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Chair

The Honourable Denis Paradis

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● (1205)

[*Translation*]

The Chair (Hon. Denis Paradis (Brome—Missisquoi, Lib.)): Good afternoon, everyone. We will now resume our session in public.

Pursuant to Standing Order 108(3)(f), we are continuing our study of the full implementation of the Official Languages Act in the Canadian justice system.

Joining us today are representatives from the Fédération des associations de juristes d'expression française de common law inc., Daniel Boivin, president, and Rénald Rémillard, director general. We will then hear from Mark Power and Marc-André Roy, appearing as individuals.

Gentlemen, welcome to the Standing Committee on Official Languages.

Each panel will have about 10 minutes for their presentation. We will then move to questions and comments from the members of the committee.

We will begin with Mr. Boivin.

Mr. Daniel Boivin (President, Fédération des associations de juristes d'expression française de common law inc.): Thank you very much, Mr. Chair.

Ladies and gentlemen, thank you for welcoming us to address this issue, which is very important to the FAJEF.

As mentioned before, I am the president of the Fédération des associations de juristes d'expression française de common law inc., which brings together seven associations of French-speaking lawyers.

As you may know, the FAJEF works very closely with its network of French-speaking lawyers' associations. We also work with national legal organizations, such as the Canadian Bar Association and people from the francophone community, particularly with the Fédération des communautés francophones et acadienne du Canada (FCFA). Actually, the FAJEF is a member of the FCFA. We are also one of the founding members of the Réseau national de formation en justice, whose representatives appeared before you a few weeks ago.

In a few minutes, I will be pleased to answer your questions about the themes suggested by your committee for your study on the full implementation of the Official Languages Act in the Canadian justice system. In response to your questions, I will be able to talk about a related topic, the issues of access to justice and the promotion and use of the French language in the legal system.

In terms of access to justice in French, the problems and solutions were well defined in the 2015 report of the Commissioner of Official Languages. This report is still the reference document for the work that the FAJEF wants to accomplish in this area. That is why I would like to address access to justice in both official languages.

I will start my presentation by suggesting a new and very specific measure that we would like the federal government to adopt. This measure is related to access to justice in French and to the promotion of the access.

Here is the request in question:

> That the House of Commons Standing Committee on Official Languages recommend that the federal government adopt the best approach to extend language rights to divorce so that all Canadians can have the right to divorce in the official language of their choice.

In the FAJEF's opinion, that's the next step. The fact that people around the table are surprised to hear that it is not possible to obtain a divorce in French across the country explains in itself why this is important for the FAJEF.

Clearly, in the past 20 years or so, access to justice in French has improved in Canada. A number of reasons explain that progress, including the fact that some provinces and territories have taken concrete, significant measures to improve access to justice in French. Those initiatives deserve to be highlighted. It is also important to note the government's leadership role in setting out, in part XVII of the Criminal Code, that all the accused under the Criminal Code have the right to stand trial in the language of their choice in all provinces and territories.

In fact, in provinces such as British Columbia and Newfoundland and Labrador, access to justice and to the courts in French is largely limited to this right in criminal courts. The fact that the federal government has given all Canadians the right to stand trial in the language of their choice and allocated the resources needed to protect this right has resulted in the promotion and implementation of a wide range of measures and resources for promoting judicial bilingualism and access to justice in French across Canada. We feel that, without this commitment and, of course, without other key decisions of the courts, such as the decision in Beaulac, access to justice in French would not have made such significant strides in the past 20 years.

It makes sense to focus on access to justice in French in the context of criminal law. After all, it is an important point of contact between citizens and the legal system. There are other areas, particularly family law, which has serious consequences for many Canadians. Actually, family law proceedings often leave indelible marks on the lives of Canadians.

● (1210)

The Divorce Act is a federal act, like the Criminal Code, and yet the right to divorce in French does not exist in all the provinces of the country. It does not exist in British Columbia, in Nova Scotia or in Newfoundland and Labrador.

In 2017, we think it is at least incongruous and inconsistent with the objectives of the Official Languages Act and the requirements of subsection 41(1) of the act for French-speaking Canadians to not be able to obtain a divorce in French in all the provinces and territories in Canada, a divorce that is in fact granted under a federal act.

Let me point out that the success of the project to expand access to justice in French also depends largely on the ability to operate as a network. I appeared before you a few months ago to talk about the importance of the network of lawyers' associations to connect the legal community and the francophone community. Right now, the existing networks could help increase access to justice in French in all the areas of law, including criminal law, family law and divorce, as I mentioned.

In conclusion, we believe that explicitly recognizing the right to divorce in French in all the provinces and territories in Canada, as well as the ongoing support of the national networks of lawyers, such as the FAJEF network, will generate positive results for francophone litigants. In addition, we believe that it would be a good use of the existing financial resources, because a number of necessary measures to guarantee the right to divorce in French have already been put in place by the Criminal Code and the Contraventions Act in some respects.

Those are some of my comments. I'm sure that I will be able to answer other questions.

The Chair: Thank you very much, Mr. Boivin.

I will now give the floor to Mr. Power.

