House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 032 • 2nd SESSION • 40th PARLIAMENT

EVIDENCE

Wednesday, June 17, 2009

Chair

Mr. Ed Fast

Standing Committee on Justice and Human Rights

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● (1545)

[*English*]

The Chair (Mr. Ed Fast (Abbotsford, CPC)): I call to order meeting number 32 of the Standing Committee on Justice and Human Rights for today, Wednesday, June 17, 2009.

Members, you have before you the agenda for today. We're continuing our review of Bill C-232, An Act to amend the Supreme Court Act (understanding the official languages). We'll be hearing from two separate panels of witnesses.

For the first hour, I'm pleased to welcome retired Justice John Major. Thank you for being here and welcome to our committee. I think you know the process. You have 10 minutes to present, and then we'll open up the floor to questions from members.

Mr. John Major (C.C., Q.C, Puisne Judge of the Supreme Court of Canada, Retired, As an Individual): My presentation won't be too profound, as I was only invited to this unexpected party, as it were, last Friday. However, I understand the nature of this amendment to the Supreme Court Act requiring that any new nominee understand French and English without the help of an interpreter.

I would begin by saying there is no question of the right of the litigant to have his case heard in his language of choice in Canadian courts. Certainly, in the section 96 courts, that is his right.

The basic concept here has to be properly decided, and the judge has to have a complete understanding of the case. The ideal, of course, would be to have a judge who was perfectly bilingual. But there are very few of those in the country. Of recent memory was the late Chief Justice Lamer, who was fluent both in the spoken and written language.

It is vital that the case is properly understood, and the system must be fair to all parties. But I am absolutely adamant in my view that the test for the appointment of a judge should be competency. That has to be the priority, and anything else that comes with it is a bonus. It would be a mistake to substitute anything in place of competency. Particularly in the Supreme Court, cases have to be as near correct as humanly possible, because they have a national impact on the whole of the country.

Any inadequacies in the language of an appointee are presently handled by way of translation. I was unilingual for all intents and purposes, and I was on the court for 14 years and made use of the translation, which I found to be very good. There was no case from Quebec or elsewhere argued in French in which I did not feel I had a complete grasp of the facts and the positions of the parties.

It's interesting that the United Nations operates the same way, except that they have multi-translations because of the nature of the establishment.

I guess I'm going to sound like a broken record on the subject, but competency is the cloud that sits over top of this.

Sometimes the matter comes up in a different way. As you know, in Canada we have geographic requirements for six of the judges on the Supreme Court; that is, they have to come from different areas of the country. Quebec has constitutional right to three judges. I've heard the question raised—in fact, in Rothstein's appearance—how do the common law judges feel about deciding civil law cases? The answer is that they feel very comfortable, just as the three civil law judges from Quebec feel quite comfortable in deciding common law cases from the nine other provinces. So I don't think the question of understanding a case by virtue of translation is a serious problem.

● (1550)

I think it would be a serious problem for the country as a whole if anything less than competency were the first requirement for appointment to that court. Over the years, there have been no complaints from litigants—at least, not any made to the court during my tenure there. The Canadian Bar Association has not raised this as an issue.

I suppose by way of concluding remarks I would ask, does anyone suffer by this proposed amendment? I would say the litigants suffer if the test of the judge is less than that of competency.

Thank you, Mr. Chairman. Those are the few remarks I have.

The Chair: Thank you so much.

We'll open up the floor to questions. Who will be going first?

Monsieur D'Amours, for seven minutes.

[*Translation*]

Mr. Jean-Claude D'Amours (Madawaska—Restigouche, Lib.): Thank you, Mr. Chairman.

Thank you for coming this afternoon, Mr. Major. I would like to ask you a few questions.

Would you say that the Supreme Court is the final court or final recourse that citizens can turn to?

[*English*]

Mr. John Major: As I said at the beginning, I'm unilingual. I was saying how good the translation was.

The Chair: We'll make sure you have your earpiece available. We'll wait a moment until you have your earpiece in place.

[*Translation*]

Mr. Jean-Claude D'Amours: Thank you, Mr. Chairman.

You will now be able to hear the simultaneous interpretation. Perhaps you'll understand my concerns. Do you think that the Supreme Court is the final place Canadian citizens can turn to to have their rights respected?

● (1555)

[*English*]

Mr. John Major: It raises an interesting question. Not to be too philosophical about it, Parliament remains the final court of appeal, but in the judicial system it's the Supreme Court.

[*Translation*]

Mr. Jean-Claude D'Amours: So it is the final court. I asked the question but I expected the answer. As you know, in the lower courts there are bilingual judges. The fact that they are bilingual means that francophones can automatically exercise their rights in their own language. It also means that anglophones can exercise their rights in their language. It means that when there is a need to speak, one can do it in one's language. The judge who is sitting will be able to understand the importance of the arguments and ensure their rights are respected. I'm talking about the lower courts.

Given that you stated earlier that the Supreme Court is the final court Canadian citizens can turn to to exercise their rights, it is fortunate that being before the Supreme Court does not involve life or death issues. However, one can't go any further than that.

