles recognized in case law. However, some witnesses questioned the relevance of such a measure and pointed out its potential risks to the Act's interpretation. Calls were also made to set out the language obligations for divorce and bankruptcy law.

Third, the mechanisms for implementing the Act need to be reviewed. The same message has been heard from report to report: responsibility for the Act's implementation should be assigned to a central agency, which could play a key role in advancing language rights.

Specifying the scope of certain existing duties, particularly regarding parts IV, V and VII of the Act, would lead to tangible results. The idea of enshrining the principle of institutional vitality in the Act to determine the provision of services to the public was raised again. New proposals were made to clarify the rights of public servants respecting language of work.

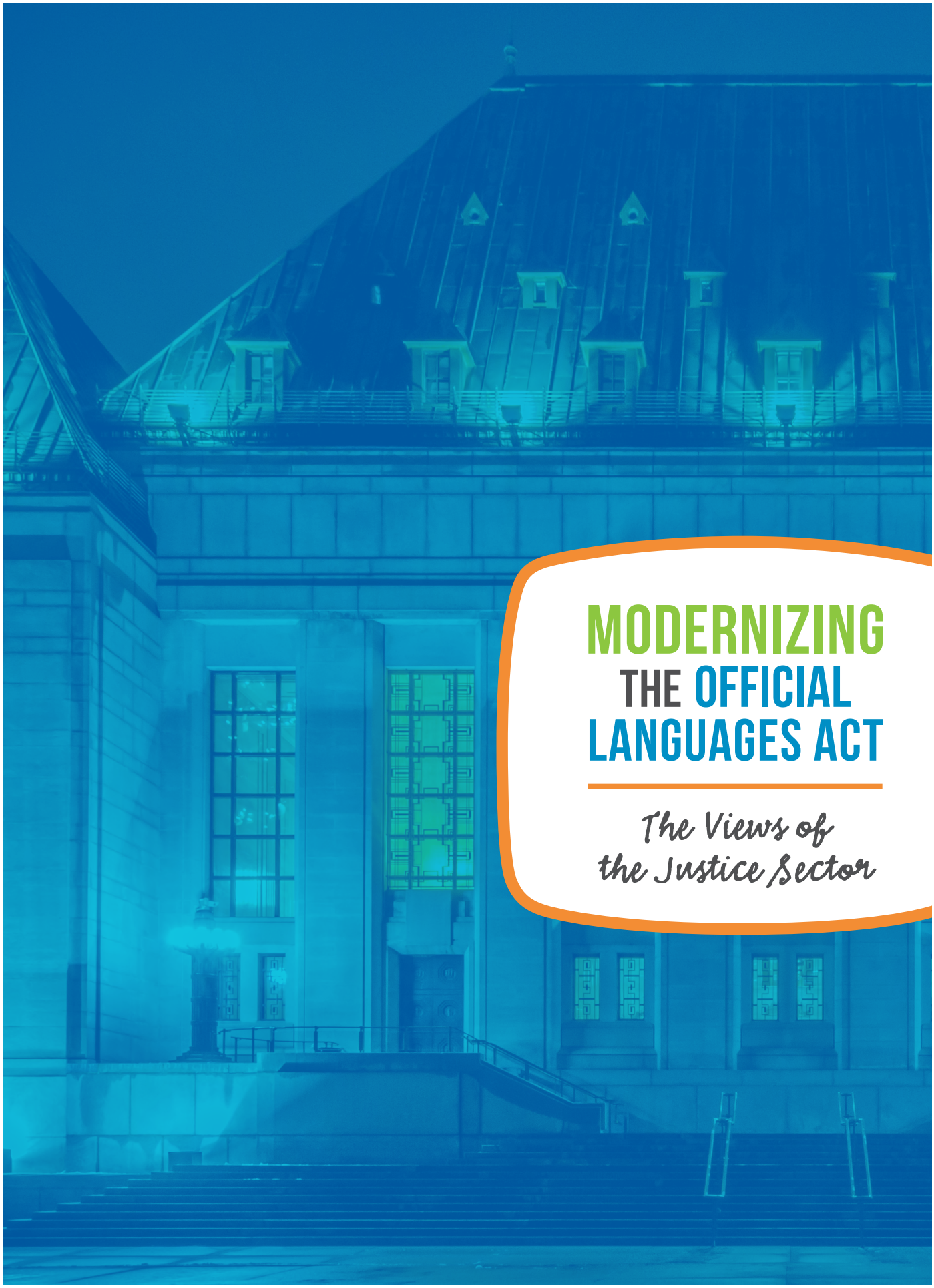
Most witnesses agreed on the need to define the scope of "positive measures". Witnesses urged the federal government to make regulations to clarify the obligations with respect to community development and community vitality, and to the advancement of English and French in Canadian society.

A modernized Act must also foster a contextual approach while providing for a periodic review of its objectives.

In short, modernizing the Act is an opportunity for the federal government to ensure the substantive equality of Canada's two official languages in the legislative and judicial areas.

NEXT STEPS

On track to table its final report in June 2019, the committee will consult with federal institutions, the final segment of the Canadian population scheduled to be studied. The views presented during the five phases of this study, including those of justice sector experts, will support the federal government in its work to modernize the Act.



MODERNIZING THE OFFICIAL LANGUAGES ACT

The Views of the Justice Sector

The Honourable Mobina S.B. Jaffer.

INTRODUCTION

On 6 April 2017, the Standing Senate Committee on Official Languages (the Senate Committee) received Senate approval to study Canadians' views on modernizing the *Official Languages Act* (the Act). The study consists of five phases, which correspond to the five segments of the population that the Senate Committee has consulted or plans to consult:

- young people;
- official language minority communities;
- stakeholders who have witnessed the evolution of the Act;
- the justice sector; and
- federal institutions.

The Senate Committee's objective is to table a final report with specific recommendations for the federal government by June 2019, when Canada will mark the 50th anniversary of the adoption of the first Act. This fourth interim report provides an overview of the testimony heard during the fourth phase of the study.

From October to November 2018, the Senate Committee studied issues specific to **the administration of justice in both official languages**, potential shortcomings of the Act in this regard, and what can be done to ensure respect for English and French as the official languages of Canada.

While the Senate Committee's original terms of reference focused on a review of the implementation of Part III of the Act, it also took the opportunity to review the implementation of Part II, recognizing that the provisions relating to legislative bilingualism and judicial bilingualism are closely linked.

The Senate Committee held most of its public hearings in Ottawa. It also held some public meetings during its visit to New Brunswick in October 2018. In total, 25 witnesses, seven briefs and three follow-ups were used to inform the content of this interim report. In this interim report, the Senate Committee presents the perspectives of:

- francophone and anglophone organizations in the legal community;
- lawyers;
- lawyers' associations;
- bars;
- legal translation specialists;
- federal institutions acting before federal courts;
- researchers; and
- representatives from the post-secondary community.

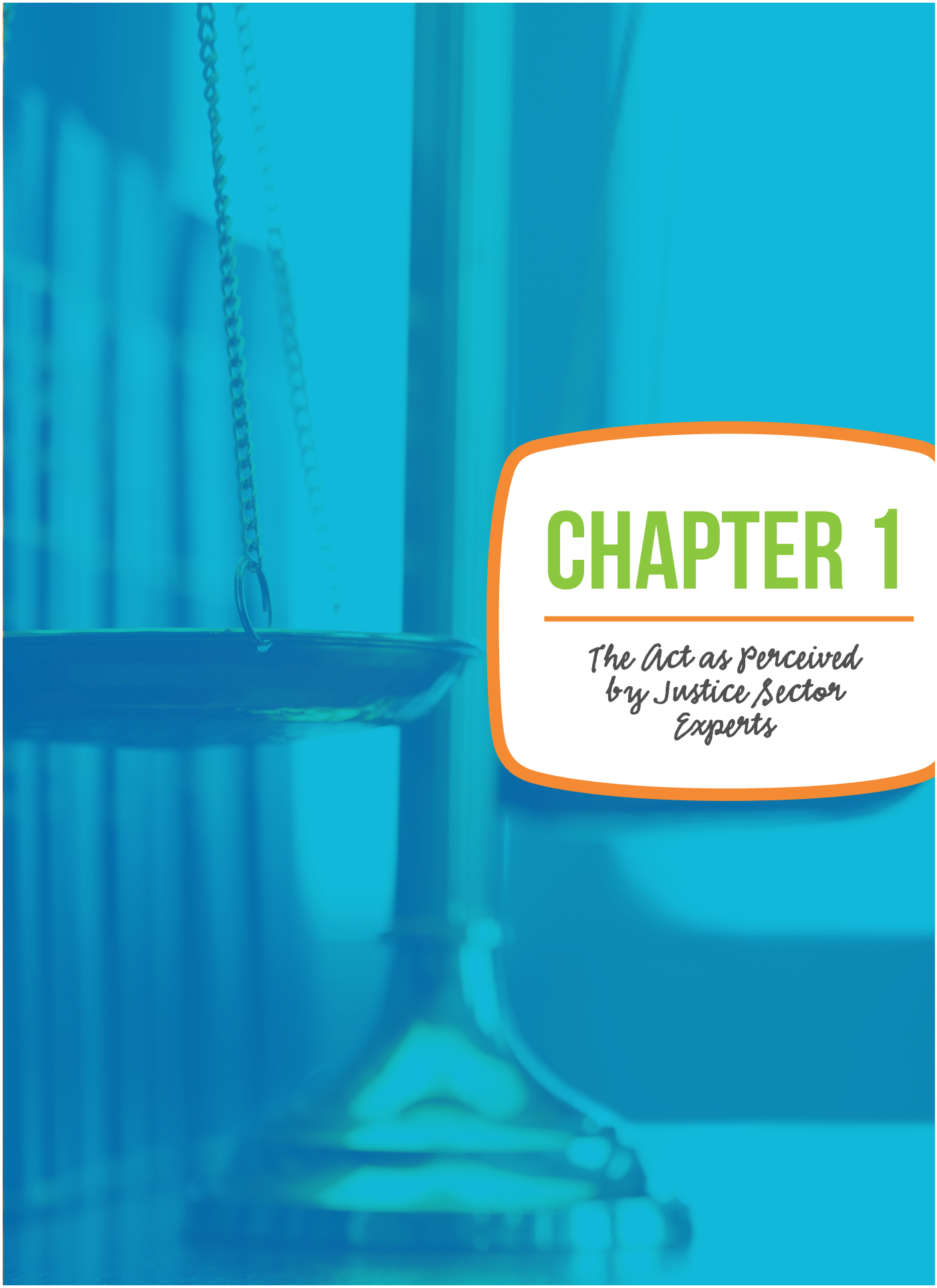
The proposals made in this phase of the study echo some of the ideas that the Senate Committee has already heard, such as requiring judges of the Supreme Court of Canada (the Supreme Court) to be bilingual when they are appointed. However, the evidence and briefs also present new proposals that are more specific to the drafting of legislation and access to justice in both official languages.

The first key message of this fourth interim report is to ensure greater consistency between the provisions of the Act that deal with legislative bilingualism and judicial bilingualism. Second, the Act must guarantee equal access to justice in both official languages. Achieving this ideal of equality requires clear objectives, defined responsibilities, ongoing collaboration among the various stakeholders and effective remedies. Third, the Act's implementation mechanisms need to be reviewed, as proposed in the first three interim reports.

This interim report is divided into two parts. **Chapter 1** presents the evolution of legislative bilingualism and judicial bilingualism in Canada and current challenges related to the Act's implementation. **Chapter 2** outlines the proposals presented to the Senate Committee to modernize the Act. This report provides the federal government with a vision for modernizing the Act based on the views of justice sector experts.

Readers are encouraged to consult the glossaries in the first two interim reports, in addition to the glossary in this report, to better understand the context and scope of the comments that were made.[1]

From left to right: The Honourable Lucie Moncion and Raymonde Gagné.



CHAPTER 1

The Act as Perceived by Justice Sector Experts

This fourth interim report looks at the Act's implementation through the narrower lens of justice sector experts. Chapter 1 traces the history of legislative bilingualism and judicial bilingualism in the federal context and briefly discusses the evolution of provincial and territorial language regimes in each of these two areas. It highlights current issues with their implementation, based on the testimony heard and the briefs received.

Legislative bilingualism: Evolution of the constitutional and legislative framework

One has to go back to the *Constitution Act, 1867* (the 1867 Constitution) to fully understand current debate on the Act's modernization. In fact, obligations relating to legislative bilingualism preceded the adoption of the first Act, in 1969. Many consider that recognition of the status and equality of both official languages is all but achieved in this area today. Yet the evidence and briefs highlighted a number of shortcomings that need to be addressed.

Constitution Act, 1867

Legislative bilingualism is rooted in section 133 of the 1867 Constitution.

The Origins of Legislative Bilingualism

"Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses… The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages."

***Constitution Act, 1867*, s. 133.**

Under this constitutional provision:

- the use of English and French is mandatory for **parliamentary documents**, namely, **acts**, **records** and **journals**; and
- the use of English and French is optional for **parliamentary debates**.

Interestingly, section 133 of the 1867 Constitution applies to both the **Parliament of Canada** and the **Legislature of Quebec**. It upholds the bilingual nature of these two parliamentary institutions. The years following the adoption of this constitutional provision saw the evolution of the interpretation of obligations relating to the adoption of bilingual acts and the start of simultaneous interpretation in Parliament. It also highlighted a shortcoming that is still a concern today: the lack of an official French version of the 1867 Constitution.

A Constitution lacking an official French version

From 1867 to 1931, when the *Statute of Westminster* was adopted, the British Parliament legislated on behalf of Canada. As a result, the 1867 Constitution was ratified in the United Kingdom in English only. To this day, there is no official French version of the constitutional provisions of that time.

In 1982, 22 of those 31 constitutional documents were incorporated into the *Constitution Act, 1982* (the 1982 Constitution) without an official French version.[2] That is why section 55 of the 1982 Constitution states that a French version should be drafted "as expeditiously as possible." Section 56 states that, once enacted, the English and French versions of constitutional provisions are equally authoritative.