Mr. Mark Power (Lawyer, Specialist in language rights, As an Individual): Thank you, Mr. Chair.

Good afternoon. Thank you for your invitation. I am pleased and honoured to be here to talk about another topic of interest.

You should have received a document. It's a memorandum in English and in French. The first page outlines the four points that my colleague Mr. Roy and I will be presenting in the 10 minutes that we have. Toward the end, you will see an excerpt from a report by the Commissioner of Official Languages of Canada.

I will make two comments on the subject at hand, namely the full implementation of the Official Languages Act in the Canadian justice system.

The first comment is on the publication of judgments. That information is on page 2 of the document sent to you. The page numbers are in the top righthand corner.

First, the Official Languages Act requires that some, but not all, Federal Court judgments be in English and in French. This requirement depends on the importance of the judgment and the language chosen by the litigants. Section 20 is actually not well implemented. There is a problem with the translation of federal judgments, which is attributable first to a lack of funding in the federal legal system, and second to the ambiguity of section 20, specifically paragraph 20(1)(a). There is no consensus in the legal community or in the judiciary on the rationale for translating a decision. There are some quite surprising, tangible examples of that. I will be able to talk about it more when answering questions.

There is a second problem with the translation of judgments. A number of provinces provide no translation of the judgments rendered by their courts of appeal, superior courts, the Court of Queen's Bench or the Supreme Court, meaning the highest court. This measure would be very useful for promoting access to justice in French. In terms of part VII of the Official Languages Act, the funding could be increased so that the provincial courts of appeal and highest courts could translate more judgments.

Quebec had a program with $200,000 to translate some judgments into English. It is not too difficult to imagine how that could be reproduced elsewhere, in Ontario or Manitoba for instance. However, it no longer exists. Reinstating such a program would be a concrete and important measure to implement part VII of the Official Languages Act.

I will now turn to the second point, which is on page 5 of the document.

That's the role of the Commissioner of Official Languages of Canada. Initially, in the 1970s and 1980s, members of Parliament and senators talked about what is now the Official Languages Act. They wanted the Commissioner of Official Languages to play a more significant role before the courts. The Commissioner of Official Languages intervenes often, but he is seldom the main party leading the case.

Let's take a very concrete example. You surely travel more than I do. I go to Ottawa once a week. When I arrive at the airport in Ottawa, it is very difficult to be served in French at the security checkpoint. Half of the time, it's in English. I complain. Although Air Canada makes an effort, the service in French is not great, which may be a polite understatement.

Why should it be my job to complain every time to the Commissioner of Official Languages, to appear before the Federal Court and to initiate proceedings against Air Canada or the Canada Border Services Agency? Few do so. Those who do are basically the diehard guardians of French. Take Thibodeau v. Air Canada, for example. Mr. Thibodeau, who is a private citizen and a public servant living in Vanier, sued Air Canada. He won, then lost on appeal. He then took his case to the Supreme Court of Canada. The Commissioner of Official Languages intervened in the matter. The roles were reversed; it should be the other way around. When the problem is institutional, an institution with funds and a sizeable budget should lead the case. It's not an issue that an individual should have to resolve. That was your predecessors' intent, but it has not materialized.

● (1215)

The Official Languages Act should be amended to specify more explicitly, more clearly and more concretely when the Commissioner of Official Languages should appear before the courts, not only in the background as an intervener, but in the foreground, as a lead party. The details are in the document.

In closing, I would like to make two very short comments.

First, in terms of access to justice in French, it is especially important to know where the people who speak French are. There is also the issue of access to justice in English, but for the time being, I am most interested in francophones outside Quebec. To find out where the francophones are, we would need a better census. So there's a connection here with your other study. The fact that Statistics Canada does not allow people to give multiple answers to the mother tongue question affects much more than education; it also has an impact on access to justice.

As a final comment, I would like to point out that there are a number of issues with the Official Languages Act. Overall, it is a good piece of legislation, but it is old. It has not been amended for several decades and it is time to rethink it. Some of the issues we have raised today should be resolved not only through small amendments here and there, but an overhaul of the act in its entirety. There are issues everywhere—the census, services, part VII, access to justice in French—and they could be resolved if the act in its entirety were reviewed, rather than patched up with band-aids.

Thank you.

● (1220)

The Chair: We have not heard you talk about the Supreme Court.

Mr. Mark Power: My colleague Mr. Roy is just as qualified as me, if not more so, to talk about that issue.

The Chair: We're listening, Mr. Roy.

Mr. Marc-André Roy (Lawyer, As an Individual): Thank you, Mr. Chair.

Ladies and gentlemen, I will add two points to complete our presentation.

First, in terms of bilingualism in the Supreme Court of Canada, we clearly cannot oppose virtue. All judges appointed to the Supreme Court in the future should be able to fulfill their functions in both official languages without relying on simultaneous interpretation or translation services. For this reason, we are very pleased with the federal government's measure to appoint judges in the future who are "functionally bilingual"—this is the term used by the government.

