



February 15, 2019

Via email: mcu@justice.gc.ca

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister Lametti:

Re: Bilingual Constitution of Canada

I am writing to request that the federal government engage with the provinces and territories to make Canada's Constitution officially bilingual, in compliance with section 55 of the *Constitution Act, 1982*.

Many Canadians would be astonished to learn that the majority of Canadian constitutional documents are not officially bilingual. Of the 31 documents declared in the *Constitution Act, 1982* to be part of the Constitution of Canada, 22 (71%) were adopted only in English and still have no official French version.

It is a glaring contradiction: even though the Constitution guarantees the equal status of French and English and stipulates that Parliament must enact statutes in both official languages, most constitutional documents are unilingual.

Remedying this incongruity was the aim of the authors of the *Constitution Act, 1982* in adopting sections 55 and 56:

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an

Version française de certains textes constitutionnels

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

Versions française et anglaise de certains textes constitutionnels

56. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.

The wording of section 55 confirms the binding nature of the obligation to prepare and enact an official French version of the Constitution. Section 55 sets out two separate obligations:

- (1) For a French version of the portions of the Constitution of Canada referred to in the schedule of the *Constitution Act, 1982* to be *prepared by the Minister of Justice* as expeditiously as possible.
- (2) For the Minister of Justice *to put forward for enactment*, pursuant to the applicable amendment procedure, any portion of the Constitution of Canada that has been prepared. [emphasis added]

While the first obligation specifically concerns the Minister of Justice, the second obligation requires the cooperation of Parliament and the provincial and territorial legislatures to table the French version for enactment according to the applicable constitutional amendment procedure.

The first obligation has already been completed. In 1984, the French Constitutional Drafting Committee was mandated to produce French versions of the constitutional documents, a task it completed in 1990. However, the French versions were never introduced in Parliament and have yet to be enacted.

The federal government attempted to begin negotiations with the provinces to adopt a French version of the entire Constitution in the 1990s. It did not go through with the process at the time because of Quebec's refusal to participate, which was deemed necessary. The issue has not been addressed since.

To encourage discussion, the CBA adopted a [resolution](#) to promote compliance with section 55 of the *Constitution Act, 1982* because the failure to provide a fully bilingual Constitution undermines the rule of law and access to justice. While we appreciate the complexities involved with constitutional amendment, with current the political landscape in Canada it may be an opportune time to make the Constitution officially bilingual.

We therefore urge you to take the initiative and engage with the provinces and territories to put forward for enactment an official French version of the Constitution. We understand that the Quebec Branch of the CBA has written to the Quebec Minister of Justice asking her to work towards making the Constitution officially bilingual. The Quebec Branch's letter is attached.

Yours truly,

(original letter signed by Raymond G. Adlington)

Raymond G. Adlington

CC The Honourable Mélanie Joly, P.C., M.P., Minister of Tourism, Official Languages and La Francophonie
The Honourable Pablo Rodriguez, P.C., M.P, Minister of Canadian Heritage
Me. Audrey Boctor, President, CBA-Québec

Attachments:

1. Letter of the Canadian Bar Association (Quebec Branch) to the honourable Sonia Lebel, Minister of Justice and Minister Responsible for Canadian Relations and the Canadian Francophonie dated February 15, 2019. (Available in French only)
2. Canadian Bar Association, [*Access to Justice in French and English in the Context of Modernizing the Official Languages Act*](#), Submission to the Standing Senate Committee on Official Languages during its study on the modernization of the *Official Languages Act*
3. Canadian Bar Association, [*Resolution 18-04-A – Bilingual Constitution of Canada*](#), February 16, 2018



Vendredi, le 15 février 2019

PAR COURRIEL ET PAR LA POSTE

L'honorable Sonia Lebel, M.A.N.
Ministère de la Justice
Édifice Louis-Philippe-Pigeon
1200, route de l'Église, 9^e étage
Québec (Québec) G1V 4M1

Objet : Franciser la Constitution canadienne

Madame la ministre,

Comme vous le savez, la majorité des textes constitutionnels du Canada n'ont pas été adoptés dans les deux langues officielles, ce qui inclut la *Loi constitutionnelle de 1867*. Parmi les 31 textes déclarés dans la *Loi constitutionnelle de 1982* comme faisant partie de la Constitution du Canada, non moins de vingt-deux textes (71 %) ont été adoptés uniquement en anglais et n'ont toujours pas d'équivalent français.

La contradiction est frappante : alors que la Constitution du Canada garantit l'égalité de statut du français et de l'anglais¹ et dispose que les lois du Parlement doivent être promulguées dans les deux langues officielles², la majorité des textes constitutionnels du Canada, incluant son texte fondateur, sont unilingues.

C'est afin de remédier à cette incongruité que le constituant, sans le concours de l'Assemblée Nationale toutefois, a adopté les articles 55 et 56 de la *Loi constitutionnelle de 1982*, qui prévoient ce qui suit :

¹ *Charte canadienne des droits et libertés*, partie I de la *Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11, art 16.

² *Loi constitutionnelle de 1867*, art 133.

Version française de certains textes constitutionnels

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe ; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

Versions française et anglaise de certains textes constitutionnels

56. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

Le libellé de l'article 55 confirme le caractère obligatoire du devoir de produire et adopter une version officielle française de la Constitution³. L'article 55 prévoit deux obligations distinctes :

- 1) l'obligation du ministre de la Justice du Canada de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe de la *Loi constitutionnelle de 1982*, et
- 2) l'obligation de déposer pour adoption, dès qu'elle est prête, toute partie suffisamment importante, conformément à la procédure applicable de modification des dispositions constitutionnelles qu'elle contient.

Alors que la première obligation vise spécifiquement le ministre de la Justice du Canada, la participation des provinces et territoires est nécessaire en vertu de la deuxième afin de respecter la procédure d'amendement constitutionnel applicable à certaines parties des textes constitutionnels⁴.

La première obligation a déjà été mise en œuvre. En 1984, le Comité de rédaction constitutionnelle française a été créé avec le mandat de rédiger les textes constitutionnels en français, ouvrage que le Comité de rédaction a achevé en 1990. Ce comité était composé d'illustres juristes québécois, dont l'honorable sénateur Gérard-A. Beaudoin, l'honorable Louis-Philippe Pigeon, ancien juge de la Cour suprême du Canada, maître Robert Décary, qui deviendra juge à la Cour d'appel fédérale, et maître Gil Rémillard, qui deviendra ministre de la Justice du Québec. Le rapport final du Comité de

³ Voir notamment le *Renvoi : Droits linguistiques au Manitoba*, [1985] 1 RCS 721 à la p 737.

⁴ Partie V de la *Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada* (R-U), 1982, c 11 [*Loi constitutionnelle de 1982*].

rédaction a été déposé à la Chambre des communes en 1990 par l'honorable Kim Campbell, alors ministre de la Justice du Canada⁵.

Toutefois, aucun texte constitutionnel n'a par la suite été déposé pour être débattu, adopté puis promulgué. L'unilinguisme actuel des textes constitutionnels constitue un obstacle grave à l'accès à la justice et à la primauté du droit, ainsi qu'un affront à l'égalité constitutionnelle des deux langues officielles du Canada⁶.

L'accès à la justice dans les deux langues officielles et la mise en œuvre effective des droits linguistiques est une priorité pour l'ABC. En février 2018, elle a exhorté le gouvernement du Canada à respecter ses obligations en vertu de l'article 55 de la *Loi constitutionnelle de 1982*, pour assurer que la Constitution soit elle-même dans les deux langues officielles⁷.

Alors que l'obligation de faire rédiger une version française des textes constitutionnels incombe explicitement au ministre de la Justice du Canada, l'obligation de déposer la version française pour adoption exige la collaboration du Parlement et des assemblées législatives des provinces et territoires, selon la procédure d'amendement constitutionnel applicable⁸.