Do you feel that people should feel comfortable and certain that they are at no risk, with respect to the Supreme Court's final rulings, because of their language?

In the lower courts, these individuals are guaranteed that they can speak in their own language and that the person before them will be able to speak to them in their own language and understand their language. One can go no further, I'll repeat this, one can turn to no other court, one has no other recourse, it's the end. Earlier, you couldn't hear the interpretation. Therefore you were not able to understand me, and I respect that, but imagine the situation where the interpretation was even further from what I am saying right now. If people cannot be well understood because of the interpretation, do you think that the citizens or the lawyers representing them will be able to present their arguments and fully exercise the rights of their clients?

[*English*]

Mr. John Major: From my experience there and seeing the litigants argue in French, I never had the impression that they did not feel they were being fully understood. There will always be, of course, the three Quebec judges, but the environment and the translation is such that it never occurred in my 14 years. The translation is very good. The parties argue in French and seem quite comfortable with the questions asked, and in many cases the lawyer understands English, so he answers; in other cases, it's translated for him.

[*Translation*]

Mr. Jean-Claude D'Amours: Mr. Major, imagine an individual who wants to exercise his rights, an individual who wants to say absolutely everything he or she has to say before the Supreme Court and be sure that the judges will be able to understand his arguments and the direction that he is going in. Are you certain that the judges have no problems? It can't just be a feeling, it has to be a certainty.

I have been speaking somewhat faster and I am convinced that it automatically becomes more difficult for the interpreters to follow me. Imagine a flamboyant lawyer who's getting carried away and who is speaking even faster than I am. At some point in time the judge will probably experience problems in understanding everything that lawyer is saying. The interpreter will also experience problems in following what they are saying.

If the interpreter is having a problem in following me, will you, as a judge at the Supreme Court, be able to fully understand my arguments?

[*English*]

Mr. John Major: I understand what you're saying, but from my experience, if the lawyer was speaking rapidly, you would ask him to slow down. The translation always seemed to be accurate; the lawyers appeared quite comfortable. Now, I can't speak for what may be their hidden thoughts, but I never had the impression that the francophone lawyer did not feel his case was understood.

● (1600)

[*Translation*]

Mr. Jean-Claude D'Amours: You'll understand that on the other hand, the speed I am speaking at would not be a problem for a judge who understood my language. I could speak at whatever speed I wanted to, and the judge would be able to understand me.

[*English*]

Mr. John Major: No, don't assume that, because many lawyers speak very rapidly and they're asked to repeat. You have to hear what's being said if you're a judge. Some lawyers get excited, speak rapidly, and the court will say, “You're speaking too quickly.” So you have to adjust to who you have in front of you.

[*Translation*]

Mr. Jean-Claude D'Amours: I understand your point of you, but clearly if the judge before me understands my mother tongue—even if I come from New Brunswick my mother tongue is French—then regardless of the speed at which I'm speaking, they will have no problem in understanding me. It's the translation that may suffer some distortion or delay.

You say that a lawyer can be asked to speak more slowly but I would just point out that this is also a way to exercise one's rights. They say what they want to say and it comes from the heart. Lawyers are there to ensure that their client, who is a Canadian citizen, gets full justice. This is the final court in the land. I understand that lawyers can be asked to slow down, but this is their way of expressing themselves.

If judges understand both French and English does that not allow lawyers then to express themselves at the speed they wish to? If this is how they exercise the rights of their clients then at least they can do so fully. When citizens hear the ruling, whether it is in their favour or not, at least they will know that they were fully understood. At least they will be able to tell themselves that the proceedings were held in their language and that nobody will have been able to say that they didn't understand what was said fully.

[*English*]

Mr. John Major: You made some assumptions that I don't agree with.

What we're talking about is a trade-off. In the ideal world, all nine judges would be bilingual. In a practical sense, it's going to be very difficult to find judges from B.C. and Alberta who have had the same opportunity to be bilingual. So the test is this. Will you sacrifice the competency of a judge in order that he has an understanding, without the help of an interpreter, to hear the case? In my opinion, to sacrifice competency in order that all the judges.... They may not be bilingual in accordance with the amendment; they just understand with an interpreter. I think it's a bad trade-off for the litigant. I would prefer to have a competent judge who needs the help of translation than someone not as competent who does not.

The Chair: Thank you.

We'll move on to Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you for coming this afternoon.

I would say with the greatest of respect that I was very disappointed by your testimony. I hope that your opinions aren't shared by most legal experts.

First, I refuse to disassociate competency and bilingualism.

[*English*]

The Chair: On a point of order, Mr. Storseth.

Mr. Brian Storseth (Westlock—St. Paul, CPC): Thank you, Mr. Chair.

I'd like to point out that Mr. Ménard represents a riding in Quebec and he represents the Bloc Québécois, but he does not represent the majority of lawyers in this country and shouldn't speak on behalf of them.

The Chair: Thank you, Mr. Storseth. I don't believe that's a point of order, it's a point of debate.

Mr. Réal Ménard: This is not a point of order, and you will ask your question at your turn. Now it's my turn.

The Chair: Monsieur Ménard, please continue.