That said, the measure is not entrenched in any law or in the Constitution. It would therefore be relatively easy for a subsequent government, or for the same government if circumstances change, to abandon this practice and to appoint judges who do not sufficiently understand one of the two official languages, in most cases French. So it is really important that this measure be entrenched in legislation or in the Constitution.

As Professor Grammond noted at his appearance on March 7, it is very possible that the imposition of a language requirement that judges of the Supreme Court be able to fulfill their functions in both official languages could be implemented unilaterally by the federal Parliament. However, there is some doubt as to whether the federal Parliament may legislate alone by virtue of its power over federal courts under section 101 of the Constitution Act, 1867. It is also possible that this affects one of the Supreme Court's essential features, thereby requiring the assent of seven provinces representing, in the aggregate, 50% of the Canadian population.

Since there is doubt, we agree with Professor Grammond that it would be very useful for the federal government to refer the matter to the Supreme Court for the final say. That would be a way of resolving the impasse. This would help prevent a situation like the case of Justice Nadon a few years ago, when the debate had been unintentionally personalized. There was in fact a challenge based on the appointment of a particular individual. So we think the way to avoid that and move forward would be to refer the matter to the Supreme Court.

That's the first point I wanted to raise.

The second and final point I am putting forward is about the other judicial appointments.

The federal government appoints the judges of the federal courts. To that end, there are bilingualism rights under the Official Languages Act. However, the act is silent on all other judicial appointments made by the federal government in the courts, that is, the superior courts and appellate courts of the provinces and territories.

In our view, it is important to put in place rules, probably by amending the Official Languages Act, to establish quotas or, at the very least, guidelines to ensure that, when the government appoints judges to those courts, there is a sufficient number of judges capable of fulfilling their functions in both official languages. As a result, francophones' rights of access to justice would be upheld across the country.

We have identified five reasons why this would be useful.

First, federal laws, and the laws of New Brunswick, Quebec, Ontario, Manitoba and the three territories are enacted in both official languages. Judges must therefore be able to understand them in order to give full effect to the French version of these laws.

Second, under the Criminal Code, in accordance with the Beaulac ruling, the accused has a right of equal access to designated courts in the official language chosen. If there are not enough judges to respond to the request, we have a problem.

Third, many provincial and territorial regimes guarantee litigants' language rights before superior and appellate courts. If the federal government does not appoint those judges, that will not work.

Fourth, this may address the bilingualism issue at the Supreme Court of Canada. Appointing more bilingual judges or ensuring that there are bilingual judges in lower courts, superior courts and appellate courts will generate a larger pool of potential candidates for the Supreme Court.

● (1225)

Fifth, these rules would allow the federal government to meet the commitment set out in part VII of the Official Languages Act.

I would like to mention one last point before I end my presentation. If truth be told, the problem is not new. Since at least 1995, the Office of the Commissioner of Official Languages has been raising concerns about access to justice in courts presided over by federal judges.

More recently, in 2013, the Commissioner of Official Languages of Canada published a joint report with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario, which raised a number of issues and provided recommendations. The report essentially proposed that the federal government and the provinces work together to determine the needs for judges capable of fulfilling their functions in both official languages. It also proposed that a process be implemented for the systematic assessment of language capabilities and of language training needs to ensure that those obligations are met. The report has not been implemented and, to my knowledge, has not received a response. It would be a good idea to take action. The first pages provide a summary of the report, and you will find the summary of the recommendations in the appendix to our document, that is, the last two pages. Points 2.1, 2.2 and 2.3 deal with the collaborative approach between the federal government and the provinces, and point 5.1 deals with establishing an assessment process.

That concludes my presentation. I am ready to answer your questions.

Thank you.

The Chair: Thank you very much, Mr. Roy.

We will start with Mr. Généreux and Mrs. Boucher, who will be sharing their time. They have six minutes.

We'll start with you, Mrs. Boucher.

Mrs. Sylvie Boucher (Beauport—Côte-de-Beaupré—Île d'Orléans—Charlevoix, CPC): I'll just ask a quick question, because I have to leave.

I'd like to go back to what you said earlier, Mr. Power. Would you be in favour of the Commissioner of Official Languages having more powers? In my opinion, he has none.

Mr. Mark Power: Yes, of course, he should have more powers, but—

Mrs. Sylvie Boucher: Could the Office of the Commissioner become a separate entity? In other words, do you believe that the commissioner can be independent, somewhat like an ombudsman, but with respect to official languages?

Mr. Mark Power: Mrs. Boucher, I think he is independent, and he's already an ombudsman.

Mrs. Sylvie Boucher: However, he does not have much power.

Mr. Mark Power: He still has some powers. The essence of my remarks is that the commissioner, or the next commissioner, should make greater use of his current powers and that it would be desirable for the House of Commons and the Senate to better regulate this discretionary power, to first force him to do more.

Second, if he does more, he of course needs more money, which means that his budget must also be increased.

Mrs. Boucher, in addition to intervening in court, commissioners have several other ways of exercising their power. Some federal commissioners have the power to issue orders, for example, and others have the power to rule on cases or to force the use of arbitration. So it's not just a question of going to court, although it would be much better if they could do more. In my opinion, at the risk of repeating myself, it is unfortunate, if not ridiculous, that someone like Mr. Thibodeau should have to represent himself in court with the commissioner behind him when it should actually be the other way around.