Suite à l'avis de la Cour Suprême du Canada dans l'affaire du *Renvoi sur l'opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793, le gouvernement fédéral a, dans les années 90, tenté d'entamer des pourparlers avec les provinces, dont le Québec, pour convenir de textes constitutionnels complets dans les deux langues officielles de la fédération.

Conscients et respectueux des raisons historiques et politiques pour lesquelles les textes constitutionnels complets ne sont toujours pas édictés, nous attirons tout de même votre attention sur le fait qu'il persiste une anomalie majeure en l'unilinguisme anglais de la majeure partie des textes constitutionnels formant la fédération canadienne.

Cet unilinguisme officiel est un enjeu majeur non seulement pour le Québec, mais pour tous les francophones à travers le pays. Compte tenu du contexte actuel dans lequel les droits des francophones à l'extérieur du Québec se voient de plus en plus menacés, le Québec se doit d'être un leader afin d'assurer le respect du bilinguisme dans nos textes les plus fondamentaux. C'est pourquoi nous vous demandons de bien vouloir faire toutes les interventions utiles afin de faire en sorte que soient francisés les textes constitutionnels dans des versions officielles, complètes et cohérentes.

Par ailleurs, le président national de l'Association du Barreau canadien, Me Ray Adlington, a transmis aujourd'hui une lettre sur le même sujet à l'honorable David Lametti, ministre de la Justice du Canada, que vous trouverez jointe à la présente.

⁵ [*Rapport définitif du Comité de rédaction constitutionnelle française chargé d'établir, à l'intention du ministre de la Justice du Canada, un projet de version française officielle de certains textes constitutionnels*](#), Ottawa, ministère de la Justice, 1990 ; *Rapport définitif du Comité de rédaction*, *ibid*, no 342-4/39 dans *Journaux*, 34^e parl, 2^e sess, no 269 (19 décembre 1990).

⁶ Association du Barreau canadien, [*L'accès à la justice en français et en anglais dans le cadre de la modernisation de la Loi sur les langues officielles*](#), Mémoire présenté au Comité sénatorial permanent des langues officielles dans le cadre de son étude sur la modernisation de la *Loi sur les langues officielles* (octobre 2018), aux para 11-17 (**en pièce jointe**).

⁷ Association du Barreau canadien, [*Résolution 18-04-A – Constitution du Canada bilingue*](#), 16 février 2018 (**en pièce jointe**).

⁸ Certains amendements constitutionnels peuvent être effectués par le Parlement agissant seul (art 44 de la *Loi constitutionnelle de 1982*), par une province seule (art 45), par le Parlement et les provinces concernées (art 43), par le Parlement et une majorité des provinces (arts 38(1) et 42), ou par le Parlement et l'ensemble des provinces à l'unanimité (art 41).

Veillez agréer, Madame la Ministre, l'expression de nos sentiments les meilleurs.



Me Audrey Boctor
Présidente, Division du Québec de
l'Association du Barreau canadien

Pièces : Association du Barreau canadien, *l'accès à la justice en français et en anglais dans le cadre de la modernisation de la Loi sur les langues officielles*, Mémoire présenté au Comité sénatorial permanent des langues officielles dans le cadre de son étude sur la modernisation de la Loi sur les langues officielles

Association du Barreau canadien, Résolution 18-04-A – Constitution du Canada bilingue,
16 février 2018

Lettre de l'Association du Barreau canadien à l'honorable David Lametti, Ministre de la
Justice et procureur général du Canada du 15 février 2019



THE CANADIAN
BAR ASSOCIATION

L'ASSOCIATION DU
BARREAU CANADIEN

Access to Justice in French and English in the Context of Modernizing the *Official Languages Act*

**FRENCH SPEAKING COMMON LAW MEMBERS SECTION
AND CONSTITUTIONAL AND HUMAN RIGHTS LAW SECTION
CANADIAN BAR ASSOCIATION**

October 2018

PREFACE

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the French Speaking Common Law Members Section and the Constitutional and Human Rights Law Section of the Canadian Bar Association, with the assistance of the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the French Speaking Common Law Members Section and the Constitutional and Human Rights Law Section of the Canadian Bar Association.

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Annex C Letter from the Canadian Bar Association to the Honourable Scott Brison, the Honourable Jody Wilson-Raybould and the Honourable Mélanie Joly, November 23, 2017

Annex D List of constitutional documents enacted only in English

Access to Justice in French and English in the Context of Modernizing the *Official Languages Act*

I. INTRODUCTION

1. The French Speaking Common Law Members Section and the Constitutional and Human Rights Law Section of the Canadian Bar Association (the CBA Sections) are pleased to comment on study on modernizing the *Official Languages Act* by the Senate Committee on Official Languages.¹ The CBA has worked tirelessly to encourage official bilingualism in the legal arena and improve access to justice in French for many years.
2. In February 2018, the CBA adopted a resolution² that aims to promote compliance with section 55 of the *Constitution Act, 1982*,³ which requires that an official French version of the Constitution of Canada be prepared and enacted. This submission describes the problem and offers recommendations to finally resolve the deadlock over the issue.⁴
3. The submission also presents our recommendations to modernize the *Official Languages Act* to better reflect the present-day reality of Canada's linguistic duality.⁵

II. RIGHT TO A BILINGUAL CONSTITUTION

A. Section 55 of the *Constitution Act, 1982*

4. Many Canadians would be astonished to learn that the majority of Canadian constitutional documents are not officially bilingual, including the *Constitution Act, 1867*.⁶ Of the 31 documents declared in the *Constitution Act, 1982* to be part of the Constitution of Canada, 22 (71%) were adopted only in English and still have no official French version.⁷
5. It is a glaring contradiction: even though the Constitution of Canada guarantees the equality of status of French and English⁸ and stipulates that the statutes of Parliament must be

¹ *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

² [Resolution 18-04-A](#) – Bilingual Constitution of Canada, February 16, 2018 (Annex A).

³ *Constitution Act, 1982*, Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.) [*Constitution Act, 1982*].

⁴ This submission expands on the Canadian Bar Association's [letter to the Senate Committee on Official Languages](#) dated August 14, 2018 (Annex B)

⁵ Our recommendations were also outlined in a November 23, 2017 [letter from the Canadian Bar Association](#) to the Honourable Scott Brison, the Honourable Jody Wilson-Raybould and the Honourable Mélanie Joly (Annex C).

⁶ 30 & 31 Victoria, c. 3, formerly the *British North America Act* [*Constitution Act, 1867*].

⁷ See Annex D for list of the constitutional documents that were enacted only in English.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982*, c. 11, s. 16 (U.K.) [the Charter].

enacted in both official languages,⁹ a clear majority of Canadian constitutional documents, including the founding document (the *Constitution Act, 1867*, sometimes called the *British North America Act*), are unilingual.

6. Remediating this incongruity was the aim of the authors of the *Constitution Act, 1982* in adopting sections 55 and 56:

French version of Constitution of Canada

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

Version française de certains textes constitutionnels

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient.

Versions française et anglaise de certains textes constitutionnels

56. Les versions française et anglaise des parties de la Constitution du Canada adoptées dans ces deux langues ont également force de loi. En outre, ont également force de loi, dès l'adoption, dans le cadre de l'article 55, d'une partie de la version française de la Constitution, cette partie et la version anglaise correspondante.

7. The wording of section 55, and use of “shall” in the English version¹⁰, confirm the binding nature of the obligation to prepare and enact an official French version of the Constitution. Section 55 sets out two separate obligations:

(1) For a French version of the portions of the Constitution of Canada referred to in the schedule of the *Constitution Act, 1982* to be prepared by the Minister of Justice as expeditiously as possible.