[*Translation*]

Mr. Réal Ménard: As I was saying, sir, I'm disappointed in your opinion and I hope that it is not shared by most legal experts. I refuse to accept that there's no connection between competency and knowledge, on the one hand, and bilingualism, on the other. Mr. Godin pointed out in his testimony that the requirement to be bilingual applied to courts within federal jurisdiction. Therefore if this requirement applies to judges in federal courts that are lower than the Supreme Court, I would think that as parliamentarians we are justified in thinking that it should also apply to Supreme Court judges.

I do not know why you haven't learned French and I don't judge that, but as parliamentarians, it is our duty to say that if Mr. Godin's bill is passed, then all those in the legal profession in Canada who want to be accepted on the bench and be given higher levels of responsibility, in the Supreme Court, for example, will have to learn French, whether they come from Alberta, Prince Edward Island, Saskatchewan or elsewhere. If, in your case, that requirement had existed, then maybe you would have made the effort to learn French.

I think that Mr. Godin's bill sends a very clear message to the next generation of people of the legal profession. I do not question at all your legal knowledge and I do not doubt that you have served the Supreme Court well, but if that message had been clearer when you were studying law, then perhaps you would have made the effort to learn French.

I would like to hear your opinion on that.

● (1605)

[*English*]

Mr. John Major: You've asked me about 15 questions, but let me try to answer some of them.

First, this amendment would not have the support of the majority of lawyers in Canada. I doubt it would have the support of the majority of lawyers in Quebec. That's point number one.

Point number two is that in my own case I did not aspire to be a judge; I was invited to be a judge when I was in my late fifties. So your premise that you start off wanting to be a judge and as a result you'll learn French is not practical, because I don't believe most lawyers start out wanting to be a judge. You can't be a judge by choice; you have to be selected. You can't write an exam and be a judge.

In the lower courts, as you mentioned, they are entitled to have their cases heard in the language of their choice, and in virtually all those courts.... In Alberta, for instance, you have 90 judges, and of the 90 judges there are some who are bilingual and can hear the case in French. So at the lower courts it's not a problem. There are enough bilingual judges in both languages. I'm sure the same is true in Quebec. You can have your case heard in English. A Supreme Court decision says you can do that in French or English. But we come back to this question: if you have the most competent judge possible available but he needs to use translation, are you prepared to say to the people of Canada, we're not going to give you the best judge; we're going to give you the best judge who can understand your language without translation?

[*Translation*]

Mr. Réal Ménard: I am not sure what leads you to think that the majority of lawyers would not agree with the requirement under this bill. I would like you to tell me what you base your statement on.

Furthermore, I will say again with all due respect, that I refuse to support your logic, which I think is flawed. You can't disconnect knowledge and bilingualism. Competency can be strengthened and increased by bilingualism. I refuse to think that it has to be a choice. How many bilingual judges currently sit on the Supreme Court? We've been told there are 8 bilingual judges. With the exception of Judge Rothstein, the other judges are bilingual. There is no disassociation. We don't have to choose between bilingualism and competency. We have to send a message to all lawyers in training that competency includes bilingualism. There is no disconnect between the two.

[*English*]

Mr. John Major: First of all, you ask the lawyers this question: do you want the most competent judge, or do you want the most competent judge with some knowledge of the other language?

It is incorrect to say you have eight bilingual judges in the Supreme Court at the moment. You have eight judges who probably meet the requirement of the amendment, in that they have some knowledge of the other language, but to me—and I speak from the knowledge of my own spouse and members of the family—being able to converse is not being bilingual. Being bilingual, understanding the other language fully, is quite a chore. You can have somebody who has a very acute legal mind but is not very good at languages.

I'm just repeating that if the test is the most competent versus the most competent who is somewhat bilingual, my own opinion is that I want the most competent judge. It's same as surgery: I want the best doctor; I don't want the linguist.

● (1610)

The Chair: We'll move on to Mr. Comartin. You have seven minutes.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair. Thank you, Justice Major, for being here.

I don't want this to seem offensive, but I've sat—

Mr. John Major: I don't think you have to worry about offending me.

Mr. Joe Comartin: Okay. Thank you. That's actually what I'm getting at.

I've sat through the last four appointments to the Supreme Court. They all employed different methodologies, but I certainly got a real sense of not only the ultimate candidates but of all the candidates who were eligible. Because that's all confidential, I cannot go into any more detail than that, but I can say to you, Justice Major, that in all those cases they were in fact solid candidates who were fluently bilingual. I will add that if they were coming from the appeal level, they had conducted trials and hearings, as they would have to do at the Supreme Court level.

I think what I'm doing at this point is challenging your assertion that those candidates do not exist. This is the final point I'll make: they not only exist now, they are in fact growing in number. As the years go by, more and more competent lawyers and judges will be candidates for the Supreme Court.

Mr. John Major: I don't think the fact that they're bilingual is going to be held against them. I said at the beginning that it's desirable. I would agree that it would be the perfect world; if you can get a talented judge who is also conversant with the language, that's the best of both worlds.