● (1230)

Mrs. Sylvie Boucher: It should be the other way around, yes.

The Chair: Thank you, Mrs. Boucher.

Mr. Généreux, go ahead.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): I would like to continue with the same topic, but I will come back to it later if I have time.

Mr. Boivin, earlier, Mr. Samson jokingly said that we could get married in both languages. However, since I'm not divorced, I did not know that we could not get divorced in both languages. Please note that I have not attempted to do so either.

You suggest that the committee recommend that the government promote greater access to justice in both official languages for those who wish to divorce. Clearly, we are not promoting divorce as such, but how do you see this? We're basically talking about access to justice, and you're telling us that all other areas of the justice system, including criminal law, are well covered, unlike divorce law. That's my understanding. Before you comment on that, have I understood correctly that this is not possible in New Brunswick either?

Mr. Daniel Boivin: No. It is possible in New Brunswick.

Mr. René Arseneault: It is possible in our province.

Mr. Bernard Généreux: Okay. I should have talked to Mr. Arseneault about it instead.

Mr. Daniel Boivin: Under part VII of the Official Languages Act as it applies to the promotion of access to justice, the federal government should take the necessary measures to ensure that citizens have access to justice in their own language in any area they need. However, in the case of divorce proceedings, this is not possible in some territories and provinces.

Mr. Bernard Généreux: If people have access to justice in their language in other areas of activity, why is it that they do not also have access to this human right in the territories you named earlier? In fact, it is not a human right. I don't know what area of law it falls under. That said, how come they do not already have access to it?

Mr. Daniel Boivin: Civil litigation in provinces generally falls under provincial jurisdiction. Family law and the Divorce Act fall under federal jurisdiction. Several aspects of family law do not deal with divorce, but when it occurs, it falls under federal law.

The power of Parliament to legislate in its own areas could do for divorce what the federal Parliament has done for criminal law, meaning that when justices hear someone under that federal power, they will have to provide the service in English and in French.

Mr. Bernard Généreux: So there are precedents in other areas that could be applied to this as well.

Mr. Daniel Boivin: Criminal law is the best example.

Mr. Bernard Généreux: In your opinion, we should address this.

Mr. Power, you are on a roll today; you want us to change the Official Languages Act entirely. In fact, you would like the government to tackle the entire act to completely overhaul it, or to at least make major adjustments to it.

No government has done that in the past 20 or 25 years. I do not know how many years it has been since it was done.

You say that the act is not necessarily obsolete, but it needs to be updated. Which elements of the current act seem most problematic to you?

Mr. Mark Power: I have two comments, Mr. Généreux.

It is unusual for the federal Parliament not to touch an important piece of legislation for more than 30 years. In taxation, there are annual changes.

Federal legislation on official languages is the result of the work of Lucien Bouchard, when he was secretary of state in Mr. Mulroney's government, before he founded the Bloc Québécois. He did a good job.

Mr. Bernard Généreux: Is that the last time the act was updated?

Mr. Mark Power: That was the last time. It's been a long time, Mr. Généreux. It is important to remember that there was no Internet at the time. However, it revolutionized services.

At the time, Mr. Bouchard and Mr. Mulroney did a good job. Times have changed now. At the very least, it would be worthwhile for some people to review the issue as a whole.

Mr. Bernard Généreux: To make us understand that those changes were necessary, can you tell us what were the most significant changes that Mr. Bouchard made to the act at that time? That could remind us of the context. If you want, you can make a comparison with the changes we should make today.

● (1235)

Mr. Mark Power: I have never thought of the issue in that way. That's an excellent question.

Before that, the act was passed in the 1960s, during Pierre Trudeau's time. The act did not grant any real power to the Commissioner of Official Languages. I agree with Mrs. Boucher. So there was no real right to federal services in French. In addition, the territorial application of the act was very limited.

Changes were then made. The 1960s version and the 1988 version are like night and day. That's because society has changed and Canada has changed. The Canadian Charter of Rights and Freedoms, for example, was passed in 1982.

Today's Canada is no longer the same country it was in 1988. It is time to update this law.

Let me go back to your initial question. You asked what could be done in terms of access to justice. Language tests could be established for Supreme Court of Canada justices. As my colleague Mr. Roy suggested, this could also be done for the higher Court of Appeal.

In closing, I would like to say that another way of looking at this would be to set aside partisan considerations. For 30 years, all parties, whether the NDP, the Conservative Party or the Liberal Party, have introduced all kinds of small bills. Take Mr. Dion's bill on Air Canada services, or the Supreme Court bills introduced by the NDP or the Liberal Party. There have been all sorts of small bills that, in their own way, have all tried to change things that needed to change.

Mr. Bernard Généreux: It was compensating, in a way.

The Chair: Thank you, Mr. Généreux. I now have to give the floor to Mr. Lefebvre.

Mr. Paul Lefebvre (Sudbury, Lib.): Thank you, Mr. Chair.