(2) For the Minister of Justice to put forward for enactment, pursuant to the applicable amendment procedure, any portion of the Constitution of Canada sufficient to warrant action that has been prepared.

8. While the first obligation specifically concerns the Minister of Justice of Canada, the second obligation does not. To make the entire Constitution officially available in French, the

⁹ *Constitution Act, 1867*, s. 133.

¹⁰ See *Re Manitoba Language Rights*, [1985] 1 SCR 721, p. 737 [*Re Manitoba Language Rights*].

provinces must cooperate to respect the constitutional amendment procedure that applies to certain parts of the constitutional documents.¹¹

9. The first obligation has already been completed. In 1984, the French Constitutional Drafting Committee (the Drafting Committee) was created with a mandate to produce French versions of the constitutional documents, a task it completed in 1990.¹² The Committee was made up of eminent jurists, of which the Honorable Senator Gérald Beaudoin, the Honorable Louis-Philippe Pigeon, retired justice of the Supreme Court of Canada, Robert Décary who would go on to the Federal Court of Appeal and Gil Rémillard, future Minister of Justice of the province of Quebec. The Drafting Committee's final report was tabled in the House of Commons in 1990 by the Honourable Kim Campbell, then Minister of Justice.¹³

10. However, the French versions of the constitutional documents were never tabled for adoption, and thus have yet to be enacted.

B. Impact of Unilingualism of Constitutional Documents

i. Serious barrier to improving access to justice and defending the rule of law

11. As early as 1867, the Constitution of Canada recognized the importance of French-speaking Canadians having access to a French version of legislative texts. Section 133 of the *Constitution Act, 1867* "ensures [...] full and equal access to the legislatures, the laws and the courts for francophones and anglophones alike" by guaranteeing access to an official French version of Canadian laws.¹⁴ French-speaking litigants can then use the French text to interpret the law and fully participate in debates on federal legislation in their own language. However, they still cannot exercise this fundamental right when consulting the majority of Canadian constitutional documents, including section 133 of the *Constitution Act, 1867* itself.

12. Although many unofficial translations exist of the constitutional documents adopted only in English, they do not have force of law. If there is any ambiguity, it is not possible to cross-interpret the English and French versions to determine the true meaning. Since the English version is the only official version, its wording takes precedence over that of the French version. Therefore, when courts render constitutional decisions in French, they refer to unofficial French versions, recalling that only the English version has force of law.¹⁵

13. This ongoing problem had unfortunate consequences in *Caron*,¹⁶ 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*

¹¹ Part V of the *Constitution Act, 1982*.

¹² *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 – Introduction*, Ottawa, Department of Justice, 1990, [online](#). [*Final Report of the Drafting Committee*].

¹³ *Final Report of the Drafting Committee, ibid*, No. 342-4/39 in *Journals*, 34th Parliament, 2nd Session, No. 269 (December 19, 1990).

¹⁴ *Re Manitoba Language Rights*, *supra* note 10, p. 739.

¹⁵ See for instance *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549, p. 573, where Beetz J. recalls that section 133 of the *Constitution Act, 1867* has no official French version, and *Fédération Franco-Ténoise v. Canada*, 2001 F.C.A. 220, para. 11, where the Federal Court of Appeal refers to the Drafting Committee's proposed translation, recalling that these documents still have no official French version.

¹⁶ *R v. Caron*, 2009 ABQB 745, para. 56 [*Caron*].

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 cross-analysis 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.¹⁷

14. The absence of an official French version has practical implications for the development of law and devalues French-speaking jurists' and litigants' participation in discussions on the interpretation of our society's most fundamental legal texts.

ii. Affront to the equality of status of both official languages in Canada

15. The lack of a complete official French version of the constitutional documents also has a jarring symbolic effect, and is an affront to the equality of status of both official languages in Canada and to our Constitution's underlying fundamental principles, which are the rule of law and the protection of minorities.

16. Recognition of the equality of status of the English and French versions of the Constitution has value in and of itself, beyond its purely instrumental advantage as a legal text. As the Supreme Court of Canada has recognized, language reflects a sense of identity and community:

Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.¹⁸

17. Official state recognition of a linguistic community increases the community's vitality, by instilling pride of belonging and by promoting community members' involvement in society's institutions.¹⁹ This recognition helps fight and address assimilation.

C. Implementation of Section 55

18. Considering that a complete French version of the constitutional documents was prepared in 1990, one has to wonder why an official version has yet to be adopted 28 years later. Both political and legal hurdles are at play.

i. Political impasse

19. Although the Minister of Justice of Canada is explicitly responsible for preparing a French version of the constitutional documents, the cooperation of Parliament and provincial

¹⁷ The English version used the term "legal rights," whereas the French version produced in 1867 used the term "droits acquis," and the Drafting Committee's proposed translation in 1990 simply used the term "droits" (see *Caron, ibid*, para. 56; François Larocque and Darius Bossé, "L'obligation de faire adopter la version française des textes constitutionnels canadiens" (the obligation to adopt the French version of Canadian constitutional documents), in François Larocque and Linda Cardinal (eds.), *La Constitution bilingue du Canada: Un projet inachevé*, Presses de l'Université Laval, 2017, p 124).

¹⁸ *Mahe v. Alberta*, [1990] 1 SCR 342, p. 362.

¹⁹ Raymond Breton, "L'intégration des francophones hors Québec dans des communautés de langue française" (the integration of Francophones outside Quebec in French-language communities) (1985) 55:2 *University of Ottawa Quarterly*, p. 77, pp. 78-79.

legislatures is required to table the French version for enactment according to the applicable constitutional amendment procedure.²⁰

20. The federal government attempted to begin negotiations with the provinces to adopt a French version of the entire Constitution in the 1990s. However, there was considerable tension between Ottawa and Quebec at the time, and Quebec refused to participate in the process.²¹ The federal government did not go through with the process at the time because Quebec's participation was deemed necessary to adopt all the documents.²² The federal government has not addressed the issue since.

ii. Legal impasse

21. There is no consensus among the courts over the binding nature of section 55 given the need for political cooperation between the federal government and the provinces in the adoption process by Parliament and by provincial legislatures.²³

22. The issue was briefly considered on two separate occasions, but no court ruled on it. In *Bertrand*,²⁴ the plaintiff plead that Quebec's sovereignty proposal was unconstitutional. The Quebec government had filed a motion for dismissal claiming that because section 55 had not been respected, the Constitution was itself inoperative. The judge considered that the issue could not be decided due to inadmissibility, and the substance of the case never moved forward. In *Langlois*,²⁵ the defendant presented a similar argument, and the Court concluded that the Constitution itself could not be unconstitutional, thus avoiding having to decide whether section 55 of the *Constitution Act, 1982* is indeed justiciable.

23. Given this uncertainty, parliamentary action is an effective way to remedy the unilingualism of the Constitution.

iii. Parliamentary action is needed to end the impasse

24. The impasse is related to each stakeholder's lack of accountability in adopting the French version of the Canadian Constitution. The obligation to put forward the French version of the constitutional documents for enactment necessarily devolves to all parties involved in carrying out the applicable constitutional amendment procedure. However, the wording of section 55 of the *Constitution Act, 1982*, which does not explicitly describe the extent of each party's obligation, enabled, if not encouraged, a certain degree of idleness on the part of political actors who have been waiting since the 1990s for their peers to take the initiative and reignite the discussion.

²⁰ Certain constitutional amendments may be made by Parliament acting alone (s. 44 of the *Constitution Act, 1982*), by a single province (s. 45), by some but not all provinces (s. 43), by Parliament and a majority of provinces (ss. 38(1) and 42) or by Parliament and all provinces unanimously (s. 41).