In the early 1990s, the French Constitutional Drafting Committee tabled a report aimed at implementing these constitutional provisions.[3] However, the committee's recommendations never came into effect, as they were not acted on by Parliament or endorsed by the provinces and territories.[4] In its testimony to the Senate Committee, the Canadian Bar Association (CBA) proposed taking advantage of the Act's modernization to add an enforceable section requiring the Minister of Justice of Canada to act on the committee's recommendations, an idea supported by the *Fédération des associations de juristes d'expression française de common law* (FAJEF).[5] The details of its proposal are presented in Chapter 2.

Laws printed and published in both official languages

Section 133 of the 1867 Constitution required that federal acts be printed and published in English and French, but it did not state that the two versions were equally authoritative. It was not until the 1969 Act that this was recognized. As noted later in this report, this provision was further strengthened in the *Canadian Charter of Rights and Freedoms* (the Charter), in 1982, and again in the 1988 Act.

Although the original constitutional provision was not explicit, the courts upheld that federal acts must be available in their entirety in both official languages. This meant that the obligation to print acts in English and French inevitably included the obligation to use both languages simultaneously throughout the process leading to their enactment.[6] As we will see below, challenges exist in implementing this provision in Quebec.

Simultaneous interpretation

Section 133 of the 1867 Constitution recognized the right of parliamentarians to intervene, legislate and have access to documents reviewed by Parliament in the official language of their choice. In the years following the enactment of the Constitution, progress was made to ensure equal participation in the debates and business of Parliament. In 1934, the Translation Bureau was created, in part to provide parliamentarians with better-quality translation services. Twenty-five years later, in 1959, the House of Commons introduced simultaneous interpretation. The Senate followed in 1961. However, the 1969 Act made no mention of the existence of the Translation Bureau or the practice of simultaneous interpretation.

The 1969 Act

The 1969 Act codified some practices relating to legislative bilingualism. In addition to recognizing that the English and French versions of federal statutes were equally authoritative, it contained provisions on the interpretation of bilingual statutes and provided for the making and printing of some documents reviewed by Parliament in both official languages. Moreover, even before the Charter came into force, the federal government had implemented a much-praised method of legislative drafting: co-drafting.

Interpretation of bilingual legislation

The 1969 Act contained provisions on interpreting statutes written in both official languages. The 1969 Act:

- stated that "[i]n construing an enactment, **both its versions in the official languages are equally authentic**"; and
- set out the **rules for the bilingual interpretation of statutes**, including the rules for identifying the meaning that is common to both versions, while respecting Parliament's intent.[7]

Although the principles of interpretation applicable to bilingual legislation are now part of the case law, as upheld by the Supreme Court,[8] they were removed from the Act in 1988. Witnesses in this phase of the study asked that a modernized Act set out these principles again, as did witnesses in an earlier phase.[9] We will come back to this in Chapter 2.

Language of other documents reviewed by Parliament

The 1969 Act stated that all rules, orders, regulations, by-laws and proclamations to be published in the Canada Gazette had to be made and issued in both official languages, but in urgent matters could be made and issued in one of the official languages and thereafter in the other.[10] It would take judicial interpretation and the Act's overhaul in 1988 for bilingualism to apply to all documents reviewed by Parliament, since they had to be available simultaneously – that is, adopted, printed and published at the same time – in both official languages.[11]

Co-drafting of federal legislation

Not only did the 1867 Constitution and the 1969 Act state that laws must be printed and published in both official languages, but the Supreme Court also upheld that both languages must be used simultaneously when drafting laws.[12] Moreover, since 1978, Justice Canada has **co-drafted federal legislation**. In this method of legislative drafting, the English and French versions of a statute stand alone and neither version is subordinated to the other. Many justice sector experts have praised this practice, which promotes the equal status of both official languages. Chapter 2 deals with this issue in more detail.

Co-drafting is a method of drafting federal statutes that takes into account Canadian bijuralism and legislative bilingualism, whereby the English and French versions are drafted jointly by two law clerks, a francophone generally trained in civil law and an anglophone generally trained in common law. Both language versions are equally authoritative.

From the Charter to the overhaul of the Act in 1988

The Charter and the 1988 Act provided an opportunity to reaffirm – even expand – existing legislative bilingualism obligations. Witnesses noted shortcomings in the implementation of some of these obligations or proposed expanding their scope. They highlighted the importance of translation in a parliamentary setting. Other events that took place outside the Act, described below, strengthened Parliament's bilingual nature.

Both language versions of federal legislation and parliamentary documents equally authoritative

Section 18 of the Charter and Part II of the 1988 Act recognized:

- the obligation to enact, print and publish all Acts of Parliament in **both official languages, both language versions being equally authoritative**;

- the obligation to make, print, publish and table **parliamentary documents** – that is, the journals and other records of Parliament as well as regulations, orders, all legislative instruments published in the *Canada Gazette* and instruments of a public and general nature – in both official languages, **both language versions being equally authoritative**; and
- the obligation to make all **rules, orders and regulations governing the practice or procedure in any proceedings before a federal court** in both official languages, **both language versions being equally authoritative.**

In general, experts applauded the fact that the various documents reviewed by Parliament are equally authoritative. However, these documents do not have to be published in English and French side by side, an obligation that community representatives we met with in a previous part of our study would like to see included in a modernized Act.[13] Although no such proposal was made this time, witnesses would like to see the principles of legislative bilingualism applied to judicial bilingualism.[14] Details of their proposals are provided later in this report.

Language rights of parliamentarians

The Charter and the 1988 Act assert **the right** of all senators and members of Parliament **to use English or French in the debates and proceedings of the Senate and House of Commons**. These provisions reaffirm an established fact, while extending these rights to the work of **parliamentary committees**. Senators and members of Parliament have the right to use the official language of their choice in committee, both orally and in writing. Moreover, the 1988 Act sets out in subsection 4(2) the obligation to provide **simultaneous interpretation**. This practice is now considered essential for the proper functioning of Parliament.

Witnesses who appear before a committee may speak in English or French, thanks to simultaneous interpretation, and have their briefs and written presentations translated. In 2006, the Federal Court recognized in *Knopf v. Canada (House of Commons)* that a committee can refuse to distribute unilingual documents provided in support of a witness's brief.[15]

That is why witnesses in the second phase of the study called for the Act to require that witnesses be offered translation services for their documents.[16] This request was not made in this fourth phase but could be part of a modernized Act.

Language of international treaties and federal–provincial/territorial agreements

Section 10 of the 1988 Act governs the language of **international treaties** and **federal–provincial/territorial agreements**. Both versions of these documents are equally authoritative when made in both official languages. In practice, however, not all documents are made in English and French. The Act provides that, for treaties, the federal government must take "all possible measures" to make these documents available, while for agreements, it limits the obligation where English and French both have official status in the province or territory. As a result, few of these documents are bilingual. Official language minority communities asked that the obligation to draft federal–provincial/territorial agreements in both official languages be extended to all federal–provincial/territorial agreements.[17] Witnesses interviewed in this phase of the study did not address the issue, but such a change warrants consideration by the federal government when it modernizes the Act.

Notices and advertisements

Section 11 of the 1988 Act incorporates provisions from the 1969 Act concerning the publication of **notices and advertisements** in at least one publication in the minority official language in a given region. Shortcomings exist in this obligation's implementation. Community media, which play a key role in the development of official language minority communities, are often underutilized. That is why witnesses in earlier phases of the study proposed that notices and advertisements must be published simultaneously in both official languages using community media.[18] Moreover, section 15 of New Brunswick's *Official Languages Act* contains a provision that could be used as a model for the federal government; however, the testimony heard in this phase of the study did not refer to it. Modernizing the Act provides an opportunity to examine this long-standing issue.

Texts incorporated by reference

Sometimes, texts are incorporated by reference into federal Acts or regulations for practical reasons. The Act does not specify that language obligations apply to incorporation by reference. However, the Supreme Court has already ruled that this practice is likely to result in translation obligations.[19]

A **text incorporated by reference** is a document or part of a document incorporated into an Act or regulation by reference to its title. A text incorporated by reference into an Act or regulation is an integral part of it.

The Honourable René Cormier, Chair.

In the case of federal regulations, section 18.3 of the *Statutory Instruments Act* requires that documents incorporated by reference be accessible. The Standing Joint Committee for the Scrutiny of Regulations has argued that, to be considered accessible, these documents must be available free of charge, in both official languages, including all former versions.[20] The federal government usually incorporates these documents by reference in both official languages, unless there is a legitimate reason to incorporate them in only one language. This is in keeping with a policy that came into effect in July 2018.[21] Proposals were made in the second phase of the study to extend the obligation to publish texts in both official languages to regulations incorporated by reference.[22] No such proposal was made in this phase of the study; however, the Senate Committee encourages the federal government to take this issue into account in modernizing the Act.

Translation in the parliamentary setting

Translation and interpretation services play an important role in the implementation of constitutional and legislative provisions relating to legislative bilingualism. The Translation Bureau serves Parliament in both respects, and was granted additional resources in 2017 to fulfill its role.[23] As noted below, the proposals of justice sector experts addressed translation in a judicial context, rather than a parliamentary context. In both cases, however, the prominent role of the Translation Bureau in the Act's implementation was highlighted. Even so, its role is not codified in the Act as witnesses in the third phase of the study proposed.[24]

Bilingualism requirements for officers of Parliament

Although not directly enshrined in the Act, since 2013 officers of Parliament have had to be bilingual – that is, having the ability to speak and understand clearly in both official languages – at the time of their appointment. This obligation is set out in the *Language Skills Act*. Eleven offices are subject to this obligation, which once again reinforces the bilingual nature of parliamentary institutions.

Development of provincial and territorial language regimes

Over the years, several provinces and territories have adopted measures to oversee the bilingualism of legislation enacted by their assemblies and the use of English and French in parliamentary debates.

Quebec is directly affected by the constitutional provisions of section 133, as mentioned at the beginning of this chapter. Yet the testimony heard in this phase of the study showed that this constitutional obligation is not yet fully assured in this province. Sections 7 and 8 of the *Charter of the French Language* recognize that both English and French may be used in the legislature, subject to certain conditions.

A lawsuit was filed by the *Barreau du Québec* and the *Barreau de Montréal* in the spring of 2018 on the grounds that acts in the Quebec National Assembly were not passed simultaneously in English and French, contrary to section 133 of the 1867 Constitution.[25] For years, the two law societies have been asking the Quebec National Assembly to hire law clerks to co-draft acts. Despite numerous attempts to settle the case out of court, their calls have gone unheeded. However, both law societies were forced to drop the lawsuit on the advice of their members. Michael Bergman, President of the Association of English Speaking Jurists of Quebec (AESJQ), would like the federal government to support their efforts so as to facilitate access to Quebec's laws in both languages.[26]

In **Manitoba**, section 23 of the *Manitoba Act* includes provisions similar to section 133 of the 1867 Constitution, making the use of English and French:

- mandatory for the records and journals of the Manitoba legislature; and
- optional in parliamentary debates.

The Supreme Court has repeatedly upheld the province's obligation to draft, print and publish its acts and other parliamentary documents in English and French. In 1985, it required the province to translate all laws previously enacted in English only.[27]

Denis Roy, Dean of the Faculty of Law of the Université de Moncton*, and Yves Goguen, President of the* Association des juristes d'expression française du Nouveau-Brunswick*, testify at public hearings in Moncton, October 24, 2018, as part of the study on the Modernization of the* Official Languages Act.

In **New Brunswick**, obligations related to legislative bilingualism were included in the province's first *Official Languages Act* in 1969. Then, in 1982, these obligations were enshrined in subsections 17(2) and 18(2) of the Charter. New Brunswick's *Official Languages Act* sets out these obligations and goes even further than the federal act by:

- specifying that they apply to the Legislative Assembly and its committees;
- providing for the co-drafting of laws; and
- requiring notices and advertisements to be printed and published in both official languages.

In the **three territories**, which are "creatures" of the federal Parliament, obligations relating to legislative bilingualism are included in the territorial acts.[28] In Ontario, they are listed in sections 3 and 4 of the *French Language Services Act*. In **Saskatchewan** and **Alberta**, provisions in provincial acts permit the use of both English and French in parliamentary debates.[29] With respect to parliamentary documents, Saskatchewan's legislative framework provides that Saskatchewan's acts and regulations may be enacted, printed and published in English only or in both English and French. This is not the case in Alberta, a fact that the Supreme Court recognized in 2015 in *Caron v. Alberta*.[30]

Canada's other provinces have not enacted legislation to regulate legislative bilingualism in their respective assemblies.

Judicial bilingualism: Evolution of the constitutional and legislative framework

Judicial bilingualism also dates back to the 1867 Constitution. Some of its provisions were incorporated into the 1969 Act, then enshrined in the Charter, and then set out in the 1988 Act. Before looking at its evolution from a historical perspective, it is worthwhile explaining how the justice system works in Canada. This section also highlights the current challenges of implementing judicial bilingualism, which are the focus of debate on the Act's modernization.

A complex justice system with shared jurisdiction

As the testimony showed, Canada's justice system is complex. It is based on two legal traditions, separates jurisdictions between different levels of government and relies on a wide range of stakeholders. In addition, aspects of its operation depend on the federal government, as is the case for the appointment of certain judges. Moreover, some areas of law are legislated by the federal government but administered by the provinces and territories.

Two legal traditions

In Canada, two legal systems coexist: the **civil law** in Quebec and the **common law** elsewhere. This poses challenges in terms of access to justice because the civil law applies mainly in French and the common law mainly in English. That said, the law can be practised in English or French across Canada. Yet the training of legal practitioners and access to legal and/or jurilinguistic tools varies greatly from one language to another and from one region to another.