My thanks to the witnesses. Your comments and suggestions are clear. It is nice to hear concrete ideas.

I would like to come back to what Mr. Généreux said about promoting access to justice in French in minority communities.

What is happening in that area right now? What is the federal Department of Justice doing to promote access to justice in French?

Mr. Daniel Boivin: Working groups were formed in the wake of the 2015 report by the Commissioner of Official Languages. In that respect, it is clear that work is being done. This morning, Mr. Rémillard and I met with people from the Department of Justice so that they could update us on what is happening. There's some progress.

Mr. Paul Lefebvre: So committees are meeting, fine, but what more would you like?

Mr. Daniel Boivin: There is a common factor to the difficulties we face: a lot of people are involved in the field of justice. We have chief justices on the one hand and provinces on the other. Although appointments are a federal responsibility, the administration of justice is in provincial jurisdiction. So there are a lot of bridges to build.

Some bridges were built a few years ago when there were problems in connection with the Contraventions Act. Committees were set up. Those bridges were imposed by the court when a tribunal indicated that the feds should be more proactive in terms of the Contraventions Act. Those bridges are still being built and agreements with those providing the services are still being reached. But people at municipal and provincial level, who are not necessarily under federal control, are often the actual primary interface with the public. That is a difficulty.

Another reason why the situation is difficult is that, as a community, we lack a solid network capable of assisting the Department of Justice. To move things forward, the department needs information on what is happening in the trenches. That need can be met by lawyers and their communities. In Ontario, it is not a major problem. The Association des juristes d'expression française de l'Ontario (AJEFO) operates in the province and is a very solid, active and reasonable organization. The fact remains that such is not the case everywhere.

Mr. Paul Lefebvre: In this study, we are asking ourselves how we could encourage the federal government to support access to justice in French. Perhaps you could suggest other concrete ways of doing that.

We often hear that there are delays in terms of access to justice in French. In Ontario, if people want a case to be heard in French, they have to expect delays. There are often not enough judges or prothonotaries, for example. A number of positions in the legal system cannot be filled in a reasonable time. But everything has to be in place at the same time if a case is to be heard in French.

Does anyone keep track of the delays? Here in our world, we are missing a lot of data. We are told that we have to invest more money, but how can we be assured that the services are really going to improve?

● (1240)

Mr. Daniel Boivin: That is a very good question. In fact, one of the problems is that chief justices want to know exactly how many requests there are. But quantitative analysis has to consider so many factors that, statistically, the data have little validity. Actually, you can make those figures say anything you like.

That is why the Commissioner of Official Languages went to a qualitative analysis, rather than a quantitative one. He conducted interviews with people like myself, people working in the trenches, that is, to determine the nature of the obstacles, not to try and quantify the consequences of those obstacles.

Mr. Paul Lefebvre: Thank you.

Mr. Power, Mr. Roy, do you have an answer to my question?

Mr. Marc-André Roy: I quite agree with everything that Mr. Boivin said, but I would like to add that it is difficult to get a handle on the problem quantitatively. First, we need more judges. As a result, we cannot count all the people who became discouraged by our lack of judges and who never asked for for justice services in French.

That is why more appointments are needed. So the act will have to be amended or restructured and the report from the Commissioner of Official Languages will have to be implemented. We also have to make sure that services in French, or in the minority language, are actively offered by court administrations, not just by judges. So we have to work with provincial governments to make sure that that is done.

Mr. Paul Lefebvre: In your brief, you state that things are not perfect at the federal level in terms of judgments being published, and even that a number of them are not translated.

I have two questions.

Do you know who the translators working for the Department of Justice are? Does the translation bureau do those translations?

Then, do we have an idea of the budget for translating those judgments?

This week, we had representatives from the Quebec Bar here with us. The President told us about the challenges in Quebec. Previously, they received the $200,000 you mentioned, but that was eliminated, which greatly reduced the ability to translate the judgments.

Can you give us more details about what happens at federal level?

Mr. Mark Power: I am sorry, Mr. Lefebvre, I do not have specific answers to those questions.

However, I repeat that what we need is for the service to be actively offered, which means appointing more judges. If more bilingual judges are appointed, people will come forward and ask for services in their own language.

It is the same with the judgments. Let me give you an example. In 2008, when Mr. Harper prorogued Parliament in order to trigger an election, it led to a 2010 Federal Court judgment called Duff Conacher, et al. v. Prime Minister of Canada, et al. At the time, the Canadians most interested in the matter, according to the polls, were those in Quebec. In Quebec, it was being followed more than anywhere else. But the Federal Court judgment was published in English only, with a note that the French version would follow. That makes no sense, Mr. Lefebvre.

Mr. Paul Lefebvre: I don't understand. All Federal Court of Appeal judgments are published in both languages, are they not?

Mr. Mark Power: No, Mr. Lefebvre, I am sorry, but that is not so. Look at page 2 of our document. It's in 10-point type, you need good eyesight to read it, but we included the wording of section 20 of the Official Languages Act, Mr. Bouchard's and Mr. Mulroney's act, which specifies the circumstances under which translation is done. It is not done all the time.

The Chair: Thank you very much, Mr. Lefebvre.