What we have to do is come down to the tough decision, the ultimate decision—and it may not happen—in which you have a most competent judge who doesn't meet the requirements of the present amendment versus a judge who, though not as competent, does meet those requirements. If you get to that hypothetical position, then I say that in the interests of justice for the whole country, you should pick the most competent judge. After all, it's a judge you're looking for. I agree that chances are you'll be able to find both, but I don't think it should be a statutory requirement because of that possibility of not getting the most competent.

Mr. Joe Comartin: It precludes the possibility of the unusual or rare case, given the number of competent lawyers and judges we have at the lower levels, as a candidate. That's your position?

Mr. John Major: Yes, that's right. It's essentially my position. I want to make it clear. Somebody inferred that I might have said that because a person's bilingual he's therefore not competent. I don't know how that could have been misinterpreted. I'm not saying that. Usually you find people who are bilingual very competent as judges. I have no problem with that. It's an added feature. It's something that elevates them a step higher than another. But we're not talking about those people. We're talking about the tough case, where you have to make a choice—if it ever comes to that—between the most competent but inadequate in this requirement and somebody not as competent.

To me, it would be a mistake to sacrifice competency. If you don't have to sacrifice competency, then it's not a question.

● (1615)

Mr. Joe Comartin: Let me flip that to the other side, because I think that if there were criticism of your position, this is where it would come from. What I see and I think most of us who are supporting this motion see is that the competency issue includes giving someone credit for being fluently bilingual.

Mr. John Major: Well, you see, that's a mistake. Competency in the law and competency in language—some people may be gifted in both, but a linguist may not be a good lawyer. There are lots of them who are very good lawyers, and they can speak two or maybe more languages. It's not an impediment to be a linguist.

However, come back to the essential question. You've asked the tough question: are we going to pick competence over the ability to understand the other language? Don't cloud the issue by saying that you have a lot of both. If you have a lot of both, you don't need the amendment and you don't come down to the question of what the main quality is for serving on the court, which is legal competency. It must be legal competency. At least, that's my opinion.

Mr. Joe Comartin: Just so we're clear, if two candidates are of equal competency but one is fluently bilingual, we pick the fluently bilingual candidate.

Mr. John Major: Yes, I think that's fine. I think then you have equal competency plus, and the plus goes to the person who is bilingual or who understands sufficient, according to the amendment, to qualify.

The Chair: You have one minute.

Mr. Joe Comartin: In terms of the points you made earlier in your presentation, we did have a law professor and lawyer here on Monday who indicated that he, in fact, felt that on at least one occasion he did not get a full hearing and a full understanding from the bench because of the translation.

Mr. John Major: Did he lose?

Mr. Joe Comartin: He lost on a five-to-four vote.

Mr. John Major: Frequently the ones who lose have that opinion. I'd like the professor to come. I'd like to challenge him on that. I don't believe it. I know a lot of lawyers who are disappointed. If they're English and they go before an English judge and lose, they walk out and say, “He didn't understand a word I said.” It's so natural for a lawyer to shift the blame that I'm not impressed by the professor who came with that story. I don't believe it.

The Chair: Thank you.

We'll move on to Mr. Storseth. You have seven minutes.

Mr. Brian Storseth: Thank you very much, Justice Major, for coming. I know it can be very weathering to sit before the committee, so if you need a drink of water or anything, please feel free.

Mr. John Major: If water's the only resource, I guess so.

Some hon. members: Oh! Oh!

Mr. Brian Storseth: We appreciate your time today. Truly, somebody who has the experience you have within this field is an eminent resource for us.

I want to start by thanking you for the lifetime of dedication you have provided our country, most recently by leading the investigation into the Air India bombing. You've done great work for our country. I know that everybody around this table appreciates that.

To go on to this issue, I have to admit that I'm not a lawyer, but it does bring some compelling thoughts to my mind. I don't understand how we can say that somebody like Justice Rothstein or you shouldn't have been appointed, even though you may have been the most competent legal mind, simply because you didn't have the requirement of being functionally bilingual. I think it's important that we recognize the words “functionally bilingual”. I'll get to that in a second.

We've had some litigants here that.... I'd like to give you a chance to reiterate your position that you feel the test of competency should be the most important test for a judge, and competency within the law and the legal field, not competency within any language barriers.

Mr. John Major: Or a musician or anything else.

Mr. Brian Storseth: That's a good point.

Mr. D'Amours brought up the point of somebody speaking rapidly in their native tongue, whether it be English or French. As an anglophone Supreme Court justice or a judge in your prior lifetime, have you ever had a case where an English lawyer has presented in front of you and you've asked him to slow down?

● (1620)

Mr. John Major: It's a very common reaction, particularly at the Supreme Court, whether the lawyer is French-speaking or English-speaking. If it's their first appearance, they're generally nervous. When a person is nervous, they frequently speak a lot faster than they intend to. It would happen very frequently that you would ask the lawyer to slow down. We use the excuse that the translators need time to translate, or the clerk needs time, to try to relax them. Sometimes they hyperventilate. We call an adjournment and let them get a drink of water.

Your first trip to the Supreme Court is a very trying experience, so French or English makes no difference. People will frequently start to speak so rapidly, and there are usually more English provinces' cases just by virtue of the number, so it's more frequent that the advice is given to an English-speaking lawyer.