Federally administered courts

The Act applies to federal institutions, which by definition includes federal courts. These include the following:

- **administrative or quasi-judicial tribunals**, which may be called upon to deal with language rights cases – for example, the Canadian Human Rights Tribunal, the Immigration and Refugee Board of Canada (IRBC) and the Canadian Radio-television and Telecommunications Commission;
- the **Federal Court**, which holds trials involving matters specified in federal legislation, including appeals against the Act;
- the **Tax Court of Canada**, which specializes in income tax, the goods and services tax and employment insurance;
- the **Court Martial Appeal Court**, which specializes in military issues and hears appeals of court martial decisions;
- the **Federal Court of Appeal**, which hears appeals from the Federal Court and the Tax Court of Canada as well as the judicial reviews of certain federal tribunals; and
- the **Supreme Court**, the highest court in the land, whose jurisdiction covers all areas of law and which may be called upon to provide advisory opinions to the federal government on the interpretation of the Constitution and federal or provincial legislation.

The Senate Committee heard testimony from a representative of the Supreme Court and met representatives of two federal institutions working in the justice sector that are subject to the Act:

- the **Courts Administration Service** (CAS) provides four federal courts[31] with services specifically relating to hearings, rules of practice, the maintenance of court records, the recording of proceedings, security services and the online posting of decisions; and

- the **Office of the Commissioner for Federal Judicial Affairs** (OCFJA), which is responsible for administering the appointment of judges of federal courts and provincial and territorial superior courts and courts of appeal, and providing them with language training to improve the use of their second official language.

Federal courts have the power to establish their own rules of procedure regarding the use of English and French. Other federal laws and regulations have an influence on the respect for official languages in the justice sector, as we will see below. The testimony of justice sector experts focused on amendments to the Act, rather than on other legislative and regulatory instruments.

Provincially and territorially administered courts

Strictly speaking, the Act does not apply to provincially and territorially administered courts. In these jurisdictions, courts generally fall into four categories:

- administrative tribunals;
- provincial and territorial courts;
- provincial and territorial superior courts; and
- provincial and territorial courts of appeal.

Stéphane Beaulac, Director of the National Observatory on Language Rights (NOLR) at the *Université de Montréal*, warned the Senate Committee that a proposal to extend bilingualism obligations to provincially and territorially administered courts may be unconstitutional.[32] Nevertheless, these courts play an important role in areas of law under federal jurisdiction and some witnesses called for the relevant linguistic obligations to be clarified. We will come back to this point later in this chapter.

Justice system stakeholders

The Canadian justice system relies on a multitude of stakeholders, as the following excerpt shows.

"Justice is a patchwork of many players. Of course, we're talking about provincial, federal and constitutional jurisdictions for all legal issues. However, when it comes to access to justice, we must take into account the federal judiciary; the provincial judiciaries; the provincial departments; the federal Department of Justice; legal aid, which is different everywhere; law schools, which have somewhat different approaches; court administrators, who are the provincial administrators who often handle federal matters; the bar associations, which have different priorities; the police forces; the penitentiaries; and so on. This patchwork, which consists of a large number of stakeholders, will ensure that Canadians have access to justice."

Daniel Boivin, *Fédération des associations de juristes d'expression française de common law inc.*, *Evidence*, 15 October 2018.

Even at the federal level, several institutions have a role to play in this sector, for example: Justice Canada, the Canada Border Services Agency, the Royal Canadian Mounted Police, the Correctional Service of Canada, the Public Prosecution Service of Canada and Public Safety Canada.

An effective implementation of language obligations to ensure equal access to justice in both official languages depends on many players.[33] Cooperation is therefore a central theme in the current discussion. Some witnesses suggested that Justice Canada be given responsibility for interdepartmental coordination in a modernized Act, as we will see in Chapter 2.

Appointment of judges

The federal government administers the appointment of judges for:

- all federal courts; and
- provincial and territorial superior courts and courts of appeal.

With respect to judges of the Federal Court, Federal Court of Appeal and Tax Court of Canada, candidates are reviewed by advisory committees and appointed by the Governor General acting on the advice of the federal Cabinet, upon the recommendation of the Minister of Justice.[34] In the case of Supreme Court judges, candidates are reviewed by an independent advisory board and appointed by the Prime Minister.

Judicial candidates for the provincial or territorial superior courts and courts of appeal are reviewed by advisory committees and appointed by the Governor General acting on the advice of the federal Cabinet, upon the recommendation of the Minister of Justice.[35] Bilingualism is not a mandatory requirement for appointment. However, as of October 2016, candidates for judicial appointment must answer four language-related questions as part of the application process.[36] Since September 2017, they must answer two additional questions on their ability to conduct hearings and write decisions in both English and French.[37] It is important to note, however, that these questions are put to new candidates only. It is therefore impossible to draw an accurate picture of the current linguistic ability of judges nationwide.

For years, stakeholders have been calling on the federal government to appoint a sufficient number of bilingual judges, whose appointment is a federal responsibility, to provincially and territorially administered courts. A federal action plan to improve the bilingual capacity of the superior court judiciary, published in 2017, aims, among other things, to identify and assess the language skills of judicial candidates.[38] The evidence showed that we must go further. Concrete proposals are presented in Chapter 2.

Areas of law under federal jurisdiction

Divorce and bankruptcy are examples of areas of law legislated partly by the federal government – through the *Divorce Act* and the *Bankruptcy and Insolvency Act* – and partly by the provincial government. In practice, provincially administered courts are responsible for implementing language rights in these areas of the law.[39] Calls for clarification of these rights are not new. Federal legislation is silent in this regard. The federal government is being asked to extend access, for the Canadian public, to cases and legal proceedings related to divorce and bankruptcy in both official languages. Today, the burden of choosing the language of proceedings rests with citizens and lawyers.

"For us, a litigant paying for a form to be translated is not what we call equal access to justice."

Ronald Bisson, *Réseau national de formation en justice*, *Evidence*, 22 October 2018.

In its report tabled in December 2017, the House of Commons Standing Committee on Official Languages endorsed a recommendation to change linguistic obligations in terms of divorce proceedings.[40] The federal government's response was vague on the measures it intended to take.[41] Witnesses once again called for changes in this regard. The area of divorce is seeing change, as discussed in Chapter 2.

Constitution Act, 1867

The provisions relating to judicial bilingualism are also rooted in section 133 of the 1867 Constitution.

The Origins of Judicial Bilingualism

"[E]ither [the English or the French Language] may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec."

***Constitution Act, 1867*, s. 133.**

According to these constitutional provisions, the use of English and French is permitted in any **pleadings** or **processes** in **federal courts** and **Quebec courts**. The 1969 Act, the Charter, the 1988 Act and case law clarified the scope of those rights.

The 1969 Act

For federal courts, the 1969 Act established:

- criteria for the **publication of decisions**:
  - in both official languages where they determine a question of law of "general public interest or importance or where the proceedings leading to its issue were conducted in whole or in part in both official languages";
  - in one of the official languages and thereafter, within a reasonable time, in the other;
- permission to **deliver an oral decision** in only one of the official languages;
- the option to establish **rules governing practice and procedure** in both official languages for these courts;
- the right to be heard in the official language of one's choice, making **interpretation services** available when needed; and
- the power to order that **criminal proceedings** be conducted in either official language.

Some of these provisions were included in the 1988 Act, while others were expanded.

From the Charter to the overhaul of the Act in 1988

Section 19 of the Charter provides that English or French may be used in **pleadings** in or **processes** issuing from **federal courts**. Subsection 19(2) of the Charter defines similar rights for **New Brunswick courts**. Section 14 of the 1988 Act recognizes that English and French are the official languages of the federal courts. The following section describes in more detail the language rights covered by the Act with respect to the administration of justice starting with those that apply to criminal law, legislated outside the Act.

Criminal Code language obligations

Language rights in criminal law matters have been legislated since 1978 through the *Criminal Code* (the Code). Sections 530, 530.01 and 530.1 of the Code guarantee every accused **the right to a criminal trial in the language of their choice**. The accused must be informed of this right and may obtain the translation of an **information** or **indictment** in the other language. The provinces and territories are required to comply with these language requirements and ensure that a bilingual trial runs smoothly.

Justice sector experts pointed out that provincially administered courts and municipalities, through police services, have a significant role to play in the implementation of the Code.[42] In *R.v. Beaulac*, the Supreme Court upheld that courts hearing criminal cases are required to be institutionally bilingual.[43]

However, disparities in access to justice exist across the country, as resources and legislative frameworks vary from province to province and territory to territory. The testimony from justice sector experts emphasized the importance of close federal–provincial/territorial cooperation. A bill to amend the Code, which is still before Parliament, aims to standardize the accused's language rights for all types of offences, allowing the accused to make their application as late in the process as possible.[44] The Senate Committee will follow the bill's progress with interest.

Right to be heard in the official language of one's choice

Section 14 of the Charter grants witnesses and parties to a proceeding the right to the assistance of an interpreter. Section 15 of the 1988 Act upholds the **right of witnesses to be heard in the official language of their choice**. It requires **simultaneous interpretation** to be provided to witnesses and parties to a proceeding upon request or when the proceedings are of "general public interest or importance."

In addition to this right, section 18 of the Act requires federal institutions that are parties to civil proceedings to use the official language chosen by the other parties in **pleadings**. In the case of **forms**, section 19 requires the pre-printed portion to be set out in both official languages, but allows the particular details added to a form to be set out in only one language, provided that a translation is made available on request. Witnesses in the second phase of the study wanted federal institutions to be required to complete forms that must be filed in federal court in the language of the litigant or in both official languages.[45] Louis Beaudoin, a jurilinguist and legal translator for some 30 years, and Denis Roy, Dean, Faculty of Law, *Université de Moncton*, also argued that judges must be required to issue decisions in the language of the litigant.[46]

In *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, the Supreme Court upheld the right to equal access to justice in the official language of one's choice – for parties, witnesses and counsel – in federal courts.[47]

Judges' understanding of the official languages

Sections 16 and 17 of the Act deal with the duty of **judges to understand both official languages** and the authority to make **implementing rules**. This duty applies to the Federal Court, the Federal Court of Appeal and the Tax Court of Canada, but not the Supreme Court. When the Act was overhauled in 1988, it was argued that the pool of bilingual candidates for the Supreme Court was insufficient. This situation seems to have changed, according to the evidence. Most witnesses and briefs proposed that the exception in section 16 of the Act be withdrawn, as we will see in Chapter 2.

Assessment of judges' language proficiency

The Act does not contain any provisions on assessing the language skills of judicial candidates. Witnesses in previous phases of the study suggested that the assessment process be codified.[48] This proposal was also made by justice sector experts.[49] Moreover, a private member's bill still before Parliament gives the Office of the Commissioner for Federal Judicial Affairs (OCFJA) the mandate to assess candidates' language skills,[50] which follows up on a recommendation from the House of Commons Standing Committee on Official Languages.[51]

The 2017 action plan to enhance the bilingual capacity of the superior court judiciary commits the OCFJA to assessing judicial candidates' language skills.[52] Since 2016, specifically with respect to Supreme Court judges, the OCFJA has been assessing candidates' actual level of bilingualism on three different tests: reading comprehension, oral comprehension and oral expression. OCFJA Commissioner Marc A. Giroux explained that candidates must obtain a passing mark of three out of five to be considered "functionally bilingual."[53]

With respect to the appointment process for judges of provincial and territorial superior courts and courts of appeal, the answers to six linguistic questions are formally assessed by the OCFJA when the answer to these questions is yes.[54]

However, these assessments apply to new candidates only.[55] Justice sector experts expressed the need for better oversight regarding the language skills assessment of all federally appointed judges, as described in Chapter 2.

Training of justice system stakeholders

The Act does not specify obligations relating to the training of justice system stakeholders. Since 2003, the federal government has provided funding to develop language training in the area of justice and to encourage students who are proficient in both official languages to pursue a career in justice. This supports the objectives of the Access to Justice in Both Official Languages Support Fund, whose budget was increased by $10 million over five years in the *Action Plan for Official Languages 2018–2023*.[56]

In 2009, a needs analysis concluded that mastering the legal vocabulary of each language is essential to ensure institutional bilingualism in the justice sector.[57] The training needs of justice system stakeholders remain very high, both in terms of legal training in French, legal terminology training and language training itself.

In their joint study published in 2013, the language commissioners of Canada, Ontario and New Brunswick praised the language training given to provincial court judges and suggested that the federal government draw inspiration from it.[58] The Senate Committee would have liked to have met with representatives of the JuraLingo immersion centre during its trip to New Brunswick to better understand its role in second language training for provincially appointed judges, but they had no perspectives to share on the Act's modernization.

From left to right: The Honourable Marie-Françoise Mégie and Paul E. McIntyre.

In 2014, the *Réseau national de formation en justice* (RNFJ) was formed, bringing together the initiatives of post-secondary institutions, jurilinguistic centres and organizations providing legal training in French across Canada. It provides training to justice professionals and post-secondary students preparing for a career in the justice sector. It advises the federal government on the language training needs of justice system stakeholders.

The Faculty of Law of the *Université de Moncton*, the *Collège communautaire du Nouveau-Brunswick* (CCNB), the *Association des juristes d'expression française de l'Ontario* (AJEFO) and the *Association des juristes d'expression française du Nouveau-Brunswick* (AJEFNB), all four members of the RNFJ, also provide training to justice sector stakeholders. These organizations called for more training support, even though the 2017 federal government action plan includes measures that:

- examine the delivery of existing language programs;
- make training and information on linguistic rights of litigants available to judicial advisory committees; and
- develop training modules on the linguistic rights of litigants for federally appointed judges.[59]

These measures do not meet all the demands of the RNFJ and its partners. They argued that more investment is needed in the:

- training of jurilinguists and translators;
- continuing education of legal professionals;
- training of police officers in French, which is currently non-existent outside Quebec;
- training in legal terminology;
- post-secondary training in French and distance education; and
- training of federally appointed judges, including their ability to give oral orders and judgments from the bench using superior language.[60]

The Honourable Marlene Jennings, Co-Chair of the Quebec Community Groups Network's Access to Justice Committee, added to this, pointing out the limited training in English available in Quebec for justice professionals, such as stenographers.[61]

Language of legal decisions

The current provisions of the Act ensure that, if proceedings are conducted in one language, the court's decision will be made and delivered in that language. A decision given in only one language is not necessarily invalid. An oral decision may be delivered in only one language. Section 20 of the Act states that **decisions, orders and judgments** must be published simultaneously in both official languages when:

- the matter determines a question of general public interest or importance; or
- the proceedings were conducted in both official languages.