We now move to François Choquette.

Mr. François Choquette (Drummond, NDP): Thank you, Mr. Chair.

My thanks to all the witnesses for shedding some very important light on the matter.

Still, I wanted to point out that you have been working on bilingualism for Supreme Court justices for a long time, Mr. Power, Mr. Roy. You have written some excellent documents, including one in French, published in *Erudit*, whose title has been translated as "On the possibility of being understood directly, orally and in writing, in Canadian courts without the assistance of interpretation or translation services". There is another document in English. Those documents clearly highlight the need to appoint bilingual judges to the Supreme Court first and foremost. Moreover, you systematically dismantle the arguments made by some who maintain that there are no bilingual judges in British Columbia or Newfoundland and Labrador. My congratulations for that.

So you welcome the Liberal government's new policy on appointing judges to the Supreme Court, but you are of the opinion that it is not enough. Is that what you are saying, Mr. Roy?

● (1245)

Mr. Marc-André Roy: We welcome the measure because it assures us that, in a foreseeable future, the next judges will be appointed under standards of bilingualism. We feel that the government is acting in good faith, that it will move forward, and that it will adopt the practice in the foreseeable future. However, it remains wholly possible that a subsequent government may quite simply abandon the practice.

That is why we are recommending this, for now. First of all, we must make sure that we understand the formula that applies. In other words, we have to determine whether Parliament can act alone or whether it must proceed using the amending formula in the Constitution. In that way, with that change, we will make sure that the judges are required to be bilingual.

Mr. François Choquette: Is it your recommendation that the current government, in this mandate, introduce a bill to amend the Official Languages Act, or should it refer the matter to the Supreme Court for it to determine whether Parliament can act without having to amend the Constitution?

Mr. Marc-André Roy: We recommend a reference. The first step is to make sure that the process is being done properly, to avoid a disaster like the Justice Nadon affair. One specific example was used to contest and overturn an appointment. We want to avoid a similar problem and all the implications of politics and respect for the courts that it caused.

Mr. François Choquette: I understand, and the sooner the better.

Mr. Marc-André Roy: Yes.

The Chair: Mr. Choquette, would you let me chime in, just for a moment?

Mr. François Choquette: By all means, Mr. Chair.

The Chair: Gentlemen, you are constitutional lawyers and you are recommending a reference. If the Official Languages Act were to be amended, would it be constitutional or not? As constitutional experts, what is your opinion?

Mr. Marc-André Roy: I read Professor Grammond's arguments in March with interest. At first sight, I share his opinion. There is a very good chance that the federal Parliament can act alone. That said, everything revolves around what is considered an essential characteristic of the Supreme Court. Unfortunately, it is very hard to predict what the courts will decide. Having an opinion as a constitutional expert is one thing; it is quite another thing to predict which way the Supreme Court will lean. There seem to be very good arguments on both sides of the debate. That is why we have to proceed carefully in this matter.

The Chair: Thank you, Mr. Roy.

Mr. Choquette, you may continue.

Mr. François Choquette: Thank you, Mr. Chair.

My next question deals with the famous report by the official languages commissioners, dealing with access to justice in both official languages. I say "commissioners" because it was done in partnership with other commissioners.

One of the recommendations in that report was to set up an evaluation process for appointing higher court judges that would be the same everywhere.

The current government has changed the formula a little. In order to assess the level of bilingualism, they propose a more detailed self-assessment using a questionnaire. Is that enough or should they be going further?

What do you think, gentlemen?

Mr. Daniel Boivin: The FAJEF's view is that the bilingualism self-assessment is a step in the right direction, but it is not enough. There must be an evaluation. In the system, people declare themselves to be bilingual too often. They are certainly bilingual enough to be able to communicate in both official languages in a social setting. But it is another thing entirely to be able to hear witness and fully understand evidence, because that requires very specific language knowledge.

These days, the Supreme Court hears the most complex and technical of cases, ones that have not been able to be resolved elsewhere. So the judges are called upon to resolve extremely complex matters. In that context, litigants must constantly be wondering whether the judge understands them when they use the technical and precise terminology of a complicated principle. It's a question I often ask myself in my area of practice. That is why it is essential to be able to measure the true ability of already sitting judges who call themselves bilingual, as well as the ability of those who are seeking judges' positions that are designated bilingual.

● (1250)

Mr. Mark Power: It is not only perfectly normal, it is responsible to require certification to confirm that those who think or say that they can do something actually can do it. As an example, I am not allowed to drive an 18-wheeler on the highway without a license, and that is a good thing. I have to prove to the state that I am capable of driving at 100 km per hour. I have no business being a member of the Royal 22nd Regiment if I cannot express myself well enough in French for my shell to go where my fellow soldiers tell me it is supposed to go. Likewise, I should not be a federal public servant providing front-line services if I do not have an exemption or the highest classification for service.

Self-assessment does not work. I go much further on this than the FAJEF, whose position is too moderate and probably too generous towards the government. Here's why.

