

BRIEF

QUEBEC BAR

Comments and observations on official languages in judicial and legislative matters

Presented to the House of Commons Standing Committee on Official Languages

April 2017

## Mission of the Quebec Bar

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

## Overview of the Quebec Bar's position

### ✓ Bilingualism at the Supreme Court of Canada and of federally appointed judges

We recommend that bilingualism be a requirement for appointment to the Supreme Court of Canada. The *Supreme Court Act* must be amended accordingly. Being understood by a judge in English or in French is a fundamental right and ensures equal status of the two official languages. In addition, hearing individuals without the help of an interpreter boosts public confidence in the rule of law and in justice and improves the quality of the services provided, since information is not being conveyed by a third party.

With respect to the other federally appointed courts, we believe that bilingualism is an asset or, depending on the region, a prerequisite.

### ✓ The requirement to draft and pass legislation in both official languages

Pursuant to section 133 of the *Constitution Act, 1867*, the National Assembly of Quebec, like the Parliament of Canada, must pass and publish its laws in the two official languages. In addition to the financial assistance it can provide to promote the drafting and translation of bills in Quebec, the federal Parliament can also provide technical assistance.

### ✓ The translation of Quebec court judgments

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

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

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## INTRODUCTION

We appreciate the invitation to appear before the House of Commons Standing Committee on Official Languages. Our short presentation concerns respect for both official languages regarding the administration of justice and access to justice.

Specifically, we will address bilingualism at the Supreme Court of Canada and of federally appointed judges, the drafting and passing of legislation in the two official languages in Quebec, and the translation of Quebec court decisions of national interest.

The Quebec Bar is a professional organization representing some 26,000 lawyers in Quebec. Its mission is to protect the public, including in their relations with lawyers. To carry out its mission, the Bar uses several tools, including oversight of admission to the profession, monitoring members through professional inspection and discipline, and managing cases against non-members who practise the profession illegally.

Broadly speaking, the Bar's mission also has a social aspect that extends to all participants in the legal system. In the Roadmap for Canada's Official Languages 2013-2018, Justice Canada committed to continue "to help provincial and territorial governments bridge gaps in bilingual service delivery."<sup>1</sup> Follow-up to this commitment is needed.

### 1. Bilingualism at the Supreme Court of Canada and of federally appointed judges

#### 1.1 Background

The new process for appointing judges to the Supreme Court of Canada announced by the Prime Minister of Canada providing for the bilingualism of judges satisfies the Quebec Bar and meets a number of its demands made over the last few years.

#### 1.2 Issues and comments

Being understood by a judge in English or in French is a fundamental right and ensures equal status of the two official languages. In addition, doing so without the help of an interpreter boosts public confidence in the rule of law and in justice and improves the quality of the services provided, since information is not being conveyed by a third party. Keep in mind that the Quebec Bar addressed this issue in 2011, 2014 and 2016.<sup>2</sup>

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<sup>1</sup> Online: <http://canada.pch.gc.ca/eng/1457029880818/1457029949239>.

<sup>2</sup> Letter to the Right Hon. Stephen Harper, June 21, 2011, online: <https://www.barreau.qc.ca/pdf/medias/positions/2011/20110621-bilinguisme-juges.pdf> [in French only]; letter to Mr. Yvon Godin, MP, February 20, 2014, online <https://www.barreau.qc.ca/pdf/medias/positions/2014/20140220-pl-c208.pdf> [in French only]; letter to the Hon. Jody Wilson-Raybould, August 15, 2016, online: <https://www.barreau.qc.ca/pdf/medias/positions/2016/20160815-nomination-juges.pdf> [in French only].

Functional bilingualism must be one of the skills required of a Supreme Court judge to ensure equal access to justice for all. We are extremely happy to see that this requirement will be part of the new process and we hope that the *Supreme Court Act*<sup>3</sup> will be amended accordingly to ensure that future governments will also be required to adhere to it.

However, some lawyers believe that such a requirement needs a constitutional amendment (seven provinces representing at least 50% of the population), as these changes would affect the “composition of the Court” as interpreted by the Supreme Court in its ruling on Justice Nadon. This constitutional aspect of the issue warrants special attention.

According to Professor Sébastien Grammond at the University of Ottawa’s Faculty of Civil Law, Parliament has the power to enact legislation that would establish bilingualism as a requirement when appointing Supreme Court judges, which would not require a constitutional amendment.<sup>4</sup>

With respect to the other federally appointed courts, we believe that bilingualism is an asset or, depending on the region, a prerequisite.

### 1.3 Recommendations

We recommend that bilingualism be a requirement for appointment to the Supreme Court of Canada. The *Supreme Court Act* must be amended accordingly, given the constitutional aspect. For the other federally appointed courts, bilingualism could be a prerequisite, depending on the region of appointment.

## 2. The requirement to draft and pass legislation in both official languages

### 2.1 Background

Pursuant to section 133 of the *Constitution Act, 1867*,<sup>5</sup> the National Assembly of Quebec, like the Parliament of Canada, must pass and publish its laws in the two official languages. However, it has become a widespread practice over the years for members to work with French texts. It often happens that amendments voted on in parliamentary committees are not immediately available in English.

In addition, draft legislation initially drafted by lawyers or notaries may be translated by translators who do not necessarily have legal training. So we often see problems in the English version, ranging from poor grammar to incorrect legal terms and even to contradictions between the English and French versions.