This includes decisions published in the *Federal Courts Reports* – but these represent only a portion of the decisions of the Federal Court and the Federal Court of Appeal.[62] Other **decisions, orders and judgments** are published "at the earliest possible time, in the other official language". There are no penalties to ensure compliance with these obligations, which was criticized by the Director of the *Centre de traduction et de terminologie juridiques* (CTTJ), Karine McLaren.[63]

Federal courts respond differently to these language obligations. There are currently no objective criteria to determine which decisions to translate.[64] While the Supreme Court does so in all cases, other federal courts do not always publish their decisions simultaneously in both official languages or have them translated by jurilinguists.

The Supreme Court is cited as a model for the translation and publication of judgments, which gives equal treatment to English and French. Jurilinguist Louis Beaudoin supported this model.[65] Roger Bilodeau, Registrar of the Supreme Court, attributed the court's good performance in this regard to the fact that it:

- has a more limited number of judgments to translate;

- uses the Translation Bureau for the initial translation;
- has a team of lawyers, jurilinguists and technical revisors; and
- has a process to ensure the equal quality of the two versions produced.[66]

In its 2016 report to Parliament, the Office of the Commissioner of Official Languages highlighted the need to clarify the obligations under the Act with respect to **posting federal court decisions on the web**; too often, translations are not posted until several months after publication in the original language.[67] These delays in publishing court decisions in one language and then in the other compromise equal access to justice in both official languages.

Some courts are sidestepping the obligations in section 20, as was the case with the Immigration and Refugee Board of Canada (IRBC) when it adopted an on-request translation policy, which was challenged in the courts since it meant that "most decisions will never be issued in the other official language."[68] After *Devinat v. Canada (Immigration and Refugee Board)*, the IRBC decided not to publish any of its decisions, thus avoiding the resulting translation duty.[69]

Another recent lawsuit against the Courts Administration Service (CAS) concerns the timeliness and quality of translations of federal court decisions.[70] Its translation policy defines an order of priority that takes limited resources into account.[71] Louis Beaudoin described the problem as follows in his brief.

> *"Since 2015, translation contracts have been awarded to large firms with no legal or jurilinguistic translators. The quality of the French version of judgments of the Federal Court, the Federal Court of Appeal and the Tax Court of Canada since CAS entrusted in 2015 the translation to two or three non lawyer firms is so worrying that it will probably require the retranslation of most of those decisions."*
>
> **Louis Beaudoin, *Brief*, 15 October 2018.**

The CAS was given additional resources in 2017 so it could translate more decisions within a reasonable time frame.[72] Appearing before the Senate Committee, its Chief Administrator, Daniel Gosselin, said that federal court decisions are posted on the web in accordance with section 20, but that additional resources are needed to improve its implementation.[73] The Office of the Commissioner of Official Languages believes that this issue falls under Part IV of the Act.[74] There is therefore some disagreement about the interpretation of the obligations arising from Part III – dealing with the administration of justice – and Part IV – dealing with communications with and services to the public. Modernizing the Act provides an opportunity to resolve this.

Legal and jurilinguistic tools

English and French legal and jurilinguistic tools contribute to equal access to justice in both official languages. One role of the RNFJ, AJEFO, AJEFNB and CTTJ is to develop and distribute such tools. The main challenge is to ensure that the tools meet the different needs of the provinces and territories. For that, resources are needed.

The RNFJ raised the need to develop templates for acts, precedents and contracts in French, a responsibility that falls to private sector lawyers and that therefore depends on market demand, which is not as strong in minority settings.[75] There is also work to be done to standardize these tools and make them available to all justice system stakeholders across Canada.[76] Jurisource.ca, a portal that brings together resources and terminology for legal professionals, is an example of a tool that the federal government must continue to support.[77]

Similar concerns exist in Quebec regarding the lack of access to tools in English, a problem exacerbated by the fact that the province's justice system operates almost exclusively in French.[78]

Translation in the judicial setting

Translation and simultaneous interpretation play an important role in the implementation of constitutional and legislative provisions relating to judicial bilingualism. The shortcomings raised by witnesses in this regard are more significant than in the case of legislative bilingualism. Initiatives exist, but the evidence showed that they need more support.

In New Brunswick, the CTTJ at the *Université de Moncton* supports the implementation of judicial bilingualism by providing translation, revision, drafting and common law terminology services in French to a diverse clientele in the public and private sectors. One of its responsibilities is to translate the decisions of the province's courts. It also has an educational mission. Its director, Karine McLaren, underlined that compliance with section 20 of the Act often depends on financial considerations related to translation, which restricts equal access to justice in both official languages.[79] For this reason, witnesses proposed that the criteria be reviewed, as described in Chapter 2.

The Senate Committee had invited representatives of the Centre for Legal Translation and Documentation at the University of Ottawa, which plays much the same role as the CTTJ for Ontario, but the invitation was declined. Louis Beaudoin, in his brief, deplored the small number of decisions published in French in Ontario.[80] He made the same comment for Manitoba, where few decisions are available in French despite existing constitutional obligations.[81] In his appearance before the Senate Committee, he argued that the translation of decisions should be entrusted to specialists to ensure quality, an idea the AJEFNB endorsed.[82]

The CAS recently explored using a machine translation tool to speed up the translation process of court decisions.

> *"The machine translation tool requires an enormous amount of manipulation. One person is needed at all times to ensure that the translations the tool generates in fact reflect the intended meaning of the original language. It will never be a perfect tool. The accuracy rate is currently near 70 per cent. The tool will never replace the services of a translator or a jurilinguist, but it can be used to speed up the process, even though that option requires further investment."*
>
> **Daniel Gosselin, Courts Administration Service, *Evidence*, 29 October 2018.**

Louis Beaudoin cited the example of a lawyer who used Google Translate to understand a judgment, which clearly involves risks in terms of meaning. He believed a lack of resources should never justify cutting corners in order to "get the lowest cost for the highest volume of translation."[83] This is reminiscent of earlier testimony before the Senate Committee regarding the risks that these practices pose to the quality of translators' and interpreters' work. Daniel Gosselin, from the CAS, acknowledged that the lack of jurilinguists is a barrier and that only 25% of the translations processed by the CAS meet its quality standards.[84] Currently, none of the Federal Court's decisions are revised; the CAS requires additional funding to meet this need.[85]

Roger Bilodeau admitted that to achieve the same results as the Supreme Court in terms of the quality of translated decisions, other federal courts need specialized staff, resources and experience.[86] Daniel Gosselin said it was unrealistic to duplicate the Supreme Court model at the Federal Court, Federal Court of Appeal, Tax Court of Canada and Court Martial Appeal Court, as their volume of decisions is much higher.[87] He also expected that the number of decisions to be translated will increase in the coming months.[88] Denis Roy said that he was aware of the practical challenges, but offered that this ideal would ensure greater consistency between legislative bilingualism and judicial bilingualism.[89] Karine McLaren stated that it is not possible at this time, even if it is ideal.[90]

Development of provincial and territorial language regimes

Both the evidence heard and the briefs received showed that federal–provincial/territorial cooperation is crucial to the implementation of judicial bilingualism. Over the years, provinces and territories have taken measures to facilitate access to justice in both official languages, particularly with respect to court administration.

In **Quebec**, judicial bilingualism rights are governed by section 133 of the 1867 Constitution, as mentioned above. Sections 7 and 9 of the *Charter of the French Language* recognize that both English and French may be used in the province's courts and provide for the translation of decisions, at the request of one of the parties.

The *Barreau du Québec* said it is "particularly concerned with the translation of judgments rendered by Quebec courts" because in practice, the vast majority of judgments are issued in French.[91] The Honourable Marlene Jennings, from the QCGN's Access to Justice Committee, shared these concerns.[92] Sometimes decisions are not translated, despite requests to do so.[93] Louis Beaudoin brought up the delays involved in this process, which discourage individuals from exercising their right to a decision in their own language.[94]

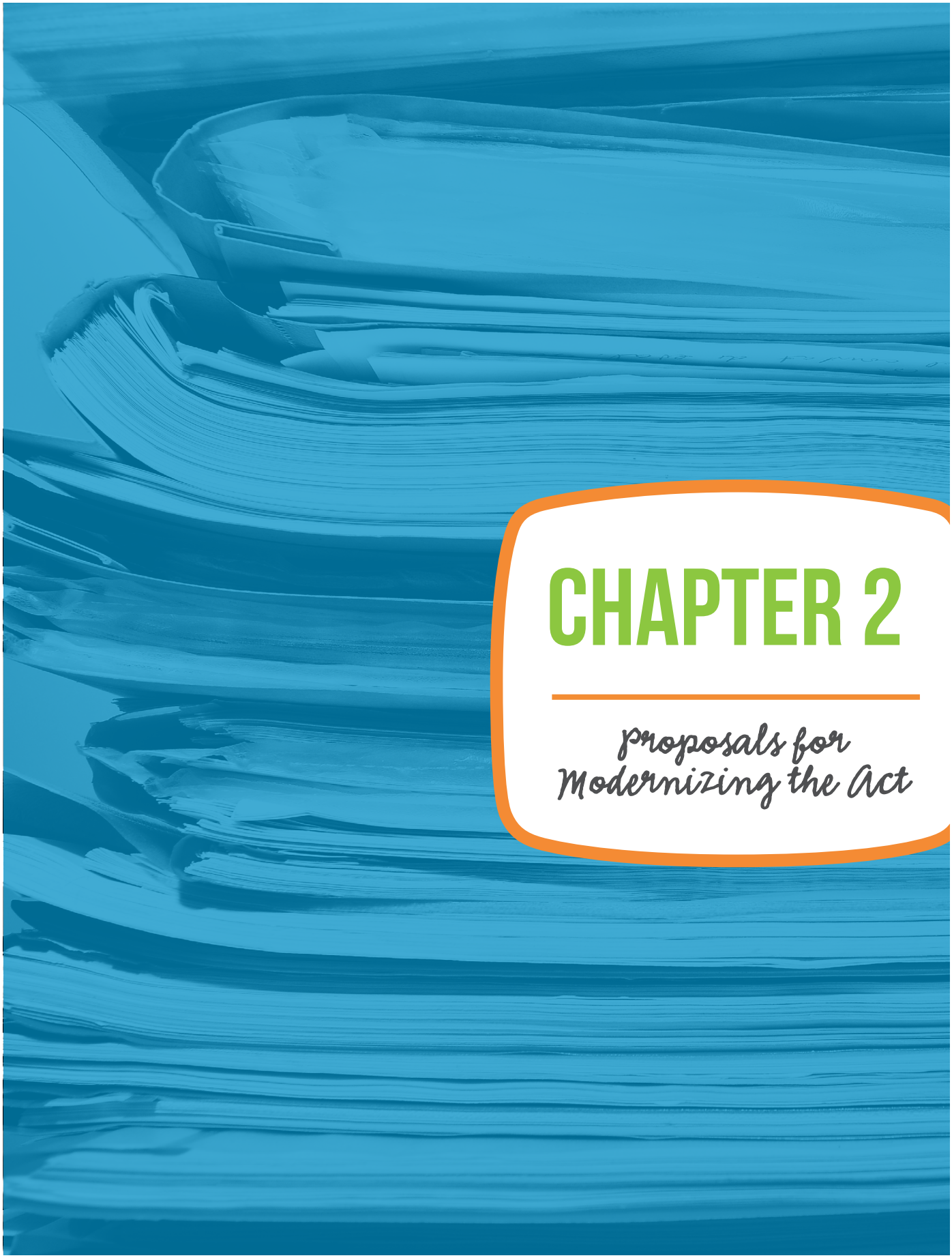
In **Manitoba**, section 23 of the *Manitoba Act* includes similar provisions by conferring the right to use English or French in any matter before the province's courts and in any pleading or process. Sections 4 and 10 of the *Francophone Community Enhancement and Support Act* encourage the representation of Manitoba's francophone community on administrative tribunals.

In **New Brunswick**, similar provisions appear in subsection 19(2) of the Charter. Sections 16 to 26 of New Brunswick's *Official Languages Act* set out these obligations and go even further than the federal act by requiring that:

- judges of all courts in the province understand the matter before them without the assistance of an interpreter; and
- decisions of the New Brunswick Court of Appeal be bilingual, regardless of the public interest test.

In the **three territories**, obligations relating to judicial bilingualism are included in the territorial acts themselves.[95] In Ontario, they are listed in the *Courts of Justice Act*. In **Saskatchewan** and **Alberta**, provisions in provincial acts permit the use of both English and French in designated provincial courts.[96]

Canada's other provinces have not enacted legislation to regulate judicial bilingualism in their respective courts.



CHAPTER 2

Proposals for Modernizing the Act

From left to right: The honourable Ghislain Maltais and Larry W. Smith.

The Senate Committee heard new proposals to adapt the Act to the realities of the 21st century. Some ideas already expressed in previous phases of the study were repeated, sometimes as is, sometimes with added nuance. Three findings emerged from the evidence and briefs.
A modernized Act must:

- ensure consistency between legislative bilingualism and judicial bilingualism by incorporating new principles, clarifying current criteria and enshrining existing practices;
- guarantee equal access to justice in both official languages through clear objectives, defined responsibilities, ongoing cooperation and effective remedies; and
- review the mechanisms for implementing the Act by assigning responsibility for its implementation to a central agency, specifying the scope of some of its duties, fostering a contextual approach and reviewing its objectives periodically.

Chapter 2 presents the proposals made by justice sector experts to modernize the Act, which will inform the Senate Committee's final report.

Ensure consistency between legislative bilingualism and judicial bilingualism

It is important to note from the outset that there are more challenges related to the implementation of judicial bilingualism than to the implementation of legislative bilingualism. Five proposals emerged from the evidence and briefs. Sometimes new, sometimes similar to previous ones, these proposals aim to ensure greater consistency in the implementation of judicial bilingualism and legislative bilingualism.