Mr. Brian Storseth: Is it your experience that this hasn't hurt their opportunities in front of the court?

Mr. John Major: I should tell you that the oral hearing is the last step in the appeal. Before the appeal is heard, you get the written arguments. You get the judgments from the two courts below. You read that material. You read the argument. You know the case pretty well before you go in. In the hour that the lawyer has, he should pick his strongest point and argue it. But the judges don't learn much about the case in the courtroom. They should know about the case before they get in the courtroom. That's usually the way it is: you do know the case before you get in.

Now, cases don't always go the way you think they might, because a lawyer raises a new point, or a judge raises a point, there's an argument around it, and people change their minds, but in 95% of the cases that does not happen.

Mr. Brian Storseth: One thing that has been brought up and said time and time again is that eight of the nine current justices are functionally bilingual. This is where the opposition kind of contradicts themselves, because we've heard witnesses come before us and say that these legal proceedings are tremendously technical and that being in any way functionally bilingual would not be enough or wouldn't replace the ability of a translator who has a Ph.D. in translation, who would be far more competent in relaying what they're actually trying to say through their oral argument, rather than their being functionally bilingual.

Would you have any experience of this being the case, where even some Supreme Court justices who are functionally bilingual still rely on the translation?

Mr. John Major: I think it happens quite frequently, because if you're not that sure of yourself, you get reassurance from listening to the translator. You may get it right, but that's a backup for you.

As for being functionally bilingual, I take it more as being conversational. Legal arguments are not conversational. They're quite different, as you know, so the translation acts as a backup. I don't think being functionally bilingual would be a great deal of help. Being completely bilingual is a different thing. Completely bilingual in both languages—well, that's a requirement that certainly would elevate the court if you had competency and bilingual ability both.

Mr. Brian Storseth: I think you make a great point there. I'd also like to make one other point, that we do have other bilingual countries in the world that have final courts of appeal, countries like Belgium, and they all rely on translators and allow for unilingual judges in those.

Mr. John Major: UNESCO relies on translation. War Crimes relies on translation. I mean, those are different circumstances, but as I said in the few opening remarks, the United Nations relies on translations. Translators are not a dime a dozen. A skilled translator is a very skilled person.

● (1625)

Mr. Brian Storseth: I would just ask one final question of you, Justice Major. In your 14 years on the Supreme Court, did you have problems with the translation? Did you ever have any doubts with the translation as to whether or not they were giving you an accurate definition of the argument that was before you?

Mr. John Major: No. And following the case, we always had a conference immediately. If anything like that had happened, it just would have been so apparent.

Mr. Brian Storseth: Thank you very much for your time.

The Chair: Thank you.

We'll go to the next round.

Monsieur Lemay, you have five minutes.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Good afternoon, Your Honour.

Let me to share my personal experience. I went to the Supreme Court of Canada. I was not presenting arguments but I was accompanying a colleague who was presenting arguments under the Young Offenders Act.

I am certain that what you answered earlier to Mr. Storseth's first question was perfectly valid but I simply want you to know how a lawyer feels when they go to the Supreme Court of Canada. It's not every day that one goes to the Supreme Court of Canada and when you do go, it's because you are pleading a very important case.

For my point of view, it's not only being heard that is important, it is being understood. From that perspective, I have some difficulty with respect to judges who cannot follow what is being said in French, for example. It could be during exchanges with Justice Lamer or any other attending judge. You know how these things work because you have considerable experience, which I don't deny. It's about what is important for us.

The reality is often different. Our clients wonder why the judge does not understand what is being said, why they need interpretation, when we've always presented our arguments in courts where it was possible to present them before perfectly bilingual judges.

You understand that it is important for many groups to have the feeling that they're being heard and understood. Being heard is different from being understood. The distinction is important to us. Judges on the Supreme Court of Canada, the highest court, must be able to understand us in the French language, the language we express ourselves in, whether the case is being heard at the first, second or highest level.

[*English*]

Mr. John Major: Well, all I can say is that I felt completely comfortable relying on the translator.

I'm here to answer questions, not to ask them, but I'd like you to think of a client you might have had where you asked them, "Look, we have our choice of judges, A and B. Judge A speaks both languages pretty well, but he's not as good a judge as Judge B. If you go with Judge B, you're going to have to rely on the translator. Which judge will you take?"

[*Translation*]

Mr. Marc Lemay: With all due respect, Your Honour, that is not what I meant by my question.

I have a few years of experience. Of course I do not deny your own experience. However I think that when a judge is appointed to the Supreme Court of Canada—I'm thinking of Justice Lebel, for example, and all the judges who are there—they are appointed because they are very competent. I do not know any judges who have been appointed to the Supreme Court of Canada who are not competent. Perhaps you know some, but I personally could not know of any as I have only being there once. Even though I am aware of all the rulings.

Competency is the first criteria. That is true. But on top of that requirement, we're also asking to be understood by the judges who listen to us. Furthermore, the issue is not the same for my client. My client has no choice. Perhaps the situation is different in the lower courts. However, at the Supreme Court of Canada, everyone is competent, I think, with no exception. I therefore think that the ability to speak the French language or to understand the French language is a requirement that should be included.