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<sup>3</sup> RSC, 1985, c. S-26 (hereafter, the “Supreme Court Act”).

<sup>4</sup> Paul GABOURY, “Le bilinguisme sans passer par la Constitution,” *Le Droit*, 8 March 2017, p. 17 [in French only]

<sup>5</sup> 30 & 31 Vict., c. 3 (U.K.) (hereafter, the “*Constitution Act, 1867*”).

While the federal government takes a co-drafting approach to legislation, in Quebec legislation is drafted and then translated in a vacuum.

## 2.2 Issues and comments

It is important to remember that, under section 133 of the *Constitution Act, 1867* and section 7 of the *Charter of the French Language*,<sup>6</sup> the English and French versions are equally authoritative. Therefore, two provisions, supposedly stating the same principle, may in fact impose entirely different obligations on individuals. Choosing the language the law is read in can lead to very different results. Legal predictability is directly affected. This problem is exacerbated by the fact that litigation may then result, further burying already overwhelmed courts. It is a question of access to justice, equality before the law and the sound administration of justice.

For example, the Montreal Bar recently raised serious problems in the English version of the new *Code of Civil Procedure*.<sup>7</sup> This new code is the fruit of several years of hard work in which the Quebec Bar is proud to have participated and promoted, in particular in view of a growing judicial culture focused on preventing and resolving disputes and ending automatic court action. It is deplorable to see this major legislative document marked by drafting problems and major differences in quality between the English and French versions.

What's worse yet, this problem is not new. Similar problems were raised during the passage of the *Civil Code of Quebec*<sup>8</sup> in 1991. It took years to resolve the various problems raised by the vast differences between the English and French versions. This project came to an end last year, with the passage of *An Act to ensure better consistency between the French and English texts of the Civil Code*.<sup>9</sup>

## 2.3 Recommendations

We believe that the federal government has a role to play, at least in terms of financial or technical assistance, to help guarantee and enforce the rights of the English language minority in Quebec.

### 3. The translation of Quebec court judgments

#### 3.1 Background

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<sup>6</sup> CQLR, c. C-11.

<sup>7</sup> CQLR, c. C-25-01.

<sup>8</sup> CQLR, c. CCQ-1991.

<sup>9</sup> SQ 2016, c. 4 (Bill 89).

As we pointed out before the members of the Standing Committee on Languages on November 22, the Quebec Bar is particularly concerned by the translation of judgments rendered by the Quebec courts. Under section 133 of the *Constitution Act, 1867*, a Quebec judge may write his or her judgment in English or in French. Section 7 of the *Charter of the French Language*<sup>10</sup> also provides the right for anyone to have judgments translated free of charge into English or French.

Different rules govern the translation of judgments in Canada. A distinction is made between criminal and penal proceedings and civil proceedings. In criminal law, Part XVII of the *Criminal Code*<sup>11</sup> provides that the court must make available, in the official language of the accused, the judgment (reasons) made in writing in either official language.

With respect to criminal offences under provincial jurisdiction, some provinces have integrated Part XVII and section 530.1(h) of the *Criminal Code* into their own laws and therefore have the same obligation with respect to the availability of written judgments.

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

### 3.2 Issues and comments

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

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

Between 2010 and 2012, a grant provided by Justice Canada to the SOQUIJ allowed for the translation of an additional 1,350 pages a year of judgments by the Quebec Court of Appeal.

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<sup>10</sup> CQLR, c. C-11 (hereafter, "Charter of the French Language").

<sup>11</sup> SRC, 1985, c. C-46 (hereafter, the "*Criminal Code*").



Because the grant was not renewed, the number of pages of judgments translated annually by the SOQUIJ fell back to 1,350, or 450 pages per court. Translation costs are covered entirely by the SOQUIJ.

This lack of translated judgments has major repercussions on the profile and visibility of decisions rendered by Quebec courts. Take the Quebec Court of Appeal, for example. It has a similar number of judges to the Ontario Court of Appeal. However, in 2015, and as there is a Divisional Court in Ontario, the Quebec Court of Appeal rendered roughly two and a half times more judgments than the Ontario Court of Appeal.

Yet, in 2015, decisions of the Ontario Court of Appeal were cited 1,500 more times in Canadian jurisprudence. The Quebec Court of Appeal was cited only about 300 times.

So, even though it renders more judgments per year, the Quebec Court of Appeal seems to have been forgotten by the other Canadian courts, specifically because it renders most of its judgments in French.

While additional funding would help increase the profile of Quebec courts, including the Court of Appeal, that is not the purpose of our remarks today. Rather we wish to draw attention to the legal community's considerable loss of prolific and pertinent jurisprudence concerning the *Canadian Charter of Rights and Freedoms*,<sup>12</sup> criminal law, the *Divorce Act*<sup>13</sup> and the *Bankruptcy and Insolvency Act*.<sup>14</sup>

To improve access to the Canadian justice system, Budget 2017 proposes to provide \$2 million over two years, starting in 2017-2018, to the Courts Administration Service to enhance federal courts' ability to make decisions available in English and in French. The targeted courts are the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada, and the Tax Court of Canada. The Quebec Superior Court and the Quebec Court of Appeal are not included.

### 3.3 Recommendations

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

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

<sup>13</sup> RSC, 1985, c. 3 (2nd Supp.).

<sup>14</sup> RSC, 1985, c. B-3.