Recognize legal decisions as equally authoritative and of equal value in the Act

Similar to a proposal heard in the second phase of the study,[97] the following suggestion was made: recognize that federal court decisions are equally authoritative in English and French, as is the case for statutes. The AESJQ, the FAJEF, the RNFJ, the *Barreau du Québec*, Louis Beaudoin, Denis Roy, Karine McLaren and Stéphane Beaulac all supported this proposal.[98]

"When participants in the legal system read either version of a judgment, they should be able to rely on it."

***Barreau du Québec*, *Brief*, p. 14.**

"What is the use of translating a judgment if the two versions do not hold equal value and authority? How can we speak of equality if one of the languages is disadvantaged when it comes to choosing the version of a judicial decision? ... In reality, there is inequality. On the one hand, there is the treatment of laws, of which the English and French versions have the same authority and value, and on the other hand, there are decisions and judgments that do not have the same value or official recognition."

Louis Beaudoin, Universal Linguistics Services, *Evidence*, 15 October 2018.

Federal courts, which are called on to interpret laws that are conceived, drafted and enacted in both official languages, should issue decisions that reflect this obligation, i.e., that are equally authoritative and have equal value in English and French. Stéphane Beaulac proposed doing so in the preamble to the Act or by adding an interpretation clause.[99] There is also a need to make changes to current practices and provide the necessary resources to ensure that this obligation is met.[100] Denis Roy noted that translators need to be better trained to meet this obligation.[101]

Include the practice of legislative co-drafting in the Act

Witnesses suggested including the practice of co-drafting federal legislation in the Act. This system is the envy of the world, according to Louis Beaudoin.[102] The *Barreau du Québec* suggested following the New Brunswick model, which has enshrined it in its own legislation.[103] Karine McLaren added that this could serve as inspiration for other legislatures.

"Codifying that requirement would be natural, and could inspire other legislatures, because its objective is to ensure the full participation of both language groups in the preparation of these laws. It is normal that that method is the one chosen by the federal government and by New Brunswick, as both have conferred an equal status on the two official languages. That status is the absolute prerequisite for joint drafting."

Karine McLaren, *Evidence*, 25 October 2018.

Michael Bergman, from the AESJQ, would like Quebec to be inspired by it.[104] Lawyer Justin Dubois, however, did not see the need to enshrine this principle in the Act, since the practice already exists.[105] Denis Roy and Stéphane Beaulac saw it as an added value.[106] Stéphane Beaulac even proposed applying this practice to the justice sector by encouraging the co-drafting of reasons and judgments in English and French.[107]

Add a bilingual interpretation clause

Courts interpret laws based on the principle of bilingual interpretation. Lawyers and judges recognize that both versions are equally authoritative and urge common sense in the event of ambiguity. Modernizing the Act is an opportunity to remind all Canadian lawyers of this principle, as Stéphane Beaulac from the NOLR explained.

"… in order to reach the general objective of the Official Languages Act better, and to truly and substantively promote legislative bilingualism, it would be advisable to include an interpretation provision in the [Act]. It would urge the country's lawyers in Quebec, but also in the other nine provinces and three territories, to get into the habit — without making it too demanding a rule, but an interpretation rule — of systematically taking into account both linguistic versions in the interpretation of bilingual laws in our country."

Stéphane Beaulac, *Evidence*, 5 November 2018.

Require translation of a broader range of legal decisions and their simultaneous publication on websites

As with the proposals made in previous phases of the study,[108] justice sector experts found it important to clarify the criteria in section 20 of the Act, in particular to:

- provide for the simultaneous publication in English and French of federal court decisions on the web, ensuring that exceptions do not become the rule;
- require simultaneous publication for all written decisions and reasons for decisions;
- use the expertise of the Translation Bureau and jurilinguists to ensure the equal quality of both versions;
- set a maximum time limit for the publication of decisions in the other language;
- establish a system for reviewing decisions translated into the other official language, based on the Supreme Court model, and ensure that federal courts adhere to this new translation model;
- provide the necessary funding to ensure the translation of decisions;
- extend the requirement for simultaneous publication to all Federal Court of Appeal decisions, similar to the existing obligations in New Brunswick; and
- extend the requirement to more decisions, including decisions on a matter of principle, a new matter or a controversial point of law.[109]

However, the CAS asked the Senate Committee to take into account respect for judicial independence and the discretion granted to judges in any review of the criteria in section 20 of the Act.[110]

Moreover, although the Act does not apply to provincially and territorially administered courts, witnesses went as far as asking the federal government to provide access to more decisions in both official languages across Canada. Quebec representatives and a jurilinguist pointed to the mandatory translation of decisions of provincial and territorial courts of appeal, which could be funded by the federal government.[111] Denis Roy supported requiring the simultaneous publication of Quebec court decisions in both official languages in all circumstances.[112]

The goal of that proposal was to make Quebec case law more accessible to the English-speaking population. In turn, such a proposal requiring the simultaneous publication of court decisions in both official languages elsewhere in Canada would make the case law of the other provinces more accessible to the French-speaking population throughout Canada. The *Barreau du Québec* noted that decisions issued by Quebec courts lack the visibility of those of Ontario.

> ***" [In 2017], 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."***
>
> ***Barreau du Québec*, Brief, p. 8.**

Louis Beaudoin also talked about the parallel development of two different bodies of case law.[113] Lawyers, he said, are deprived of the opportunity to access decisions of national interest that are available in only one language, as is the case with criminal cases. New Brunswick lawyer Dominic Caron also pointed this out.[114] The Act's modernization is a perfect opportunity to strengthen the obligation to translate decisions, which the Crown must provide free of charge to litigants.[115]

The CAS noted that approximately 85% of federal court decisions are first written in English, which benefits English-speaking lawyers.[116] The RNFJ, in its brief, addressed the negative effects of the lack of translated decisions from an educational point of view.

"It is embarrassing when students have to be told that a particular judgment exists only in English, especially when it comes to federal court judgments … Legislation that does not provide very clear guidelines for the publication of judgments and their equal force has a negative impact on the entire system, starting at the very base in the classroom."

***Réseau national de formation en justice*, *Brief*, pp. 2 and 3.**

Another issue is the unequal access to decisions between federal government lawyers – to whom access is guaranteed at all times – and other Canadian lawyers facing significant translation delays.[117]

Proceed with the adoption of an official French version of the Constitution

CBA representatives Mark Power and Marc-André O'Rourke argued that modernizing the Act is the ideal opportunity to move forward with the adoption of an official French version of the 1867 Constitution.[118] Their brief proposed adding three sections to the Act:

- an enforceable section requiring the Minister of Justice to make every effort to implement section 55 of the *Constitution Act, 1982*, which seeks to have the French version of the Constitution adopted;
- a section requiring the Minister of Justice to submit, every five years, a report detailing the efforts made to implement this section; and
- a section requiring that this report be referred to a parliamentary committee for review.[119]

The brief contained a **proposed amendment to the Act** to this effect.[120] Such an amendment would allow the federal government to take control and end the ongoing political and legal impasse.[121] Moreover, some witnesses were of the opinion that the lack of an official French version of the constitution could eventually be challenged in the courts.[122] Before that happens, the CBA argued that the federal government is in a position to move the issue forward.

Even today, the courts still interpret the English version of the 1867 Constitution as the only authoritative version, which inevitably has consequences for the interpretation of language rights, as illustrated in the following excerpt from the CBA's brief.

"This ongoing problem had unfortunate consequences in Caron*, where the Court had to decide whether Alberta was required to adopt, print and publish its laws in French and in English. The court had to interpret, among other things, the* 1867 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada *(the 1867 Address) found in the schedule to the 1870* Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union. *Considering that only the English version of the 1867 Address had force of law, the Alberta Court of Queen's Bench did not perform a crossanalysis to determine the original meaning of the documents, even though a French version of the document had been produced in 1867 and highlighted an ambiguity in its legal meaning."*

Canadian Bar Association, *Brief*, para. 13.

While not going to such lengths as the CBA in its proposals, the FAJEF also requested that an official French version of the Constitution be enacted.[123]

Guarantee equal access to justice in both official languages

A modernized Act must ensure progress towards the equality of status and use of English and French in the justice sector. Equal access to services of equal quality in this sector is a priority for both francophone minority communities and Quebec's English-speaking communities. The evidence detailed a series of measures to improve the situation.

Require Supreme Court judges to be bilingual

The evidence and briefs were almost unanimous on the need for the Act to require that Supreme Court judges be bilingual at the time of their appointment.[124] All phases of the Senate Committee's study focused on this issue, including this one.[125]

Over the years, two legislative options have been put forward to address this issue. While some proposed amending section 16 of the Act,[126] others suggested amending the *Supreme Court Act*.[127] The first option focuses on the institutional bilingualism of the Supreme Court, while the second focuses on the individual bilingualism of judges. In the latter case, the federal government has argued that such a provision could be unconstitutional. Justice sector experts did not agree with this interpretation. The FAJEF, the AJEFO and Stéphane Beaulac contented that such a criterion does not change the court's composition; it only modifies the qualifications required for those who are called upon to sit on it.[128] The *Barreau du Québec* pointed out that this issue deserves special attention if the changes to the Act are to be successful.[129]

An amendment to the Act would not require every judge appointed to the Supreme Court to be bilingual. It could ensure, in practice, that bilingual cases are heard by a smaller bench of judges. Nevertheless, most of the evidence and briefs emphasized the importance of such an amendment. The *Barreau du Québec* and the AJEFO argued that it is a question of equal access to justice in both official languages, a way of ensuring the continuity of an existing practice and ensuring consistency throughout the justice system.

"Functional bilingualism must be one of the skills required of a Supreme Court judge to ensure equal access to justice for all."

***Barreau du Québec*, *Brief*, p. 3.**

"It is incongruous that litigants and lawyers can appear before courts at all levels in the language of their choice, namely French, except for the highest court in the land."

***Association des juristes d'expression française de l'Ontario*, *Brief*, para. 17.**

The exception that applies to the Supreme Court is no longer relevant today because the pool of bilingual candidates has noticeably increased, which supports testimony from the third phase of the study.[130] Moreover, the OCFJA's most recent data shows that many bilingual judges are applying for new positions.[131] The AJEFO argued that legislating this obligation would send a clear message to all Canadian lawyers to develop their language skills.[132] CBA's Mark Power reasoned it would increase access to justice.[133] It would also give the recommendations of the Royal Commission on Bilingualism and Biculturalism their due, said Yves Goguen of the AJEFNB.[134]

Supreme Court judges, when called upon to interpret legislation based on civil law and common law, must demonstrate their ability to function in our bijural, bilingual justice system.[135] They must also make rulings on cases that were argued in the lower courts in English or French. They have access to simultaneous interpretation in proceedings during which lawyers speak in the language of their choice.[136] But, to paraphrase Daniel Boivin, interpretation does not guarantee full justice.[137] Judges read the evidence in the language in which it is provided.[138] A knowledge of both languages is then all the more important, according to Louis Beaudoin, since it is part of their job description.[139] This proposed amendment, which has been put forward again and again, has significant symbolic weight.[140]

While witnesses called for an amendment to the Act as a first step, the FAJEF insisted on taking a further step by amending the *Supreme Court Act*.[141]

Regulate the language requirements for federally appointed judges

It is clear from the evidence that steps must be taken to better identify the needs for bilingual judicial candidates across Canada. The lack of bilingual judges capable of hearing cases in the language chosen by a party to the proceedings increases delays in access to justice.[142] A private member's bill, still at first reading, would amend the *Judges Act* to designate bilingual positions in provincial and territorial superior courts and fill these positions with bilingual candidates.[143]

The *Barreau du Québec* endorsed this idea, which would take into account regional realities and official language minority communities in these regions.[144] The FAJEF and AJEFO briefs also supported it.[145] Marc A. Giroux said that there is currently no systematic assessment of the number of bilingual judges required to ensure equal access to justice across Canada.[146] He warned the Senate Committee, though, that such a measure may be unconstitutional.[147] Denis Roy asked that the Act require New Brunswick's superior court judges to be bilingual.[148]

The RNFJ's Ronald Bisson proposed developing a system to certify language skills in a legal context.[149] The Senate Committee had invited KortoJura to its public hearings in New Brunswick because it had developed a French oral comprehension test and another test to assess oral comprehension in a legal context, but the invitation was declined. Witnesses stressed the importance of developing national standards and assessment tools. The FAJEF President Daniel Boivin and lawyer Mark Power recommended taking advantage of modernizing the Act to clarify the federal government's duty in this regard: the assessment of language skills must be mandatory and systematic.[150] Ronald Bisson said the tools exist, they just need to be used.[151]

Daniel Boivin also raised the need to ensure official language minority communities are represented on judicial advisory committees.[152]

Include federal government objectives in the Act

The FAJEF recommended in its brief that the Act set out federal objectives with respect to access to justice in French in Canada. They included:

- promoting and ensuring full access to justice in French at the federal level;
- promoting the active use of French throughout Canada's justice system;
- ensuring access to justice in French in all areas of federal jurisdiction, such as divorce, bankruptcy and criminal matters; and
- supporting access to justice in French in the provinces and territories by:
  - translating the decisions of provincial and territorial courts of appeal;
  - standardizing and developing legal and jurilinguistic tools in French; and
  - providing language training for federally appointed judges.[153]

The AESJQ agreed: The Act must clearly set out the same type of objectives, but in this case, to ensure access to justice in English in Quebec.[154]

The RNFJ has the tools to address the institutional barriers related to access to justice in both official languages.[155] It urged the federal government to specify its objectives in the Act with respect to the administration of justice and equal access to justice in both official languages, in terms of the following four dimensions:

- the right of any litigant anywhere in Canada to have access to a lawyer who is able to provide services in the language of their choice;
- the right of every Canadian student to pursue post-secondary studies in French in the law or justice sector;
- the right of any Canadian justice professional to access on-the-job training to improve – and certify – their language skills in a legal context; and
- the obligation to support the standardization of French common law vocabulary and the obligation to produce and distribute reliable legal and jurilinguistic tools.[156]

Set out Justice Canada's responsibilities

Echoing a proposal made in two previous phases of the study, witnesses asked that the Act set out Justice Canada's responsibilities.[157] Ronald Bisson argued that Justice Canada must act as a centre of expertise in access to justice in both official languages.[158] Daniel Boivin wanted the department's responsibilities for assessing judicial candidates' language skills set out.[159] Denis Roy maintained that these responsibilities must be specified in the Act, in Part VII, as well as in the accompanying regulations.[160]

From left to right: The Honourable Rose-May Poirier, Deputy Chair, and René Cormier, Chair, Standing Senate Committee on Official Languages.