²¹ Mark C. Power, Marc-André Roy and Emmanuelle Léonard-Dufour, "L'adoption de la version française des textes constitutionnels ayant valeur officielle uniquement en anglais: Le recours aux tribunaux ou à la volonté politique pour parvenir au bilinguisme constitutionnel" (the adoption of the French version of constitutional documents that have official status only in English: resorting to the courts or political will to achieve constitutional bilingualism) in François Larocque and Linda Cardinal (eds.), *La Constitution bilingue du Canada: Un projet inachevé*, Presses de l'Université Laval, 2017, pp. 138 to 142.

²² Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown" (2012) 57:4 *RD McGill* 955, p. 978.

²³ See François Larocque and Linda Cardinal (eds.), *La Constitution bilingue du Canada: Un projet inachevé*, Presses de l'Université Laval, 2017.

²⁴ *Bertrand v. Quebec (Attorney General)*, [1996] Q.J. No. 2150 (S.C.).

²⁵ *Canada (Attorney General) v. Langlois*, (December 5, 1997), Québec 200-73-000514-979 (C.Q.).

25. In response to this impasse, we recommend that Parliament add an *enforceable* section to the *Official Languages Act* requiring the Minister of Justice of Canada to make best efforts to implement section 55 of the *Constitution Act, 1982*. This would reinvigorate implementation of section 55 by renewing the federal government's commitment to official bilingualism, by clarifying the Minister of Justice of Canada's duty to initiate and continue negotiations, and by removing doubts over the binding nature of the obligation to have an official French version of the Constitution adopted.²⁶

26. Implementing section 55 of the *Constitution Act, 1982* could also require sustained efforts beyond the federal government's mandate. To prevent the political will to implement this obligation from crumbling once again, we recommend that Parliament add a section to the *Official Languages Act* requiring the Minister of Justice to submit a report every five years detailing the efforts made to implement section 55 of the *Constitution Act, 1982*, which will be sent to committee. The reason for a five-year time frame is because the Charter sets out that no House of Commons shall continue for longer than five years.²⁷ It is therefore logical to require a report by Parliament at least every five years to ensure section 55 of the *Constitution Act, 1982* is being implemented.

27. We propose the following wording for the consideration of the Senate Committee on Official Languages:

Mise en œuvre de l'article 55 de la *Loi constitutionnelle de 1982*

(1) Le ministre de la Justice s'engage à déployer les meilleurs efforts, lors de chaque session parlementaire, pour mettre en œuvre son obligation à l'article 55 de la *Loi constitutionnelle de 1982* de rédiger et de faire adopter, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe de celle-ci.

Rapport au Parlement

(2) Tous les cinq ans après l'entrée en vigueur du présent article, et jusqu'à ce que les obligations prévues par l'article 55 de la *Loi constitutionnelle de 1982* aient été rencontrées, le ministre de la Justice établit un rapport des mesures prises pour mettre en œuvre l'article 55 de la *Loi constitutionnelle de 1982* et le fait déposer devant chaque chambre du Parlement.

Implementation of section 55 of the *Constitution Act, 1982*

(1) The Minister of Justice shall undertake to use best efforts, during each parliamentary session, to fulfill the Minister's obligations pursuant to section 55 of the *Constitution Act, 1982*, to prepare and put forward for enactment a French version of the portions of the Constitution of Canada referred to in the schedule therein as expeditiously as possible.

Report to Parliament

(2) Every five years after the coming into force of this section, and until the obligations under section 55 of the *Constitution Act, 1982* have been met, the Minister of Justice shall prepare and cause to be laid before each House of Parliament a report on the action taken by the Minister with respect to the implementation of section 55 of the *Constitution Act, 1982*.

²⁶ A similar position has been presented by the Fédération des communautés francophones et acadienne du Canada, the national political organization representing 2.7 million Francophone Canadians living in nine provinces and three territories (see Fédération des communautés francophones et acadienne du Canada, *Donner un nouvel élan à la dualité linguistique Canadienne ! Pour une Loi sur les langues officielles moderne et respectée*, Submission to the Senate Committee on Official Languages for its study on Canadians' perspectives on the modernization of the *Official Languages Act* [March 26, 2018], para. 156, [online](#).

²⁷ Charter, subs. 4(1).

Renvoi en comité

(3) Le comité du Sénat, de la Chambre des communes, ou mixte, constitué ou désigné à cette fin, est saisi d'office du rapport et procède dans les meilleurs délais à l'étude de celui-ci et, dans l'année qui suit le dépôt du rapport ou le délai supérieur accordé par le Sénat, la Chambre des communes ou les deux chambres, selon le cas, leur présente son rapport.

Reference to parliamentary committee

(3) The report of the Minister shall stand referred to the committee of the Senate, of the House of Commons or of both Houses of Parliament that is designated or established for that purpose, which shall:

(a) as expeditiously as possible after the laying of the report, undertake a review of the report; and

(b) submit a report to the Senate, to the House of Commons or to both Houses of Parliament, as the case may be, within one year after the laying of the report, or within such further time as the Senate, the House of Commons or both Houses of Parliament, as the case may be, may authorize.

III. MODERNIZATION OF THE OFFICIAL LANGUAGES ACT TO BETTER REFLECT THE PRESENT-DAY REALITY OF CANADA'S LINGUISTIC DUALITY

28. The CBA recently asked the President of the Treasury Board, the Minister of Justice and the Minister of Canadian Heritage to modernize the *Official Languages Act* to make it an efficient tool that will reflect the present-day reality of Canada's linguistic duality.²⁸

29. The CBA's recommendations in that respect are presented below.

30. On June 6, 2018, Prime Minister Trudeau formally committed in the House of Commons that his government would introduce a bill to modernize the legislative framework governing official languages.²⁹ The Prime Minister also commissioned Minister Joly, in her role as Minister of Tourism, Official Languages and La Francophonie, to "begin an examination towards modernizing the *Official Languages Act*".³⁰

IV. CONCLUSION

31. For a country that is said to be officially bilingual, Canada is slow to fulfil its duty to adopt a complete official French version of its Constitution, pursuant to section 55 of the *Constitution Act, 1982*. This anomaly has a harmful impact on the vitality of Canadian linguistic communities and undermines access to justice and the rule of law. Idleness on this issue is caused by both a lack of accountability from each stakeholder in ensuring the Constitution is available in both English and French, and uncertainties about the binding nature of section 55 before the courts.

²⁸ *Supra* note 5 (Annex C).

²⁹ House of Commons Debates, *Hansard*, 42nd parl., 1st sess., Vol. 148, No. 309 (June 6, 2018), p. 20383.

³⁰ Prime Minister's Office, *Minister of Tourism, Official Languages and La Francophonie Mandate Letter* (August 28, 2018), [online](#).

32. In response to this impasse, and in the context of a willingness to renew Canada's commitment toward linguistic duality by modernizing the *Official Languages Act*, the time is now for Parliament to intervene in order to promote compliance with section 55 of the *Constitution Act, 1982*.

V. SUMMARY OF RECOMMENDATIONS

33. We recommend that Parliament:

1. Add an enforceable section to the *Official Languages Act* requiring the Minister of Justice of Canada to make best efforts to implement section 55 of the *Constitution Act, 1982*.
2. Add a section to the *Official Languages Act* requiring the Minister of Justice of Canada to submit a report every five years detailing the efforts made to implement section 55 of the *Constitution Act, 1982*, which will be referred to a Parliamentary Committee.
3. Amend subsection 16(1) of the *Official Languages Act* so that the duty to ensure understanding in both official languages without the assistance of an interpreter applies to the Supreme Court of Canada.
4. Legislate a new mandatory and rigorous assessment of the linguistic abilities of candidates who identified the level of their language skills on their application form to ensure an appropriate bilingual capacity within the judiciary.
5. Require the federal government to take into account the vitality of official languages minority communities in its assessment of the demand for services.
6. Improve the mechanisms for implementing the *Official Languages Act* and ensure that the Commissioner of Official Languages plays a more active role, for example by specifying the circumstances in which the Commissioner *must* (not only *may*) institute and participate in legal recourse.