I do not want to be a judge, but if I did, I would fill in the form that every judge has to complete. Here is one of the questions on language:

> Without further training, are you able to understand oral submissions in court in:
> English:
> French:

It makes no sense that candidates for the Court of Queen's Bench in Alberta or the Supreme Court of Nova Scotia do a language self-assessment. I really want Justices Rowe, Rothstein et al to meet a parliamentary committee, but it is too late. We are not going to test anyone's language ability on CPAC once a candidate has been officially announced. We do it with public servants and with members of the Royal 22nd Regiment, and we should also do it with judges, whether at the Supreme Court of Canada or elsewhere.

The Chair: Thank you, Mr. Choquette.

Over to you, Mr. Arseneault.

Mr. René Arseneault: I am going to continue along these lines. I do not want to go round in circles because Mr. Choquette asked very good questions. But I would like to make a comment. When I go to buy a stamp, the clerk at the post office counter must be bilingual. But, in 2017, the person defending my rights does not need to be able to understand me in order to be able to stand up for me as I claim my language rights. That is what you are explaining to us today.

You suggested referring the matter to the Supreme Court. Is there a logical way in the short term, without being too aggressive and causing too much collateral damage, to make sure that the government, this government and governments to come after each new election, are required to appoint bilingual judges to upper courts? We have to have something more than the government's good intentions. Is it possible to pass legislation quickly and easily? Could we make some kind of amendment to an act that already exists?

Mr. Marc-André Roy: There is one thing that can be done: we could have legislation on language evaluations. We may not be able to amend the Supreme Court Act, as Mr. Choquette's bill proposes, for example, to require the appointment of bilingual judges. But we could require an evaluation for each candidate whose name is put forward for appointment by the government. In that way, we are assured that the government will at least make decisions based on facts. It does not go as far as we would like, but at least it goes part of the way.

Mr. René Arseneault: To make sure this is on the record, could you tell us how this can be done?

Mr. Marc-André Roy: There are many ways to accomplish this. An amendment to the Official Languages Act could be proposed.

Mr. René Arseneault: So we could take action through the Official Languages Act.

Mr. Marc-André Roy: Yes.

Mr. René Arseneault: Okay, perfect. Thank you.

I'm sorry for moving along quickly, but I have a lot of questions. There are so many exciting topics involving language rights.

Mr. Boivin, please allow me to address something a little more technical. I am from the generation of lawyers that lies somewhere between flint and the Chinese abacus. Quicklaw software was released in my last year in law. It is a way of consulting case law electronically. This appeared when the computers did not work well, and their motors ran for a long time.

I remember that it was a problem in New Brunswick. As much as possible, we had the documents translated. Before that, we waited for the book of case law, which was bilingual in New Brunswick. You probably remember the old black binder that arrived. Every six months, we waited to update one of these books.

Then came Quicklaw, specifically. There are others, now. However, these people who provided case law through the Internet or websites were not subject to the Official Languages Act. We often saw decisions that were presented to us on these sites in only one language.

Earlier, you were talking about the emergence of the Internet from an official languages perspective. It's a problem, even in a province that translates its decisions and makes them simultaneously in both languages, as is the case in the New Brunswick Court of Appeal, for instance.

How can we ensure that the people who produce case law on the Internet do so in both languages?

● (1255)

Mr. Daniel Boivin: The whole issue of tools needed to practise law that come from the commercial world is a big problem for francophones in minority situations, because the commercial market is not big enough to justify the expense. The problem is partly resolved by the gradual replacement of commercial databases with non-profit databases.

The database that is being used more and more now is being developed by CanLII. All of the provincial bar associations are participating in the process to encourage information exchange rather than make profits. Of course, nothing is free, but at least agreements are made with non-profit organizations that are not only interested in trying to make money with the legal community.

We could talk at length about certain software programs that help in family law or that offer models of wills and estates, for example, but that are not available at all outside Quebec where there is a francophone market.

It is important to support these projects through funding to community organizations. At the moment, for example, there is a project in Ontario that helps the AJEFO and the Centre for Legal Translation and Documentation to select important cases from the Ontario Court of Appeal for dissemination in both languages. Projects like this can at least begin to build case law.

Of course, as with any field, the more terminology is constructed, the easier it is to produce decisions in both languages, since legal experts and jurilinguists do not need to reinvent the wheel.

Of course, having an obligation under legislation would be ideal. In the meantime, we will be able to make projects by giving funding to existing community organizations and networks.

Mr. René Arseneault: Thank you very much.

I'm going to change the subject.

Mr. Power or Mr. Roy, I understand that the Official Languages Act of New Brunswick is automatically revised every 10 years. I think it was a good idea to put that provision in the legislation. So, every 10 years, the government in place, regardless of the party in power, has a duty to revise and update the act based on the development of society.

Mr. Mark Power: That's right. About 15 years ago, the Court of Appeal of New Brunswick ruled that some sections of the Official Languages Act of New Brunswick were invalid. At the time, Mr. Lord was the province's premier. So he had one year to rewrite the Official Languages Act of New Brunswick, which he did.

Before that review, the act hadn't been amended since Mr. Robichaud's era. It was outdated. One of the things that Mr. Lord did was to include a section that stated that the Legislative Assembly of New Brunswick had to review its act every 10 years.