Improve federal–provincial/territorial cooperation

Effective implementation of the Act requires the cooperation of multiple justice stakeholders. The evidence and briefs emphasized that the provinces and territories have a major role to play in ensuring access in both official languages to the entire justice system. Service delivery in English and French in this sector varies widely across the country. However, the importance of concerted action has been acknowledged.[161]

The 2017 action plan to improve the bilingual capacity of the superior court judiciary included measures to increase cooperation between the various levels of government, but the evidence showed that more needs to be done.[162] Modernizing the Act could make it possible to:

- include, in Part VII of the Act, explicit provisions on access to justice in both official languages, including the active-offer-of-services obligation; and
- insert language clauses in federal–provincial/territorial agreements.[163]

This echoes previously heard proposals.[164] However, Justin Dubois and Stéphane Beaulac reasoned that, in the justice sector, it may be difficult for the federal government to impose conditions in the Act for transfer payments.[165] That does not mean, however, that the federal government should not strengthen its accountability practices to ensure that the money it gives to the provinces and territories is used for the right purposes.[166] Justin Dubois thought that communities should have a say in how this money is used.[167] The Honourable Marlene Jennings felt the same way.[168]

The RNFJ, for its part, called on the federal government to develop principles for working together with the provinces and territories, while respecting the constitutional and legislative framework, to improve access to justice in both official languages.[169]

Provide core funding to community organizations working in the justice sector

Justice Canada supports the activities of justice sector organizations through grants and contributions, and has even committed to enhance its support over the next five years.[170] However, several organizations criticized the lack of funding and the random selection of projects. These organizations play a crucial role in ensuring equal access to justice in both official languages, and federal government support has not always met their needs.

The evidence heard and briefs received made clear that more investment is needed to ensure core funding for these organizations. Érik Labelle Eastaugh, Director of the International Observatory on Language Rights (IOLR), proposed granting them official status in the Act to guarantee them such funding.[171] This goes back to the concepts of autonomy and effective community representation outlined in the third interim report.[172]

Modernizing the Act is an ideal opportunity to give priority to structuring initiatives in the area of access to justice. Measures could be taken to:

- standardize French common law vocabulary;
- develop legal and jurilinguistic tools in English and French that are accessible across the country;
- increase access to legal information in both official languages; and
- train more jurilinguists and justice professionals capable of working in both official languages.[173]

Ronald Bisson estimated that $75 million over five years could meet these various needs.[174]

Provide effective remedies

It has become clear at this stage of the study that the remedies under the Act must be changed. Justice sector experts proposed reviewing the role of the Commissioner of Official Languages, looking into creating an administrative tribunal and recognizing the Court Challenges Program (CCP) in the Act.

Role of the Commissioner of Official Languages

Michael Bergman suggested that the Act's modernization be considered prospectively. He went as far as to propose that the Commissioner of Official Languages be responsible for implementing the Act.[175] This new responsibility would be complemented by those that strengthen the Act. He also proposed reviewing the hiring process for this position in order to fill it with candidates who have the required legal skills and knowledge. In his view, the Commissioner must be given the authority to impose penalties, an idea, as we have seen in previous interim reports, that is not unanimously supported.[176] In fact, the Honourable Marlene Jennings opposed it.[177]

Without going that far, the FAJEF, AJEFO, AJEFNB and CBA considered that the Act should provide for a more active role for the Commissioner with regard to remedies in order to speed up the judicial process in the event of non-compliance with the Act.[178] The following excerpts summarize the issue.

"… in actual fact, the Commissioner appears before the courts only sporadically, and almost exclusively as an intervener. The result of this trend is that litigants wishing to exercise their rights must do so on their own and generally with their own financial means."

Canadian Bar Association, *Brief*, October 2018, Annex B.

"The current system is not only slow, it lacks clarity and places a heavy burden on taxpayers when the Commissioner of Official Languages recommends a change that the federal government does not accept. The complaint system is slow. In addition, some complaints have been on the radar for a very long time, and they're not close to obtaining a remedy."

Daniel Boivin, *Evidence*, 15 October 2018.

Denis Roy stated that he would like the Act to establish that the findings of the Commissioner of Official Languages are decisions, not recommendations.[179] He is among those who argued that a penalty system should be made available to the Commissioner and that it be applied in stages: first a warning, then a fine, and finally a sanction.[180] Lawyer Dominic Caron reiterated the idea of specifying in the Act that the Commissioner be appointed unanimously.[181]

Creation of an administrative tribunal

As in the third phase of the study,[182] opinion was divided on the possible creation of an administrative tribunal. Daniel Boivin, Dominic Caron and the Honourable Marlene Jennings were in favour of the idea.[183] Nadia Effendi proposed following the Canadian Human Rights Tribunal model, with possible collaboration between the future tribunal and the Commissioner of Official Languages.[184] Denis Roy, from the *Université de Moncton*, did not see the need for it.[185]

Dominic Caron cautioned that the Canadian Human Rights Commission was not the most effective model and that it was important that the tribunal, if established, be given the necessary resources and tools to carry out its role.[186] He reiterated a previously made proposal to make all parts of the Act justiciable.[187] The IOLR's Érik Labelle Eastaugh suggested creating a new administrative division within the Office of the Commissioner of Official Languages responsible for appeals and remedies.[188]

Court Challenges Program

Since the release of the Senate Committee's previous interim report, the CCP has become fully operational.[189] However, this did not prevent several justice sector experts from adding to the proposals already heard in previous phases of the study, for example, by calling for the CCP to be included in a modernized Act to ensure its continuity.[190] Dominic Caron suggested that it be entrenched in Part VII.[191] The AJEFO's brief argued that the Act must enshrine the CCP's objectives to:

- allow individuals and groups to access funding to initiate and participate in test cases based on the rights and freedoms covered by the CCP;

- ensure that their views are presented to the courts in test cases; and
- ensure that the rights and freedoms covered by the CCP are clarified and strengthened.[192]

Legal process

A novel idea that emerged from the evidence was to force disclosure and sharing of evidence at the beginning of legal proceedings, which Justin Dubois supported in order to speed up access to justice.[193]

Another new idea, put forward by Dominic Caron, was to allow community organizations to appear before the courts on behalf of individuals whose rights had been violated.[194] These organizations have better access to funding, but cannot intervene in court on their own initiative unless mandated by the parties concerned to do so.[195]

Some experts also called for facilitating access to justice through mediation. Justin Dubois, who made the proposal, cited the out-of-court settlement that led to the creation of the Language Rights Support Program after the CCP was abolished in 2006.[196] A modernized Act could include mechanisms to promote faster settlements to the satisfaction of all parties, before the case went to Federal Court or a possible administrative tribunal.[197] However, Michael Bergman said that "mediation doesn't resolve these kinds of fundamental identity issues that go to fundamental rights."[198]

Set out the language obligations for divorce and bankruptcy law

Like the proposals made in the second phase of the study,[199] witnesses urged that the language obligations under the *Divorce Act* be legislated. This proposal was made by FAJEF President Daniel Boivin, AESJQ President Michael Bergman and AJEFO Chair Nadia Effendi.[200] A bill to amend the *Divorce Act*, which is still before Parliament, did not initially address the right of the parties to choose one of the two official languages in divorce proceedings under the act; however, it was amended at committee stage in December 2018.[201] The Senate Committee will follow the bill's progress with interest.

Daniel Boivin also suggested that the language obligations in the *Bankruptcy and Insolvency Act* be clarified along the lines of proposals already presented in a previous interim report.[202] In his brief, he argued that both the right to file for bankruptcy in the official language of one's choice and the right to use French at all stages of the proceedings, including on appeal, be provided for.[203] That right should also extend to the *Criminal Code*, both at trial and on appeal, a proposal that was also made in the third phase of the study.[204]

Incorporate principles recognized in case law into the preamble of the Act

One proposal that came up from report to report was to incorporate principles recognized in the case law into the Act. While he did not make any specific suggestions, Louis Beaudoin supported the idea.[205] Daniel Boivin, Nadia Effendi and Stéphane Beaulac suggested recognizing the Act's quasi-constitutional nature.[206] Dominic Caron proposed referring to the rights enshrined in the Charter.[207] Denis Roy cited three decisions on which to base the Act's interpretation, but did not propose incorporating their principles.[208]

Yet witnesses also questioned the relevance of such a measure and pointed out its potential risks to the Act's interpretation, as Stéphane Beaulac and Justin Dubois did in the following excerpts.

"Sometimes, adding legislative straps to the case law belt may raise potential contradictions between the legislative and case law source, which could lead to disputes, and so on."

Stéphane Beaulac, *Evidence*, 5 November 2018.

"I have some concerns regarding the codification of principles. Should a government decide to amend the law and remove the principles from the law, what would happen to the principles that existed, which were codified and then withdrawn? To my mind, it is less important to codify those interpretation principles, because they already exist. They have strength of law and they are applied by the courts at this time."

Justin Dubois, *Evidence*, 19 November 2018.

As to recognizing the unique constitutional status of New Brunswick, Justin Dubois, while not opposed to the idea and recognizing that it could benefit the province, questioned how it would improve the Act.[209] Denis Roy and Yves Goguen did not see the need for it, despite its symbolic purpose.[210]

AESJQ Vice President Casper Bloom proposed that the following principles be included in the Act: the federal government's obligation to support and enhance official languages, the right to damages and the place of the citizen at the core of the justice system.[211] Érik Labelle Eastaugh saw the value of more fully recognizing the collective dimension of language rights in the Act.[212]

Review the mechanisms for implementing the Act

The evidence and briefs of justice sector experts complemented the proposals previously heard regarding the need to review the mechanisms for implementing the Act.

Assign responsibility to a central agency

Justice sector experts maintained, as did the witnesses from the first three phases of the study,[213] that responsibility for the Act's implementation should be assigned to a central agency. While Daniel Boivin and Nadia Effendi suggested that the Treasury Board should be assigned this responsibility, Louis Beaudoin and the Honourable Marlene Jennings did not comment.[214]

"Since the system is complex, the Official Languages Act *must clearly identify a leader. We need someone who can create a strong central agency that can provide clear guidance on the administration of justice, to ensure that, first and foremost, all federal institutions will be able to respond in the same way. Even at the federal level, many stakeholders are involved in the justice system."*

Daniel Boivin, *Evidence*, 15 October 2018.

This requires clear departmental responsibilities and a framework for horizontal coordination in the multi-stakeholder justice sector.[215]

Michael Bergman, as we have seen, was the first to propose that the Act's implementation be entrusted to the Commissioner of Official Languages.[216] He added that the departmental responsibilities flowing from its implementation need to be clarified at the same time.[217]

Specify the scope of duties in Part IV

At the time of writing, the proposed regulations to amend the implementation of Part IV had drawn Parliament's attention, but no witnesses commented directly on its scope or relevance. Yet the evidence once again showed the importance of clarifying the scope of obligations with respect to communications with and services to the public. The CBA recommended that the federal government take the vitality of official language minority communities into account in its assessment of the demand for services.[218] The idea of enshrining the principle of institutional vitality in the Act has been a recurring theme in all the interim reports so far.

Specify the scope of duties in Part V

One witness added to the comments already made on the challenges of implementing Part V, which concerns the language of work of federal employees, and possible solutions. Érik Labelle Eastaugh argued that a modernized Act must:

- provide that everyone has the same rights respecting language of work, while maintaining the concept of designated bilingual regions for language of work purposes; and

- clarify the scope of the duty under section 36 of the Act and the resources available to employees to ensure that their rights respecting language of work are respected.[219]

Érik Labelle Eastaugh stated that bilingual employees in the federal public service must be given the means to exercise their rights and that a change in culture within federal institutions must be encouraged.[220] The current Act is too general to allow it. A modernized Act could provide for exceptions in cases involving the provision of services to the public or supervisory positions, where the duties in Part IV take precedence. This would also avoid potential legal action, such as that taken in 2015 by an employee of the Office of the Superintendent of Financial Institutions who held a bilingual position but who argued that his employer had violated his right respecting language of work by requiring him to deal with unilingual employees in their language.[221]

Specify the scope of duties in Part VII

As the study has gone on, there has been increased pressure to urge the federal government to define the scope of the principles in Part VII. A clear directive to federal institutions on what constitutes "positive measures" appears essential while awaiting a modernized Act.

Érik Labelle Eastaugh, a researcher specializing in issues relating to the implementation of Part VII, proposed that the duties be clarified, both in the Act and the regulations, by:

- taking into account the interests of communities at the outset of the decision-making process;
- respecting the principle of substantive equality;
- taking a contextual approach;
- imposing a duty to support the vitality of communities;
- clarifying the duty to consult with communities and their right to participate in the development of any program that may have an impact on their interests or vitality, similar to the model at issue in *DesRochers v. Canada (Industry)*;
- providing for the obligation to delegate the management of certain programs to community organizations, drawing on the model used for school governance and the principle of institutional autonomy; and
- developing regulations in consultation with the communities.[222]

The current wording of Part VII, according to Érik Labelle Eastaugh, is too vague, allowing the government to interpret it in a minimalist way.[223] He therefore proposed that the Act set out legal standards that apply to all federal institutions and that require consultation with the communities.[224] His brief contained a **proposed amendment to the Act** and explained the nature and reasoning for it.[225] For example, the Act could require enforceable community agreements.

"That is the pinnacle of all the changes, since those agreements would really clarify the standards that would be justiciable. The underlying problem with Part VII is that it does not have the resources to fulfill its ambitions. The wording of Part VII is so general that, when cases end up in court, in a dispute with a federal institution, for example, the wording is too general and it's too easy for the Department of Justice or the government to adopt a minimalist interpretation of its obligations. Therefore, reaching binding agreements would serve to further clarify the contents of the government's obligations."