● (1630)

[*English*]

Mr. John Major: You're free to have your opinion, obviously. I come back to my opinion that competency overrides every other consideration.

He wants my opinion, and I can't do better than that.

[*Translation*]

Mr. Marc Lemay: I respect that. Thank you.

[*English*]

The Chair: Mr. Moore, I'll give you five minutes.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Chair.

Thank you, Justice Major, for your appearance here today. We do appreciate your appearing here as a witness.

A couple of the points you did make really stood out to me. First, there is no question of the right of a litigant to be heard in their own official language. Also, you made the point about the translation obviously being probably very good at the Supreme Court of Canada. On the point about competency being the overriding goal, as a government, when we make our selections for the Supreme Court, I happen to agree with you that competency must be the overriding goal.

A point was made that at some point in a person's life they would decide that when they grew up they would want to be a Supreme Court of Canada judge, and then they would begin taking lessons in order to make themselves bilingual no matter where they were from in the country. I don't see that as realistic in any way. I don't think that's how most people's lives or careers unfold.

I wonder if you could comment on that. I know there is no typical path to the court, but maybe you could comment on why that would be an unrealistic premise.

Mr. John Major: If you had somebody who had that ambition, he might live in an area where it was impossible to learn the other language. If you're in Prince George, off the top of my head, and you're 12 years old, I don't know that you can learn French. I don't know what the situation is in the Saguenay if you want to learn English.

Not everybody has an equal opportunity to learn both languages from the time they begin school. I have a personal opinion that the judges' training, where they become mildly familiar with the other language, does not elevate that much beyond conversation. I know a lot of judges who went to study French and judges who went to study English. They get some knowledge of the language, but if you take a 55-year-old and try to teach him a new language so that he or she is bilingual, I think that's a very daunting task and an unusual 55-year-old who could learn it.

The Chair: Please continue, Mr. Moore.

Mr. Rob Moore: I guess that brings me to my second question. Could you possibly comment on new Canadians? Obviously, Canada is a place where we welcome new Canadians, we welcome them into every aspect of Canadian life. What about someone who has perhaps come from another Commonwealth country, where they obviously don't have the same opportunities to learn both of our languages? Or what about someone who may have English or French as a second language, but had no realistic prospect, growing up, of learning both of Canada's official languages? We have to remember that both English and French are official languages in our country.

How limiting would this be to someone in that scenario? And what message would it send to someone from another country who wants to become a Canadian about their ability to participate?

Mr. John Major: The French language and English language are the official languages, but you have interpreters. If someone comes from Asia or Eastern Europe and they don't speak English, the trial does not proceed unless there's an interpreter. The interpreter interprets. That's true through all the courts. It's most important, however, at the trial court, where the evidence is presented and he may want to testify and so on and so forth.

When you get to appeal courts, you're generally dealing with some question of law. Frequently, the accused person or the parties to the lawsuit don't bother to show up. The lawyers are there, but not the parties.

There's nobody in a Canadian court who stands trial and who is not entitled to an interpreter.

● (1635)

Mr. Rob Moore: You mentioned that Justice Lamer is bilingual. For those who are watching or listening, what level of competency in both languages...? There is what we think of as being bilingual, and that would be the ability to talk to someone in both official languages. But what level of competency would someone have to have—in the pool that we select from to be appointed to the Supreme Court of Canada—to never avail themselves of the use of translation services?

Mr. John Major: My wife is completely bilingual. French is her first language. When I consider her French compared to that of some of our friends, which is sufficient to meet this test, there's a huge difference. I'm sure my friends here whose first language is French would find the same thing.

Conversational bilingualism is inadequate to hear a court proceeding. I spoke of Justice Lamer. Lamer was one of the few judges who was completely bilingual. Someone who's living is Charles Gonthier. He was also able to write competently and fluently in English and French. He could understand the nuances of the language in both languages. He was truly bilingual, and he was competent. It's not impossible for people to be gifted in languages and competent in law. All I'm saying is that when you take all the straw away and you come down to the one question of whether it is competency or the ability to get along without a translator, I'd say the test has to be competency. The marginal benefit of being familiar enough with the other language so as to carry on a conversation but being unable to write or read fluently in French or English—I don't see that as being much above the translation.

The Chair: Thank you.

Before we let you go, I have a couple of quick questions. In your 14 years of service on the bench of the Supreme Court of Canada, how many complaints did you actually receive about the translation services that were available? I'm not talking about people who may have been dissatisfied with the result, but were there any specific complaints about the level or quality of the translation that was available in those proceedings?

Mr. John Major: The only complaint would be on the volume, mechanical, that the translation's not working. That's not what you're asking. Otherwise, there was never a complaint.

The Chair: Second, during your experience on the bench, of the judges you would sit with, how many of them do you believe were bilingual to the level that would be required by the bill before us?

Mr. John Major: I'd say quite a few. It's hard to say in numbers, but I would say.... Are you talking about the Supreme Court?

The Chair: Yes.