The same is true in the Northwest Territories, in Nunavut and across Canada. In fact, a similar process is set out for areas other than language. So it is normal for a parliamentary assembly to regularly review important texts. It is done for official languages elsewhere, at other levels of government. It is done in taxation. It should also be done for Canada's Official Languages Act.

The Chair: Thank you very much.

We are going to give the floor to Mr. Généreux for a final intervention from him.

● (1300)

Mr. Bernard Généreux: Thank you, Mr. Chair.

My question is more for Mr. Power or Mr. Roy. I don't know whether Mr. Boivin will be able to answer as well.

I received a letter yesterday from the president of the Bas-Saint-Laurent-Gaspésie-Îles-de-la-Madeleine bar association, Clément Massé. He shared two of his observations in his letter. First, he talks about the appointment of judges, which he thinks moves much too slowly. His second observation concerns the new federal government-designed form to put forward a Supreme Court nominee. This form represents the new way of doing things for the current federal government.

We are talking here about access to justice in both English and French across Canada. However, in Quebec, lawyers working in rural or regional settings are much less likely to be involved in litigating or defending cases before appellate courts, superior courts or federal courts of first instance, such as the Federal Court or the Tax Court of Canada. The form in question clearly indicates that nominees must have relevant experience before these bodies to eventually be appointed judges in superior courts. In fact, Mr. Massé considers that this is potentially discriminatory.

What is your opinion on this? Have you had an opportunity to consult the form?

Mr. Mark Power: Yes, I have it in front of me. I'm not sure how to answer your question. I'll try, but perhaps Mr. Boivin or others would like to try to round out the answer.

Mr. Bernard Généreux: Basically, we're talking about access to justice.

Mr. Mark Power: I understand, Mr. Généreux.

So I'll say two things. The regional or provincial chief judge is still responsible for allocating human resources as required based on absences due to illness, depending on the request for cases. However — and this may be of interest to the committee — the chief judge must have human resources to allocate. This brings us back to the need to appoint a sufficient number of judges, be they in Montreal or elsewhere.

Mr. Bernard Généreux: That is clearly not the case right now.

Mr. Mark Power: Yes, but allow me to quickly wrap up on this. In the document we have submitted to you, we include excerpts from the report of the Commissioner of Official Languages. In item 2.3, he recommends to “identify the appropriate number of bilingual judges and/or designated bilingual positions”. If bilingual positions can be designated in the federal public service, bilingual judges can be designated, be it in regional sectors or elsewhere. That can be done.

The Chair: Thank you very much.

Mr. Samson will ask the last question.

Mr. Darrell Samson (Sackville—Preston—Chezzetcook, Lib.): Do I have to ask a question or can I comment, or do both?

The Chair: You can make a comment or ask a question; it's up to you.

Mr. Darrell Samson: I have two questions.

Some judges and experts are saying that there is no need to recruit enough bilingual judges. What are their arguments and how can you answer them? You say that anything is possible, but some people doubt that. What do you say to those who feel that it is an impossible task?

Mr. Marc-André Roy: Here are the two arguments I hear most often.

First, people say that bilingualism is not a skill and that we should, therefore, support judges who have the best knowledge of the law or who have a particular expertise, rather than judges who are bilingual.

To that I say that bilingualism is, in fact, a skill. Judges are asked to interpret bilingual pieces of legislation, so they must be able to understand the hearings held before them in one language or the other and to make their own analyses by reading their own documents.

Mr. Darrell Samson: What is the second argument you hear?

Mr. Marc-André Roy: The second argument is the lack of candidates. It is assumed that there are no bilingual lawyers in Alberta or in Manitoba, and that is a false assumption.

Mr. Power and Professor Grammond co-authored a text on the issue. There are bilingual candidates in every Canadian jurisdiction.

Moreover, times are changing. Bilingualism is increasingly accepted in Canada. More and more people are proud to learn both languages.

On Monday, I was listening to Justice Brown at the Michel-Bastarache lecture. He said that he grew up in western Canada, where he learned French and where he was able to preserve it.

Moreover, just recently, Judge Rowe, who is from Newfoundland and Labrador and is bilingual, was appointed to the Supreme Court. However, no one believed that there were bilingual judges in Newfoundland and Labrador.

● (1305)

Mr. Darrell Samson: Very good. I am now convinced. That's excellent.

I have one last comment to make, before I wrap up. I was listening to the discussions, and it all comes back to the lack of promotion of language rights. The connection Mr. Power established is very important. There is a lack of promotion of bilingual services at the airport, so people don't demand that their rights be respected. In education, the rights set out in section 23 of the Canadian Charter of Rights and Freedoms are not sufficiently promoted. The lack of promotion is a problem we have to resolve in one way or another.

Thank you.

The Chair: Thank you for that comment, Mr. Samson.

Respected colleagues, thank you very much for this excellent presentation and the discussion we have had with you.

Once again, on behalf of the committee members, thank you very much.

The next meeting will be held next Tuesday. Mr. Nater will preside over it.

The meeting is adjourned.