Érik Labelle Eastaugh, *Evidence*, 25 October 2018.

Justin Dubois thought that the Federal Court's decision in May 2018[226] justified the need to clarify Part VII, particularly with respect to:

- "positive measures";
- consultation with official language minority communities; and
- the impact of federal policies and programs on these communities, taken into account at the outset of the process.[227]

The suggestions of these two witnesses echoed elements already contained in Canadian Heritage's guide to the implementation of Part VII.[228] It is therefore a matter of making the measures enforceable by including them in the Act.

The FAJEF added that the Act must enshrine the principle of "*by* and *for*" by giving communities the opportunity to participate in its implementation.[229] The CBA supported the idea of including specific community consultation mechanisms in the Act.[230] The AJEFO and lawyer Dominic Caron agreed, adding that further clarification was needed to define the concepts of vitality, active offer and substantive equality.[231] The Honourable Marlene Jennings insisted on including a clear definition of "positive measures" in the Act.[232]

Denis Roy also urged that this definition be set out, first in the Act, and then in regulations.[233] Yves Goguen stressed the urgency of making regulations.[234] In 2014, the AJEFNB filed a complaint with the Commissioner of Official Languages under Part VII. The complaint process, which is ongoing, has been called into question by the recent Federal Court decision.[235] The validity of complaints made under Part VII has been compromised, as the following excerpt illustrates.

"The situation is nevertheless precarious. We have yet to receive any core funding, and now we hear that the Office of the Commissioner has changed the way it handles complaints filed under Part VII in the wake of the Federal Court's judgment in Fédération des francophones de la Colombie-Britannique v. Canada. *This position is troubling and hard to understand, since the affair is not over. A judgment has obviously been rendered but is now under appeal, and the commissioner is expected to await the outcome of the entire case before changing the way he handles complaints filed under Part VII of the [A]ct. However, this situation shows how important it is to clarify this part of the [A]ct once and for all."*

Yves Goguen, *Evidence*, 24 October 2018.

The AJEFNB intends to act as an intervener in the appeal of this decision.[236] Érik Labelle Eastaugh contended the Federal Court erred in its interpretation.[237]

Foster a contextual approach that is tailored to needs

The QCGN warned the Senate Committee of the danger of recognizing that French is the minority language in Canada, as witnesses in phase three proposed.[238] The guiding principle for modernizing the Act is the equality of English and French; therefore, neither language should receive special treatment in the Act.[239] Stéphane Beaulac maintained that such an addition would be inconsistent with the Act's objectives.

"Before adding anything, you have to consider the potential impact, which may go beyond the symbolic one. Whether symbolic or real, the effect would not serve the purposes of the Official Languages Act *… In my humble opinion, we would be sending the wrong message, which would be that the French language is the only one that is under threat. This could lead us to the position of protecting linguistic minorities only. However, to my mind, the general objectives of the* Official Languages Act *are much broader than that, either in its current version or the modernized version, which will I hope be even broader. They are about protection, but also about the vitality of the country's official languages."*

Stéphane Beaulac, *Evidence*, 5 November 2018.

Moreover, the Act "must enable adaptation to the specific contexts and needs of the different official language minority communities" in accordance with the principle of substantive equality, as the Honourable Marlene Jennings, Érik Labelle Eastaugh and Sylvio Boudreau of the CCNB pointed out.[240]

Review the Act periodically

Although witnesses were not systematically questioned on this issue, some of them recommended that a periodic review be included in the Act. One such witness was Érik Labelle Eastaugh, whom the Senate Committee met with during its visit to New Brunswick.[241]

CONCLUSION

Senate Committee members are nearing the end of their study and strongly believe that an in-depth review of the Act is needed to better protect Canadians' language rights. Justice sector experts supported this belief. Their testimony and briefs offered a series of measures to take to ensure respect of English and French as official languages in:

- the Canadian Constitution;
- federal statutes;
- court decisions;
- the administration of federal courts;
- the federal appointment of judges; and
- access to justice.

A modernized Act must improve existing practices, for example, with respect to translation, training and the development of legal and linguistic tools. It must codify others to ensure their continuity. This is the case, for example, with the Court Challenges Program, co-drafting and the bilingual interpretation of legislation. Modernizing the Act is an opportunity to take a step forward by expanding obligations with respect to judicial bilingualism, improving collaboration between the various stakeholders and providing more direct support to organizations responsible for ensuring equal access to justice in both official languages.

The message regarding the mandatory bilingualism of Supreme Court judges is clear. The federal government must also go further in its thinking on the appointment of judges to provincial and territorial superior courts and courts of appeal. Achieving equal status and use of English and French across the country means viewing the justice system as a continuum. It also means taking a systemic approach that is adapted to the complexity of the Canadian justice system.

The evidence and briefs could not be clearer on the importance of reviewing the mechanisms for implementing the Act. The key role that a central agency could play in advancing language rights has been recognized from report to report. Specifying the scope of certain existing duties, particularly with regard to parts IV, V and VII of the Act, would lead to real results.

With this fourth interim report, the Senate Committee is presenting new proposals to support the federal government's review of the Act. As it moves towards its final report in June 2019, the Senate Committee asks the federal government to take the proposals of justice sector experts into account. The end goal of modernizing the Act is the substantive equality of Canada's two official languages in all areas of its implementation. The goals of legislative bilingualism and judicial bilingualism are no exception.

APPENDIX A – WITNESSES

Name of Organization	Spokesperson(s)
Public Hearings in Ottawa - 15.10.2018	
Fédération des associations de juristes d'expression française de common law inc.	Daniel Boivin, President
Association of English Speaking Jurists of Quebec	Michael Bergman, President and Co-Founder Casper Bloom, Vice-President
Universal Linguistic Services	Louis Beaudoin, President
Public Hearings in Ottawa - 22.10.2018	
Réseau national de formation en justice	Ronald Bisson, Director
Association des juristes d'expression française de l'Ontario	Nadia Effendi, Chair Geneviève Pilon, Acting Executive Director
Supreme Court of Canada	Roger Bilodeau, Registrar
Public Hearings in Ottawa - 29.10.2018	
Courts Administration Service	Daniel Gosselin, Chief Administrator Chantal Carbonneau, Deputy Chief Administrator, Judicial and Registry Services
Office of the Commissioner for Federal Judicial Affairs	Marc A. Giroux, Commissioner
Canadian Bar Association	Mark Power, Chair, French Speaking Common Law Members Section Marc-André O'Rourke, Lawyer, Legislation and Law Reform

Name of Organization	Spokesperson(s)
Public Hearings in Ottawa - 05.11.2019	
Quebec Community Groups Network	The Honourable Marlene Jennings, P.C., Co-Chair, Access to Justice Committee Bruce McNiven, Co-Chair, Access to Justice Committee
As an individual	Stéphane Beaulac, Professor, Faculty of Law and Director, National Observatory on Language Rights, *Université de Montréal*
Public Hearings in Ottawa - 19.11.2019	
As an individual	Justin Dubois, Lawyer, Emond Harnden LLP
Public Hearings in New Brunswick - 24.10.2018	
As an individual	Denis Roy, Dean, Faculty of Law, *Université de Moncton*
Association des juristes d'expression française du Nouveau-Brunswick	Yves Goguen, President
Public Hearings in New Brunswick - 25.10.2018	
As an individual	Érik Labelle Eastaugh, Director, International Observatory on Language Rights, *Université de Moncton*
	Karine McLaren, Director, *Centre de traduction et de terminologie juridiques, Université de Moncton*
Collège communautaire du Nouveau-Brunswick	Rachel Maillet Bard, Chair Sylvio Boudreau, First Vice-President Josée Rioux-Walker, Sector Advisor – Trades and Justice
Public Hearings in New Brunswick - 26.10.2018	
As an individual	Dominic Caron, Lawyer, Pink Larkin

APPENDIX B – BRIEFS, PRESENTATIONS AND OTHER DOCUMENTS

Canadian Bar Association, *Access to Justice in French and English in the Context of Modernizing the* Official Languages Act, Brief submitted to the Standing Senate Committee on Official Languages, October 2018.

Association des juristes d'expression française de l'Ontario, *Modernizing the* Official Languages Act*: A Matter of Access to Justice*, Brief submitted to the Standing Senate Committee on Official Languages, 30 November 2018.

Barreau du Québec, *Comments and Observations from the Barreau du Québec: Canadians' Views About Modernizing the* Official Languages Act *– The Justice Sector's Views*, Brief submitted to the Standing Senate Committee on Official Languages, 23 November 2018.

Office of the Commissioner for Federal Judicial Affairs, *Follow-up Letter*, Sent to the Clerk of the Standing Senate Committee on Official Languages, 19 November 2018.

Fédération des associations de juristes d'expression française de common law inc., *Access to Justice in French in the context of modernizing the* Official Languages Act *of Canada*, Brief submitted to the Standing Senate Committee on Official Languages, 15 November 2018.

Louis Beaudoin, *Equality of Official Languages in Canada: Judicial Bilingualism and Linguistic Bilingualism - a Variable Geometry Model*, Brief submitted to the Standing Senate Committee on Official Languages, 15 October 2018.

International Observatory on Language Rights, *The Need to Amend Part VII of the* Official Languages Act *of Canada*, Brief submitted to the Standing Senate Committee on Official Languages, 23 November 2018.

Quebec Community Groups Network, *Follow-up Letter*, Sent to the Chair of the Standing Senate Committee on Official Languages, 6 November 2018.

Réseau national de formation en justice, *Presentation to the Standing Senate Committee on Official Languages within the framework of the study on Canadians' perspective on the modernization of the* Official Languages Act, 22 October 2018.

Courts Administration Service, *Follow-up Email*, Sent to the Clerk of the Standing Senate Committee on Official Languages, 31 October 2018.

APPENDIX C – NOTES

1 Standing Senate Committee on Official Languages (OLLO), *Modernizing the* Official Languages Act: *The Views of Young Canadians*, 1st Session, 42nd Parliament, February 2018; OLLO, *Modernizing the* Official Languages Act: *The Views of Official Language Minority Communities*, 1st Session, 42nd Parliament, October 2018.

2 Canadian Bar Association (CBA), *Access to Justice in French and English in the Context of Modernizing the* Official Languages Act, Brief presented to the Standing Senate Committee on Official Languages, October 2018, para. 4.

3 French Constitutional Drafting Committee, *Final Report of the French Constitutional Drafting Committee responsible for providing the Minister of Justice of Canada with a draft official French version of certain constitution enactments*, 1990.

4 Negotiations took place in the 1990s, but Quebec did not participate. The *Court of Quebec* recognized that the federal government required the cooperation of the provinces to fulfill the obligations set out in section 55 of the *Constitution Act, 1982*, but did not rule on its justiciability. See: CBA (October 2018), *Brief*, para. 19 to 23.

5 CBA (October 2018), *Brief*, para. 24 to 27; OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power, Chair, French Speaking Common Law Members Section, CBA; Mr. Marc-André O'Rourke, Lawyer, Legislation and Law Reform, CBA); *Fédération des associations de juristes d'expression française de common law inc.* (FAJEF), *Access to Justice in French in the context of modernizing the* Official Languages Act *of Canada*, Brief presented to the Standing Senate Committee on Official Languages, 15 November 2018, p. 3.

6 *Blaikie v. Quebec (Attorney General)* [1978] SC 37; *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 SCR 1016.

7 *Official Languages Act*, S.C. 1969, c. 54, s. 8.

8 *R. v. Daoust*, [2004] 1 SCR 217.

9 OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac, Professor, Faculty of Law and Director, National Observatory on Language Rights, *Université de Montréal*, As an individual); OLLO (October 2018).

10 *Official Languages Act*, S.C. 1969, c. 54, s. 4.

11 *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 SCR 1016; *Reference re Manitoba Language Rights*, [1992] 1 SCR 212.

12 *Att. Gen. of Quebec v. Blaikie et al.*, [1979] 2 SCR 1016; *Reference re Manitoba Language Rights*, [1992] 1 SCR 212.

13 OLLO (October 2018).

14 OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman, President and Co-Founder, Association of English Speaking Jurists of Quebec (AESJQ); Mr. Louis Beaudoin, President, Universal Linguistic Services); OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson, Director, *Réseau national de formation en justice* (RNFJ)); OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy, Dean, Faculty of Law, *Université de Moncton*, As an individual); OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren, Director, *Centre de traduction et de terminologie juridiques* (CTTJ), *Université de Moncton*, As an individual); OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

15 *Knopf v. Canada (House of Commons)* [2006] FC 808.

16 OLLO (October 2018).

17 OLLO (October 2018).

18 OLLO (October 2018); OLLO, *Modernizing the* Official Languages Act: *The Views of Stakeholders Who Have Witnessed the Evolution of the Act*, 1st Session, 42nd Parliament, February 2019.

19 *Reference re Manitoba Language Rights*, [1992] 1 SCR 212.

20 Standing Joint Committee for the Scrutiny of Regulations (REGS), *Second Report*, 1st Session, 42nd Parliament, March 2017; REGS, *Fourth Report*, 1st Session, 42nd Parliament, May 2018.

21 Government of Canada, *Policy on Regulatory Development*, took effect on 1 September 2018; Government Response to the Fourth Report of the Standing Joint Committee for the Scrutiny of Regulations, 1st Session, 42nd Parliament, July 2018.

22 OLLO (October 2018).

23 Government of Canada, *Building a Strong Middle Class*, 2017 Budget, 22 March 2017, p. 221.

24 OLLO (February 2019).

25 This is similar to the grounds given in *Re Manitoba Language Rights*, [1985] 1 SCR 721, which required the Manitoba government to review all its Acts since Confederation.

26 OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman).

27 *Attorney General of Manitoba v. Forest*, [1979] 2 SCR 1032; *Re Manitoba Language Rights*, [1985] 1 SCR 721; *Reference re Manitoba Language Rights*, [1992] 1 SCR 212.