Mr. John Major: I'd say at least half, maybe a little more, would meet this test.

● (1640)

The Chair: And the remainder would require translation services and presumably use an earpiece?

Mr. John Major: There might be two or three, maybe, who really need translation services. I think that sometimes people whose knowledge of French is not that great should use the translation, but vanity being what it is, they may like to give the impression that they understand fully. I'd give them the translator because of later conversations.

The Chair: Thank you so much. Your testimony has certainly been helpful, and we'll take it under advisement as we move forward with this bill.

We'll suspend for five minutes.

● _____ (Pause) _____ ●

The Chair: We are now reconvening the meeting.

We're pleased to welcome a number of further witnesses to assist us in our review of Bill C-232. I welcome Graham Fraser, our Commissioner of Official Languages, and with him are Pascale Giguère and Christine Ruest Norrena of the legal affairs branch.

Welcome to all of you. I think you understand that you've got 10 minutes for a presentation and then we'll open up the floor to questions from our members.

Mr. Fraser, you've got 10 minutes.

● (1645)

Mr. Graham Fraser (Commissioner, Office of the Commissioner of Official Languages): Thank you very much, Mr. Chairman.

[*Translation*]

Mr. Chairman, honourable members, I would first like to thank you for giving me the opportunity to speak to you about my position on Bill C-232, which amends a section of the Supreme Court Act on the bilingualism of judges.

Over the past 40 years since the royal assent of the Official Languages Act, language rights have developed and advanced in Canada through lengthy discussions led by three key stakeholders. Initiated by the Parliament of Canada when the Royal Commission on Bilingualism and Biculturalism was formed, this discussion also mobilized the Canadian public and the courts, especially the Supreme Court.

The dialogue surrounding the application of the Official Languages Act and the Canadian Charter of Rights and Freedoms has led to new case law, building on the relationship between Canada's English-speaking and French-speaking peoples. It is a relationship that has defined our past, that informs our present and that will continue to shape our future.

[*English*]

One of the most eloquent statements on the importance of language as part of personal and collective identity comes from a Supreme Court decision in the Ford case in 1988, and I quote:

> Language is not merely a means of interpersonal communication and influence. It is not merely a carrier of content, whether latent or manifest. Language itself is content, a reference for loyalties and animosities, an indicator of social statuses and personal relationships, a marker of situations and topics as well as of the societal goals and the large-scale value-laden arenas of interaction that typify every speech community.

This view that the Supreme Court expressed so eloquently has influenced my position on the debate that brings us here today.

The bijural nature of Canada's legal system is another factor that has influenced me. Canada has not one legal system but two. We're one of a small group of countries to enjoy the richness of both common law, which originated in Great Britain, and the civil code, which flowed from Roman law to the Napoleonic code, to New France, Lower Canada, and then Quebec. This is a huge asset for our legal tradition and for many of our lawyers who function within both legal traditions, which together cover most of the world.

As the American legal scholar John Henry Merryman wrote: "It is difficult to overstate the influence of the civil law tradition on the law of specific nations, the law of international organizations, and international law."

This does not mean that all Supreme Court judges should be educated in both common law and the civil code, but they should be able to hear arguments from counsel who've been trained in either tradition, in English or in French, without requiring interpretation. As you know, Canadian laws are not translated; they are written in both English and French. The judges in the highest court of the land should therefore be able to understand nuances found within them when there is a difference between the two versions.

[*Translation*]

If Parliament were to pass this bill, it would send a powerful message to Canada's law schools that mastering both official languages is a pre-requisite for full mastery of the law, and for qualification for the most important and prestigious positions in the Canadian judiciary.

The nature of Canadian linguistic duality means that Canadians have a right to be served by the state in the language of their choice; it is, in effect, a right to be unilingual. The state is officially bilingual so that the citizen does not have to be. And citizens can live full and prosperous lives in Canada speaking only one official language, with no need to learn the other. This puts the burden of bilingualism on the state, and more particularly, on those who play national leadership roles.

Parliament has recognized the need for every federal court to be able to conduct proceedings in either English or in French. Paradoxically, there's only one exception: the Supreme Court. In my view this has perpetuated an unfortunate separation.

[*English*]

Over 30 years ago, the late Jules Deschênes, the Chief Justice of the Superior Court of Quebec, gave a speech in Toronto in which he warned of what he called legal separatism. I quote:

> "Quebec has shown the willingness and the ability to contribute to the building of [...] a national scheme of federal law, but the legal community of the rest of Canada has, by and large, closed itself off and away by simply ignoring the Quebec contribution," he said. "There now exists an actual separation in legal Canada, but it has been worked upon Quebec from without, not by Quebec from within."

He noted that the academic legal work that had been done in Quebec had gone unnoticed in the rest of Canada in the fields of commercial law, criminal law, and administrative law, and he went on to compare the absence of citation of Quebec decisions.

One of the more impressive things about the Supreme Court has been how much more bilingual it became over the three decades since Deschênes spoke, but it only takes one unilingual judge to require that all discussions occur in one language only.