VI. ANNEXES

Annex A

Resolution 18-04-A, Bilingual Constitution of Canada, February 16, 2018

Annex B

Letter from the Canadian Bar Association to the Senate Committee on Official Languages, August 14, 2018

Annex C

Letter from the Canadian Bar Association to the Honourable Scott Brison, the Honourable Jody Wilson-Raybould and the Honourable Mélanie Joly, November 23, 2017

Annex D

List of constitutional documents enacted only in English

Bilingual Constitution of Canada

Constitution du Canada bilingue

WHEREAS the Constitution of Canada is the supreme law of Canada;

ATTENDU QUE la Constitution du Canada est la loi suprême du Canada;

WHEREAS subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms* state:

ATTENDU QUE les paragraphes 16(1) et 16 (3) de la *Charte canadienne des droits et libertés* déclarent que :

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16 (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French;

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais;

WHEREAS section 55 of the *Constitution Act, 1982* states:

ATTENDU QUE l'article 55 de la *Loi constitutionnelle de 1982* déclare que :

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.;

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient;

WHEREAS a French version of sections of the Constitution was tabled in Parliament in 1990, but has yet to be enacted;

ATTENDU QU'une version française des articles de la Constitution a été déposée au Parlement en 1990, mais n'a pas encore été promulguée;

WHEREAS the failure to provide a fully bilingual Constitution of Canada undermines the rule of law and access to justice;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada to fulfill the obligations imposed by section 55 of the *Constitution Act, 1982*, to give full force and effect to the entirety of the Constitution in both official languages.

Certified true copy of a resolution carried at the Annual Meeting of the Canadian Bar Association held in Ottawa, ON, February 15, 2018.

ATTENDU QUE le défaut de fournir une Constitution du Canada entièrement bilingue mine la primauté du droit et l'accès à la justice;

QU'IL SOIT RÉSOLU QUE l'Association du Barreau canadien exhorte le gouvernement du Canada à respecter les obligations imposées au titre de l'article 55 de la *Loi constitutionnelle de 1982* pour que soit donné pleine vigueur et plein effet à l'intégralité de la Constitution, dans les deux langues officielles.

Copie certifiée d'une résolution adoptée, à l'Assemblée annuelle de l'Association du Barreau canadien, à Ottawa (ON), le 15 février 2018.

**Cheryl Farrow
Chief Executive Officer/Chef de la direction**



August 14, 2018

Via email: Rene.Cormier@sen.parl.gc.ca

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

Dear Senator Cormier:

Subject: Study on Canadians' views about modernizing the *Official Languages Act*

The Constitutional and Human Rights Law Section and French Speaking Common Law Members Section of the Canadian Bar Association (the CBA Sections) are pleased to offer comments in the context of your study on Canadians' views about modernizing the *Official Languages Act*.

The CBA is a national organization of over 36,000 lawyers, notaries, academics and law students from across Canada. The CBA's primary objectives include improvement in the law and the administration of justice, and it has worked tirelessly to encourage official bilingualism in the legal arena for many years.

Many Canadians would be astonished to learn that the majority of Canadian constitutional documents are not officially bilingual, including the *Constitution Act, 1867*. Of the 31 documents declared in the *Constitution Act, 1982* to be part of the Constitution of Canada¹, only nine have been enacted by Parliament in both official languages as required by section 133 of the *Constitution Act, 1867*². The rest of the Constitution of Canada has the force of law in English only.

¹ *Constitution Act, 1982*, subsection 52(2), being schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

² These documents are the *Manitoba Act, 1870*, the *Alberta Act, 1905*, the *Saskatchewan Act, 1905*, the *British North America Act, 1952*, which was repealed, the *Constitution Act, 1965*, the *Constitution Act, 1974*, the *Constitution Act (No. 1), 1975*, the *Constitution Act (No. 2), 1975* and the *Constitution Act, 1982* itself.

Remedying this incongruity was the aim of the authors of the *Constitution Act, 1982* in including sections 55 and 56:

French version of Constitution of Canada

55. French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.

English and French versions of certain constitutional texts

56. Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

A French version of portions of the Constitution was tabled in Parliament in 1990 but has yet to be enacted³.

In February 2018, the CBA urged the Government of Canada to fulfill the obligations imposed by section 55 of the *Constitution Act, 1982*, to give full force and effect to the entirety of the Constitution in both official languages⁴.

There is no consensus on the binding nature of section 55 of the *Constitution Act, 1982*, and no court of law has ruled on this issue⁵. Parliamentary action offers a more effective means of remedying the unilingualism of the Constitution of Canada than the judicial route.

We invite your Committee to draw on the wording of section 55 of the *Constitution Act, 1982* and to recommend that Parliament add an *enforceable* section to the *Official Languages Act* requiring the Minister of Justice to make every effort to implement section 55 of the *Constitution Act, 1982*. The Committee could also recommend that the Minister of Justice be required to submit a report detailing the efforts made to achieve these objectives (including, for example, a work schedule, explanations for delays).

A similar request has been presented by the *Fédération des communautés francophones et acadienne du Canada*, the national political organization representing 2.7 million Francophone Canadians living in nine provinces and three territories⁶.

³ See [Report of the French Constitutional Drafting Committee](#).

⁴ See [CBA Resolution 18-04-A Bilingual Constitution of Canada](#).

⁵ See Linda Cardinal and François Larocque, dir., *La Constitution bilingue du Canada, un projet inachevé*, Québec: Presses de l'Université Laval, 2017.

⁶ Fédération des communautés francophones et acadiennes du Canada, *Donner un nouvel élan à la dualité linguistique canadienne! Pour une Loi sur les langues officielles moderne et respectée*, Submission presented to the Standing Senate Committee on Official Languages as part of its study on Canadians' perspectives on the modernization of the *Official Languages Act* (March 26, 2018), para. 156.

Access to justice in the two official languages and the effective implementation of language rights is a priority for the CBA. We recently asked ministers Brison, Wilson-Raybould and Joly to modernize the *Official Languages Act* to make it an efficient tool that will reflect the present-day reality of Canada's linguistic duality⁷. Also, on June 6, 2018, Prime Minister Trudeau formally committed in the House of Commons that his government would introduce a bill to modernize the legislative framework governing official languages.

The CBA Sections would be pleased to share their views on the modernization of the *Official Languages Act* as part of your study on the justice sector.

Yours sincerely,

(original letter signed by Marc-André O'Rourke for Gaétan Migneault and Veronica L. Jackson)

Gaétan Migneault
Vice-Chair

French Speaking Common Law Members Section

Veronica L. Jackson
Chair

Constitutional and Human Rights Law Section

Encl. **Annex A:** Resolution 18-04-A, Bilingual Constitution of Canada

Annex B: Letter from the Canadian Bar Association of November 23, 2017

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See [CBA letter of November 23, 2017](#)

Annex A

Resolution 18-04-A

Résolution 18-04-A

Bilingual Constitution of Canada**Constitution du Canada bilingue**

WHEREAS the Constitution of Canada is the supreme law of Canada;

ATTENDU QUE la Constitution du Canada est la loi suprême du Canada;

WHEREAS subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms* state:

ATTENDU QUE les paragraphes 16(1) et 16 (3) de la *Charte canadienne des droits et libertés* déclarent que :

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

16 (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French;

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais;

WHEREAS section 55 of the *Constitution Act, 1982* states:

ATTENDU QUE l'article 55 de la *Loi constitutionnelle de 1982* déclare que :

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada;

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient;

WHEREAS a French version of sections of the Constitution was tabled in Parliament in 1990, but has yet to be enacted;

WHEREAS the failure to provide a fully bilingual Constitution of Canada undermines the rule of law and access to justice;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada to fulfill the obligations imposed by section 55 of the *Constitution Act, 1982*, to give full force and effect to the entirety of the Constitution in both official languages.