28 *Languages Act*, RSY 2002, c. 133, ss. 3 and 4; *Official Languages Act*, RSNWT 1988, c. O-1, ss. 6 and 7; *Official Languages Act*, SNu 2008, c. 10, ss. 4 and 5.

29 *Language Act*, SS 1988-89, c. L-6.1, ss. 3 to10; *Languages Act*, RSA 2000, c. L-6, ss. 2, 3 and 5.

30 *Caron v. Alberta*, [2015] 3 SCR 511. Alberta is therefore not required to enact, print or publish its laws and regulations in English and in French.

31 The Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada.

32 OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

33 OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings, P.C., Co-Chair, Access to Justice Committee, Quebec Community Groups Network (QCGN); Mr. Bruce McNiven, Co-Chair, Access to Justice Committee, QCGN).

34 Chief justices and associate chief justices are appointed on the recommendation of the Prime Minister.

35 Ibid.

36 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux, Commissioner, Office of the Commissioner for Federal Judicial Affairs (OCFJA)).

37 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

38 Government of Canada, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

39 This is also true for the *Criminal Code*, R.S.C., 1985, c. C-46, which we refer to later in this chapter.

40 House of Commons Standing Committee on Official Languages (LANG), *Ensuring Justice is Done in Both Official Languages*, 1st Session, 42nd Parliament, December 2017.

41 Government response to the report of the House of Commons Standing Committee on Official Languages entitled *Ensuring Justice is Done in Both Official Languages*, 1st Session, 42nd Parliament, March 2018.

42 OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson); OLLO, *Evidence*, 25 October 2018 (Ms. Rachel Maillet Bard, Chair, *Collège communautaire du Nouveau-Brunswick* (CCNB)); OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings).

43 *R. v. Beaulac*, [1999] 1 SCR 768, para. 22.

44 *Bill C-75, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Session, 42nd Parliament, first reading in the House of Commons on 29 March 2018.

45 OLLO (October 2018).

46 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); Mr. Louis Beaudoin, *Equality of Official Languages in Canada: Judicial Bilingualism and Linguistic Bilingualism – A Variable Geometry Model*, Brief presented to the Standing Senate Committee on Official Languages, 15 October 2018; OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy).

47 *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, [2018] SCC 50, para. 28. The *Association des juristes d'expression française de l'Ontario* (AJEFO) and the *Barreau du Québec* were intervenors: AJEFO, *Modernizing the* Official Languages Act: *A Matter of Access to Justice*, Brief presented to the Standing Senate Committee on Official Languages, 30 November 2018, para. 9; *Barreau du Québec*, *Comments and Observations from the Barreau du Québec: Canadians' Views about Modernizing the* Official Languages Act – *The Justice Sector's Views*, Brief presented to the Standing Senate Committee on Official Languages, 23 November 2018, p. 1.

48 OLLO (October 2018); OLLO (February 2019).

49 OLLO, *Evidence*, 15 October 2018 (Mr. Daniel Boivin, President, FAJEF); FAJEF (15 November 2018), *Brief*, p. 3; OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power); CBA (October 2018), *Brief*, para. 33 and p. 7 of Annex B.

50 *Bill C-381, An Act to amend the Judges Act (bilingualism)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 31 October 2017.

51 LANG (December 2017).

52 Government of Canada, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

53 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

54 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

55 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

56 Government of Canada, *Action Plan for Official Languages – 2018-2023: Investing in Our Future*, 2018.

57 Government of Canada, *Canada-Wide Analysis of Official Language Training Needs in the Area of Justice*, Final report submitted to Department of Justice Canada by PRA Inc. on 31 March 2009.

58 Office of the Commissioner of Official Languages (OCOL), *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, Ottawa, 2013.

59 Government of Canada, *Action Plan: Enhancing the Bilingual Capacity of the Superior Court Judiciary*.

60 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson); OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy; Mr. Yves Goguen, President, *Association des juristes d'expression française du Nouveau-Brunswick*); OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren; Ms. Rachel Maillet Bard; Mr. Sylvio Boudreau, First Vice-President, CCNB; Ms. Josée Rioux-Walker, Sector Advisor – Trades and Justice, CCNB); FAJEF (15 November 2018), *Brief*, p. 3; *Barreau du Québec* (23 November 2018), *Brief*, p. 13; AJEFO (30 November 2018), *Brief*, para. 34.

61 OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings).

62 *Barreau du Québec* (23 November 2018), *Brief*, pp. 5 to 7; Ms. Karine McLaren, "*La langue des décisions judiciaires au Canada*," *Revue de droit linguistique*, Vol. 2, International Observatory on Language Rights, *Université de Moncton*, 2015, p. 26.

63 OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren).

64 Ms. Karine McLaren (2015), pp. 30 to 32; OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren); *Barreau du Québec* (23 November 2018), *Brief*, pp. 5 to 7.

65 Mr. Louis Beaudoin (15 October 2018), *Brief*.

66 OLLO, *Evidence*, 22 October 2018 (Mr. Roger Bilodeau, Registrar, Supreme Court of Canada).

67 OCOL, *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, 2016.

68 Ms. Karine McLaren (2015), p. 27 [Translation]; *Devinat v. Canada (Immigration and Refugee Board)*, [2000] 2 FC 212.

69 Ms. Karine McLaren (2015), p. 28; Mr. Louis Beaudoin (15 October 2018), *Brief*; OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren).

70 *Pierre Devinat v. Courts Administration Service*, File T-1296-18 before the Federal Court of Canada.

71 *Barreau du Québec* (23 November 2018), *Brief*, pp. 10 and 11; OCOL (2016).

72 Government of Canada (22 March 2017), p. 220.

73 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin, Chief Administrator, Courts Administration Service (CAS)).

74 OCOL (2016).

75 RNFJ, *Presentation to the Standing Senate Committee on Official Languages within the framework of the* Official Languages Act, 22 October 2018, p. 3; OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson).

76 OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren; Ms. Rachel Maillet Bard).

77 OLLO, *Evidence*, 22 October 2018 (Ms. Nadia Effendi, Chair, AJEFO); AJEFO (30 November 2018), *Brief*, paras. 6 to 8 and 32 to 34.

78 OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings).

79 OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren).

80 Mr. Louis Beaudoin (15 October 2018), *Brief*.

81 Mr. Louis Beaudoin (15 October 2018), *Brief*.

82 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); OLLO, *Evidence*, 24 October 2018 (Mr. Yves Goguen).

83 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin).

84 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

85 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

86 OLLO, *Evidence*, 22 October 2018 (Mr. Roger Bilodeau).

87 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin); CAS, *Follow-up email*, sent to the Clerk of the Standing Senate Committee on Official Languages, 31 October 2018.

88 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

89 OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy).

90 OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren).

91 *Barreau du Québec* (23 November 2018), *Brief*, p. 7.

92 OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings).

93 *Barreau du Québec* (23 November 2018), *Brief*, p. 8; OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman).

94 Mr. Louis Beaudoin (15 October 2018), *Brief*.

95 *Languages Act*, RSY 2002, c. 133, ss. 3 and 4; *Official Languages Act*, RSNWT 1988, c. O-1, ss. 6 and 7; *Official Languages Act*, SNu 2008, c. 10, ss. 4 and 5.

96 *Language Act*, SS 1988-89, c. L-6.1, s. 11; *Languages Act*, RSA 2000, c. L-6, s. 4.

97 OLLO (October 2018).

98 OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman; Mr. Louis Beaudoin); Mr. Louis Beaudoin (15 October 2018), *Brief*; OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson); OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy); OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren); OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac); FAJEF (15 November 2018), *Brief*, p. 3; *Barreau du Québec* (23 November 2018), *Brief*, pp. 14 and 15.

99 OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

100 OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

101 OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy).

102 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin).

103 *Barreau du Québec* (23 November 2018), *Brief*, p. 15.

104 OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman).

105 OLLO, *Evidence*, 19 November 2018 (Mr. Justin Dubois).

106 OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy); OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

107 OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

108 OLLO (October 2018); OLLO (February 2019).

109 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); Mr. Louis Beaudoin (15 October 2018), *Brief*; OLLO, *Evidence*, 22 October 2018 (Mr. Ronald Bisson); OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy); OLLO, *Evidence*, 25 October 2018 (Ms. Karine McLaren); OLLO, *Evidence*, 26 October 2018 (Mr. Dominic Caron, Lawyer, Pink Larkin, As an individual); *Barreau du Québec* (23 November 2018), *Brief*, pp. 4 to 12.

110 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

111 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman); OLLO, *Evidence*, 5 November 2018 (The Hon. Marlene Jennings); *Barreau du Québec* (23 November 2018), *Brief*, pp. 8 and 9.

112 OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy).

113 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); Mr. Louis Beaudoin (15 October 2018), *Brief*.

114 OLLO, *Evidence*, 26 October 2018 (Mr. Dominic Caron).

115 Mr. Louis Beaudoin (15 October 2018), *Brief*.

116 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

117 OLLO, *Evidence*, 29 October 2018 (Mr. Daniel Gosselin).

118 OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power; Mr. Marc-André O'Rourke).

119 CBA (October 2018), *Brief*, paras. 24 to 27 and 33.

120 CBA (October 2018), *Brief*, para. 27.

121 OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power).

122 François Larocque and Darius Bossé, *L'obligation de faire adopter la version française des textes constitutionnels canadiens*, Impact study prepared for the Language Rights Support Program, 2015; Linda Cardinal and François Larocque (eds.), *La Constitution bilingue du Canada : un projet inachevé*, Québec, Les Presses de l'Université Laval, 2017. [Available in French only]

123 FAJEF (15 November 2018), *Brief*, p. 3.

124 OLLO, *Evidence*, 15 October 2018 (Mr. Daniel Boivin; Mr. Michael Bergman; Mr. Louis Beaudoin); Mr. Louis Beaudoin (15 October 2018), *Brief*; FAJEF (15 November 2018), *Brief*, p. 3; OLLO, *Evidence*, 22 October 2018 (Ms. Nadia Effendi); AJEFO (30 November 2018), *Brief*, paras. 14 to 23; OLLO, *Evidence*, 24 October 2018 (Mr. Denis Roy; Mr. Yves Goguen); OLLO, *Evidence*, 25 October 2018 (Mr. Sylvio Boudreau); OLLO, *Evidence*, 26 October 2018 (Mr. Dominic Caron); OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power); CBA (October 2018), *Brief*, para. 33 and p. 7 of Annex B; OLLO, *Evidence*, 5 November 2018 (Mr. Bruce McNiven; Mr. Stéphane Beaulac); OLLO, *Evidence*, 19 November 2018 (Mr. Justin Dubois, Lawyer, Emond Harnden LLP, As an individual); *Barreau du Québec* (23 November 2018), *Brief*, pp. 3 and 4.

125 OLLO (February 2018); OLLO (October 2018); OLLO (February 2019).

126 *Bill C-548, An Act to amend the Official Languages Act (understanding the official languages — judges of the Supreme Court of Canada)*, 2nd Session, 39th Parliament, first reading in the House of Commons on 15 May 2008; *Bill C-382, An Act to amend the Official Languages Act (Supreme Court of Canada)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 31 October 2017; *Bill C-411, An Act to amend the Official Languages Act (understanding of official languages)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 19 June 2018.

127 *Bill C-559, An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Session, 39th Parliament, first reading in the House of Commons on 5 June 2008; *Bill C-232, An Act to amend the Supreme Court Act (understanding the official languages)*, 3rd Session, 40th Parliament, first reading in the House of Commons on 3 March 2010; *Bill C-208, An Act to amend the Supreme Court Act (understanding the official languages)*, 2nd Session, 41st Parliament, first reading in the House of Commons on 16 October 2013; *Bill C-203, An Act to amend the Supreme Court Act (understanding the official languages)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 9 December 2015; *Bill C-382, An Act to amend the Official Languages Act (Supreme Court of Canada)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 31 October 2017.

128 OLLO, *Evidence*, 15 October 2018 (Mr. Daniel Boivin); AJEFO (30 November 2018), *Brief*, para. 22; OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

129 *Barreau du Québec* (23 November 2018), *Brief*, p. 4.

130 OLLO, *Evidence*, 15 October 2018 (Mr. Daniel Boivin); OLLO, *Evidence*, 22 October 2018 (Ms. Nadia Effendi); AJEFO (30 November 2018), *Brief*, para. 20; OLLO (February 2019).

131 OCFJA, *Statistics regarding Judicial Applicants and Appointees*; OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

132 OLLO, *Evidence*, 22 October 2018 (Ms. Nadia Effendi); AJEFO (30 November 2018), *Brief*, para. 21.

133 OLLO, *Evidence*, 29 October 2018 (Mr. Mark Power).

134 OLLO, *Evidence*, 24 October 2018 (Mr. Yves Goguen).

135 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin); Mr. Louis Beaudoin (15 October 2018), *Brief*; OLLO, *Evidence*, 5 November 2018 (Mr. Stéphane Beaulac).

136 OLLO, *Evidence*, 22 October 2018 (Mr. Roger Bilodeau).

137 OLLO, *Evidence*, 15 October 2018 (Mr. Daniel Boivin).

138 OLLO, *Evidence*, 22 October 2018 (Mr. Roger Bilodeau); AJEFO (30 November 2018), *Brief*, para. 8.

139 OLLO, *Evidence*, 15 October 2018 (Mr. Louis Beaudoin).

140 OLLO, *Evidence*, 15 October 2018 (Mr. Michael Bergman).

141 FAJEF (15 November 2018), *Brief*, p. 4.

142 OLLO, *Evidence*, 5 November 2018 (Mr. Bruce McNiven); OLLO, *Evidence*, 19 November 2018 (Mr. Justin Dubois).

143 *Bill C-381, An Act to amend the Judges Act (bilingualism)*, 1st Session, 42nd Parliament, first reading in the House of Commons on 31 October 2017.

144 *Barreau du Québec* (23 November 2018), *Brief*, p. 13.

145 FAJEF (15 November 2018), *Brief*, p. 3; AJEFO (30 November 2018), *Brief*, para. 23.

146 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

147 OLLO, *Evidence*, 29 October 2018 (Mr. Marc A. Giroux).

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