



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

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Act, 1870*, the *Alberta Act, 1905*, the *Saskatchewan Act, 1905*, the *British North America Act, 1952*, which was repealed, the *Constitution Act, 1965*, the *Constitution Act, 1974*, the *Constitution Act (No. 1), 1975*, the *Constitution Act (No. 2), 1975* and the *Constitution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