**Moved by Constitutional and Human Rights Law
Section and French Speaking Common-Law Members
Section**

ATTENDU QU'une version française des articles de la Constitution a été déposée au Parlement en 1990, mais n'a pas encore été promulguée;

ATTENDU QUE le défaut de fournir une Constitution du Canada entièrement bilingue mine la primauté du droit et l'accès à la justice;

QU'IL SOIT RÉSOLU QUE l'Association du Barreau canadien exhorte le gouvernement du Canada à respecter les obligations imposées au titre de l'article 55 de la *Loi constitutionnelle de 1982* pour que soit donné pleine vigueur et plein effet à l'intégralité de la Constitution, dans les deux langues officielles.

**Proposée par la Section du droit constitutionnel et des
droits de la personne et la Section des juristes
d'expression française de common law**



Annex B

November 23, 2017

By e-mail President@tbs-sct.gc.ca; mcu@justice.gc.ca; Hon.Melanie.Joly@canada.ca

The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board
90 Elgin Street
Ottawa, ON K1A 0R5

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Room 451 S, Centre Block
Ottawa, ON K1A 0A6

The Honourable Mélanie Joly, P.C., M.P.
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC K1A 0M5

Subject: Modernization of the Official Languages Act so it will better reflect the present-day reality of Canada's linguistic duality

Dear Ministers,

I am writing to ask you to modernize the Official Languages Act (the Act) to make it an efficient tool that will meet the present-day reality of Canada's linguistic duality.

The Canadian Bar Association (CBA) is a national organization of over 36,000 members, including lawyers, notaries, academics, and law students from the four corners of Canada. Its primary objectives include improving the law and the administration of justice. The CBA has demonstrated a deep and abiding commitment to official bilingualism in the realm of the law. Moreover, I assign special importance to linguistic duality, which constitutes a fundamental value underpinning our national identity and our legal system.

We are addressing this letter to you because you are responsible for the three portfolios that play the biggest roles in the implementation of the Act. The Act expressly devolves a role and imposes obligations on the Minister of Canadian Heritage (Part VII) and the President of the Treasury Board (Part VIII). In addition, access to justice in both official languages (Part III) — an area that is of particular interest to the CBA — is largely entrusted to the Minister of Justice, as the Minister responsible for the administration of justice and judicial appointments.

Initially adopted in 1969 and consolidated in 1988, the Act will celebrate its thirtieth anniversary in 2018. In the last three decades, Canadian society has been significantly transformed and the expectations of minority official language communities have also evolved. The Act was adopted before the advent of the Internet, before the increase in Francophone immigration throughout the country, and prior to a number of important Supreme Court of Canada decisions on the interpretation of the Canadian Charter of Rights and Freedoms (Charter), including the official language guarantees.

Although the reality of the official languages in the country has been continually evolving, the Act is frozen in time. It is no longer adapted to the current reality of the communities and no longer enables the proper implementation of the language guarantees set out in the Charter.

When it comes to the administration of justice, it is still very difficult for Canadians to gain access to services in both official languages. In particular, this state of affairs is due to a lack of judges who are able to understand both official languages without an interpreter.

In this regard, it is the federal government that is responsible for the appointment of judges on federal courts and judges sitting on the country's superior courts and courts of appeal. However, the rights and obligations established by Part III of the Act are limited to the courts created by federal statute. As the appointment of judges to the superior courts of the provinces is the jurisdiction of the federal government, we believe that Parliament would have the power to stipulate in the Act the linguistic requirements applicable to judges of those courts.

The Act expressly excludes the Supreme Court of Canada from the provision enjoining federal courts to ensure that the judge who hears a case can understand the language of the proceedings without the assistance of an interpreter. The modernization of the Act should repeal the exception stipulated in section 16.

Since at least 1995, the Office of the Official Languages Commissioner of Canada has been raising problems on access to justice in both official languages due to a lack of judges who are able to perform their duties in both official languages in the country's superior courts and courts of appeal⁸. In 2013, the Official Languages Commissioner of Canada published a joint report with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario⁹. The report makes recommendations to determine the needs of the provinces in terms of having judges who can perform their duties in both official languages. The report also suggests a process for the systematic assessment of the linguistic capabilities of judicial candidates. None of those measures have been implemented.

The federal government should exercise its power to make appointments to the judiciary such that the judicial system meets the demand for judges who are able to perform their duties in both official languages. However, that is not currently the case. The most efficient way to remedy this problem would be to legislate a new mandatory and rigorous assessment of the linguistic abilities of candidates who identified the level of their language skills on their application form to ensure an appropriate bilingual capacity within the judiciary. Accordingly, to achieve this objective, a major revision of Part III of the *Act* is in order.

⁸ See The equitable use of English and French before the courts in Canada: a study by the Commissioner of Official Languages, Ottawa, 1995.

⁹ Office of the Official Languages Commissioner of Canada, Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary, 2013.

Certainly, the recent adoption by the Minister of Justice of an action plan designed to “enhance the bilingual capacity of the superior courts”¹⁰ represents a positive step towards improving access to justice in both of the official languages. This measure includes strategies for “enhanced tools to verify and assess the bilingual capacity of judicial applicants, examine language training for current members of the judiciary, and confirmation of the Minister’s commitment to collaborative consultations with Chief Justices with respect to the bilingual capacity needs of their courts”¹¹. Although this is a step in the right direction, it is essential that measures designed to improve the linguistic abilities of candidates for the judiciary be incorporated into the Act to make them effective and enforceable.

The Act also has a number of other shortcomings. Among other things, Part IV, which deals with services in the official language of the minority, does not require the federal government to take into account the vitality of the minority official language community in its assessment of the demand for services. The result of this shortcoming is that all too often, dynamic communities lose their access to federal services in their language, as their numbers are not growing at the same rate as the rest of the population.

Moreover, Part VII of the Act, which imposes an obligation on federal institutions to take “positive measures” to enhance the vitality of official language communities, does not define this term or specify specific mechanisms for consultation with such communities. Consequently, decisions of importance to the future of the communities are often taken by federal institutions without truly considering the impact of the decisions on those communities.

Finally, as regards the implementation of the Act, the Office of the Commissioner of Official Languages of Canada is one of the principal mechanisms established. In particular, the Commissioner is responsible for investigating complaints received from the public and reporting on compliance with the Act by federal institutions subject to the Act. The Commissioner also has standing to appear before the courts.

When the Act was adopted, it was expected that the Commissioner of Official Languages of Canada would assume a leading role before the courts, notably as a plaintiff. This point of view was justified in view of the Commissioner’s official language expertise, as well as the office’s budget¹². However, 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 means¹³.

A modernization of the Act must improve its implementation mechanisms and ensure that the Commissioner plays a more active role, for example by specifying the circumstances in which the

¹⁰ Canada, Department of Justice Canada, Action Plan: Enhancing the Bilingual Capacity of the Superior Courts, Action Plan, Ottawa, Department of Justice, September 25, 2017, [online](http://ow.ly/Zhbw30fW6r9): (<http://ow.ly/Zhbw30fW6r9>).

¹¹ Department of Justice Canada, news release, “Government of Canada Launches Action Plan to Enhance Bilingual Capacity of Canada’s Superior Courts” (September 25, 2017), [online](http://ow.ly/m4B30fW6ei): (<http://ow.ly/m4B30fW6ei>)

¹² See Mark Power and Justine Mageau, “Réflexions sur le rôle du Commissaire aux langues officielles devant les tribunaux” (2011) 14: 1 RGD 179.

¹³ See also, in particular, the case of *Thibodeau v Air Canada*, 2011 FC 876, partially overturned by the Federal Court of Appeal: 2012 FCA 246. The decision by the Federal Court of Appeal was affirmed by the Supreme Court of Canada: 2014 SCC 67. In *Federal Court, Mr. Thibodeau* was awarded costs of \$5,375.95: 2005 FC 1621.

Commissioner *must* (not only *may*) institute and participate in court actions. A more active role by the Commissioner is essential in order to advance the interpretation of language rights and foster a progression towards the equality of French and English.

In closing, it is worth emphasizing that access to justice in the two official languages and the effective implementation of the other language rights stipulated in the Charter is a priority for the CBA. However, we note that, notwithstanding the good intentions of those who, in the 1980s, drafted the current Act, it is a struggle for those rights to be respected. Modernization is necessary. The future of linguistic duality and the vitality of minority official language communities depend on it.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kerry L. Simmons', with a stylized flourish at the end.

Kerry L. Simmons, Q.C.

c.c. The Honourable Denis Paradis, P.C., M.P.
Chair of the House of Commons Standing Committee on Official Languages
The Honourable Claudette Tardif, Ph.D,
Chair of the Senate Standing Committee on Official Languages



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

Office of the President
Cabinet de la présidente

November 23, 2017

By e-mail President@tbs-sct.gc.ca; mcu@justice.gc.ca; Hon.Melanie.Joly@canada.ca

The Honourable Scott Brison, P.C., M.P.
President of the Treasury Board
90 Elgin Street
Ottawa, ON K1A 0R5

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
Room 451 S, Centre Block
Ottawa, ON K1A 0A6

The Honourable Mélanie Joly, P.C., M.P.
Minister of Canadian Heritage
15 Eddy Street
Gatineau, QC K1A 0M5

Subject: Modernization of the Official Languages Act so it will better reflect the present-day reality of Canada's linguistic duality

Dear Ministers,

I am writing to ask you to modernize the Official Languages Act (the Act) to make it an efficient tool that will meet the present-day reality of Canada's linguistic duality.

The Canadian Bar Association (CBA) is a national organization of over 36,000 members, including lawyers, notaries, academics, and law students from the four corners of Canada. Its primary objectives include improving the law and the administration of justice. The CBA has demonstrated a deep and abiding commitment to official bilingualism in the realm of the law. Moreover, I assign special importance to linguistic duality, which constitutes a fundamental value underpinning our national identity and our legal system.

We are addressing this letter to you because you are responsible for the three portfolios that play the biggest roles in the implementation of the Act. The Act expressly devolves a role and imposes obligations on the Minister of Canadian Heritage (Part VII) and the President of the Treasury Board (Part VIII). In addition, access to justice in both official languages (Part III) — an area that is of particular interest to the CBA — is largely entrusted to the Minister of Justice, as the Minister responsible for the administration of justice and judicial appointments.

Initially adopted in 1969 and consolidated in 1988, the Act will celebrate its thirtieth anniversary in 2018. In the last three decades, Canadian society has been significantly transformed and the expectations of minority official language communities have also evolved. The Act was adopted

before the advent of the Internet, before the increase in Francophone immigration throughout the country, and prior to a number of important Supreme Court of Canada decisions on the interpretation of the Canadian Charter of Rights and Freedoms (Charter), including the official language guarantees.

Although the reality of the official languages in the country has been continually evolving, the Act is frozen in time. It is no longer adapted to the current reality of the communities and no longer enables the proper implementation of the language guarantees set out in the Charter.

When it comes to the administration of justice, it is still very difficult for Canadians to gain access to services in both official languages. In particular, this state of affairs is due to a lack of judges who are able to understand both official languages without an interpreter.

In this regard, it is the federal government that is responsible for the appointment of judges on federal courts and judges sitting on the country's superior courts and courts of appeal. However, the rights and obligations established by Part III of the Act are limited to the courts created by federal statute. As the appointment of judges to the superior courts of the provinces is the jurisdiction of the federal government, we believe that Parliament would have the power to stipulate in the Act the linguistic requirements applicable to judges of those courts.

The Act expressly excludes the Supreme Court of Canada from the provision enjoining federal courts to ensure that the judge who hears a case can understand the language of the proceedings without the assistance of an interpreter. The modernization of the Act should repeal the exception stipulated in section 16.

Since at least 1995, the Office of the Official Languages Commissioner of Canada has been raising problems on access to justice in both official languages due to a lack of judges who are able to perform their duties in both official languages in the country's superior courts and courts of appeal¹. In 2013, the Official Languages Commissioner of Canada published a joint report with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario². The report makes recommendations to determine the needs of the provinces in terms of having judges who can perform their duties in both official languages. The report also suggests a process for the systematic assessment of the linguistic capabilities of judicial candidates. None of those measures have been implemented.

The federal government should exercise its power to make appointments to the judiciary such that the judicial system meets the demand for judges who are able to perform their duties in both official languages. However, that is not currently the case. The most efficient way to remedy this problem would be to legislate a new mandatory and rigorous assessment of the linguistic abilities of candidates who identified the level of their language skills on their application form to ensure an appropriate bilingual capacity within the judiciary. Accordingly, to achieve this objective, a major revision of Part III of the *Act* is in order.

Certainly, the recent adoption by the Minister of Justice of an action plan designed to "enhance the bilingual capacity of the superior courts"³ represents a positive step towards improving access to

¹ See *The equitable use of English and French before the courts in Canada: a study by the Commissioner of Official Languages*, Ottawa, 1995.

² Office of the Official Languages Commissioner of Canada, *Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary*, 2013.

³ Canada, Department of Justice Canada, *Action Plan: Enhancing the Bilingual Capacity of the Superior Courts*, Action Plan, Ottawa, Department of Justice, September 25, 2017, [online: \(http://ow.ly/Zhbw30fW6r9\)](http://ow.ly/Zhbw30fW6r9).

justice in both of the official languages. This measure includes strategies for “enhanced tools to verify and assess the bilingual capacity of judicial applicants, examine language training for current members of the judiciary, and confirmation of the Minister’s commitment to collaborative consultations with Chief Justices with respect to the bilingual capacity needs of their courts”⁴. Although this is a step in the right direction, it is essential that measures designed to improve the linguistic abilities of candidates for the judiciary be incorporated into the Act to make them effective and enforceable.

The Act also has a number of other shortcomings. Among other things, Part IV, which deals with services in the official language of the minority, does not require the federal government to take into account the vitality of the minority official language community in its assessment of the demand for services. The result of this shortcoming is that all too often, dynamic communities lose their access to federal services in their language, as their numbers are not growing at the same rate as the rest of the population.

Moreover, Part VII of the Act, which imposes an obligation on federal institutions to take “positive measures” to enhance the vitality of official language communities, does not define this term or specify specific mechanisms for consultation with such communities. Consequently, decisions of importance to the future of the communities are often taken by federal institutions without truly considering the impact of the decisions on those communities.

Finally, as regards the implementation of the Act, the Office of the Commissioner of Official Languages of Canada is one of the principal mechanisms established. In particular, the Commissioner is responsible for investigating complaints received from the public and reporting on compliance with the Act by federal institutions subject to the Act. The Commissioner also has standing to appear before the courts.

When the Act was adopted, it was expected that the Commissioner of Official Languages of Canada would assume a leading role before the courts, notably as a plaintiff. This point of view was justified in view of the Commissioner’s official language expertise, as well as the office’s budget⁵. However, 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 means⁶.

A modernization of the Act must improve its implementation mechanisms and ensure that the Commissioner plays a more active role, for example by specifying the circumstances in which the Commissioner *must* (not only *may*) institute and participate in court actions. A more active role by the Commissioner is essential in order to advance the interpretation of language rights and foster a progression towards the equality of French and English.

In closing, it is worth emphasizing that access to justice in the two official languages and the effective implementation of the other language rights stipulated in the Charter is a priority for the CBA. However, we note that, notwithstanding the good intentions of those who, in the 1980s, drafted the

⁴ Department of Justice Canada, news release, “Government of Canada Launches Action Plan to Enhance Bilingual Capacity of Canada’s Superior Courts” (September 25, 2017), [online: \(http://ow.ly/mJ4B3OfW6ei\)](http://ow.ly/mJ4B3OfW6ei)

⁵ See Mark Power and Justine Mageau, “Réflexions sur le rôle du Commissaire aux langues officielles devant les tribunaux” (2011) 14: 1 RGD 179.

⁶ See also, in particular, the case of *Thibodeau v Air Canada*, 2011 FC 876, partially overturned by the Federal Court of Appeal: 2012 FCA 246. The decision by the Federal Court of Appeal was affirmed by the Supreme Court of Canada: 2014 SCC 67. In Federal Court, Mr. Thibodeau was awarded costs of \$5,375.95: 2005 FC 1621.

current Act, it is a struggle for those rights to be respected. Modernization is necessary. The future of linguistic duality and the vitality of minority official language communities depend on it.

Yours sincerely,

(original letter signed by Kerry L. Simmons)

Kerry L. Simmons, Q.C.

c.c. The Honourable Denis Paradis, P.C., M.P.
Chair of the House of Commons Standing Committee on Official Languages
The Honourable Claudette Tardif, Ph.D,
Chair of the Senate Standing Committee on Official Languages



Constitutional documents enacted only in English:

1. The *Constitution Act, 1867* (formerly the *British North America Act*)
2. The Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union (1870)
3. The Order of Her Majesty in Council admitting British Columbia into the union (1871)
4. The *Constitution Act, 1871*, 34-35 Victoria, c. 28 (U.K.)
5. The Order of Her Majesty in Council admitting Prince Edward Island into the union (1873)
6. The *Parliament of Canada Act, 1875*, 38-39 Victoria, c. 38 (U.K.)
7. The *Adjacent Territories Order* (1880)
8. The *Constitution Act, 1886*, 49 & 50 Victoria, c. 35 (U.K.)
9. The *Canada (Ontario Boundary) Act, 1889*, 52 & 53 Victoria, c. 28 (U.K.)
10. The *Canadian Speaker (Appointment of Deputy) Act, 1895*, 59 Victoria, c. 3 (U.K.)
11. The *Constitution Act, 1907*, 7 Edward VII, c. 11 (U.K.)
12. The *Constitution Act, 1915*, 5 & 6 George V, c. 45 (U.K.)
13. The *Constitution Act, 1930*, 20 & 21 George V, c. 26 (U.K.)
14. The *Statute of Westminster, 1931*, 22 George V, c. 4 (U.K.)
15. The *Constitution Act, 1940*, 3 & 4 George VI, c. 36 (U.K.)
16. The *British North America Act, 1943*, 6 & 7 George VI, c. 30 (U.K.)
17. The *British North America Act, 1946*, 12-13 George VI, c. 63 (U.K.)
18. The *Newfoundland Act*, 12 & 13 George VI, c. 22 (1949)
19. The *British North America Act (No.2)*, 1949, 13 George VI, c. 81 (U.K.)
20. The *British North America Act, 1951*, 14 & 15 George VI, c. 32 (U.K.)
21. The *Constitution Act, 1960*, 9 Elizabeth II, c. 2 (U.K.)
22. The *Constitution Act, 1964*, 12 & 13 Elizabeth II, c. 73 (U.K.)

Constitutional documents that are officially bilingual:

1. The *Manitoba Act, 1870*
2. The *Alberta Act* (1905)
3. The *Saskatchewan Act* (1905)
4. The *Constitution Act, 1965*
5. The *Constitution Act, 1974*
6. The *Constitution Act (No. 1)*, 1975
7. The *Constitution Act (No. 2)*, 1975
8. The *Constitution Act, 1982* itself and the *British North America Act, 1952*, 1 Elizabeth II, c. 15 (now repealed).

Out of the 22 unilingual documents set out in the schedule to the *Constitution Act, 1982*, five were repealed when section 55 was enacted. Because section 55 concerns the translation of all documents in the schedule to the *Constitution Act, 1982*, the French Constitutional Drafting Committee also translated the repealed documents. These documents are: the *Canadian Speaker (Appointment of Deputy) Act, 1895*, 59 Victoria, c. 3 (U.K.); the *British North America Act, 1943*, 6 & 7 George VI, c. 30 (U.K.); the *British North America Act, 1946*, 12-13 George VI, c. 63 (U.K.); the *British North America Act (No.2)*, 1949, 13 George VI, c. 81 (U.K.) and the *British North America Act, 1951*, 14 & 15 George VI, c. 32 (U.K.).

Bilingual Constitution of Canada

WHEREAS the Constitution of Canada is the supreme law of Canada;

WHEREAS subsections 16(1) and (3) of the *Canadian Charter of Rights and Freedoms* state:

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French;

WHEREAS section 55 of the *Constitution Act, 1982* states:

55. A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada;

WHEREAS a French version of sections of the Constitution was tabled in Parliament in 1990, but has yet to be enacted;

WHEREAS the failure to provide a fully bilingual Constitution of Canada undermines the rule of law and access to justice;

Constitution du Canada bilingue

ATTENDU QUE la Constitution du Canada est la loi suprême du Canada;

ATTENDU QUE les paragraphes 16(1) et 16 (3) de la *Charte canadienne des droits et libertés* déclarent que :

16 (1) Le français et l'anglais sont les langues officielles du Canada; ils ont un statut et des droits et privilèges égaux quant à leur usage dans les institutions du Parlement et du gouvernement du Canada.

(3) La présente charte ne limite pas le pouvoir du Parlement et des législatures de favoriser la progression vers l'égalité de statut ou d'usage du français et de l'anglais;

ATTENDU QUE l'article 55 de la *Loi constitutionnelle de 1982* déclare que :

55. Le ministre de la Justice du Canada est chargé de rédiger, dans les meilleurs délais, la version française des parties de la Constitution du Canada qui figurent à l'annexe; toute partie suffisamment importante est, dès qu'elle est prête, déposée pour adoption par proclamation du gouverneur général sous le grand sceau du Canada, conformément à la procédure applicable à l'époque à la modification des dispositions constitutionnelles qu'elle contient;

ATTENDU QU'une version française des articles de la Constitution a été déposée au Parlement en 1990, mais n'a pas encore été promulguée;

ATTENDU QUE le défaut de fournir une Constitution du Canada entièrement bilingue mine la primauté du droit et l'accès à la justice;

BE IT RESOLVED THAT the Canadian Bar Association urge the Government of Canada to fulfill the obligations imposed by section 55 of the *Constitution Act, 1982*, to give full force and effect to the entirety of the Constitution in both official languages.

Certified true copy of a resolution carried at the Annual Meeting of the Canadian Bar Association held in Ottawa, ON, February 15, 2018.

QU'IL SOIT RÉSOLU QUE l'Association du Barreau canadien exhorte le gouvernement du Canada à respecter les obligations imposées au titre de l'article 55 de la *Loi constitutionnelle de 1982* pour que soit donné pleine vigueur et plein effet à l'intégralité de la Constitution, dans les deux langues officielles.

Copie certifiée d'une résolution adoptée, à l'Assemblée annuelle de l'Association du Barreau canadien, à Ottawa (ON), le 15 février 2018.

**Cheryl Farrow
Chief Executive Officer/Chef de la direction**