● (1650)

[*Translation*]

The debates surrounding the appointment of bilingual judges is nothing new. Like my predecessors, I have already expressed my view on the matter at various forums. In May 2008, I appeared before the House of Commons Standing Committee on Official Languages and shared my view on the appointment process for the next Supreme Court of Canada judge. At that time, I pointed out that knowledge of both official languages should be among the desired qualifications for judges of the highest court of the land. In my opinion, such a standard would show all Canadians that the Government of Canada is committed to linguistic duality, in a way that is both symbolic and practical.

One year later, I still hold this belief. In fact, it seems essential to me that an institution as important as the Supreme Court of Canada not only be composed of judges with exceptional legal skills, but also reflect our values and our Canadian identity as a bijural and bilingual country.

We all know that the Supreme Court Act stipulates that there must be regional representation in the court. This important principle is strongly supported by both the public and parliamentarians. However, I find it strange that this principle is used as an argument against recognizing bilingualism as an essential qualification. I also find it hard to accept the argument that requiring Supreme Court judges to be bilingual would compromise the rights of a unilingual individual who might want to access a seat in Canada's higher court.

On the one hand, knowledge of a language is a qualification that can be acquired. On the other hand, bilingualism is already a requirement for judges of other courts in the country and for some 72,000 positions in the federal administration, so that Canadians can receive adequate service. I don't think that the bar should be set lower for Supreme Court judges.

[*English*]

In order to respect all Canadians, it's important to ensure that they are all served by judges of the highest distinction and greatest ability, who can hear and understand a case in either official language. Given the complexity and the extreme importance of the cases heard by this court, judges should be able to hear arguments presented to them without using an interpreter to understand nuanced and complex legal arguments.

I recognize the importance of selecting candidates for the judiciary based on each candidate's professional skills and merit. Where the judicial appointment process is concerned, bilingualism is an important criterion and should be a primary factor of candidates' merit and legal excellence.

The amendment proposed in Bill C-232 is for bilingualism to be a prerequisite for appointment. I strongly support this amendment.

Thank you very much.

Now I would like to answer your questions.

The Chair: Thank you, Mr. Fraser.

We will move on to Monsieur LeBlanc for seven minutes.

[*Translation*]

Hon. Dominic LeBlanc (Beauséjour, Lib.): Thank you, Mr. Chair.

Thank you, Mr. Fraser, for your comments. I fully share your opinions. In fact, I had not noticed the contradiction you so clearly highlighted, i.e., that candidates must be bilingual to obtain some positions in the public service or to become a general in the army, but that those who sit on the Supreme Court do not have to meet the same requirement. Having highlighted that in such a simple and eloquent manner is very useful.

[*English*]

Some people will say that competency in the law, legal scholarship, and understanding of the role of the judiciary—all of the traditional factors one associates with judicial competence—should be the sole factors in determining a Supreme Court appointment. To introduce a linguistic competence or bilingualism requirement would lower the bar and give less-qualified individuals a chance to be appointed, whereas an allegedly more qualified or competent person who just doesn't have this bilingualism requirement would be blocked.

What is your answer to that? That's the knee-jerk reaction if we're appointing a judge. The judge from Atlantic Canada who replaced Mr. Justice Bastarache, Justice Cromwell, is a perfect example of a bilingual, highly qualified, competent jurist from Nova Scotia.

What do you say to that obvious criticism?

● (1655)

Mr. Graham Fraser: My strong belief is that mastery of both official languages is a critical competence. So when someone comes forward and says, or says about a candidate, that he is very competent, that he has all of this experience, but he doesn't have the ability to hear a case that's presented before the Supreme Court in the language in which that case is presented, then he is missing a critical competence. He is actually not as competent as a candidate for the Supreme Court who does have that ability.

We are now in a position where nine of the ten judges are able to hear cases without interpretation—sorry, eight of the nine. Thank you for the correction. The result of that is that when the judges are in chambers and are having their discussions, even if it's a case about language in Quebec—and we're waiting for a number of decisions in which the previous judgments were written in French and the presentations that were made before the court were made in French—the debate that is presumably going on, perhaps even as we speak, about that case will have to happen in English; otherwise, one of those judges will not understand. Well, that's a competence that judge does not have. My view is that this is a skill that is a critical competence to do the job.

Hon. Dominic LeBlanc: Thank you.

Mr. Chair, my colleague Madam Coady might have a brief question.

The Chair: Madam Coady, go ahead, please.

Ms. Siobhan Coady (St. John's South—Mount Pearl, Lib.): Thank you very much. I certainly appreciate you coming here today to the speak to the committee and take questions. Thank you for preparing your brief as well.

I hail from Newfoundland and Labrador. As you know, we've been 60 years in Confederation and 500 years as an entity, and we've not yet had a member of the Supreme Court of Canada. We do speak two languages in our province, and we do have French language schools, but I fear that because we are not what one would consider a truly bilingual province, perhaps the competency or the excellence in French may not be there, and I would worry—and I have heard a number of my colleagues from Newfoundland and Labrador question this—whether or not that would be an impediment to having a Newfoundlander and Labradorian sit on the highest court of this land.

Could you comment on that at all?

Mr. Graham Fraser: Well, I would say two things. One is that I've been very impressed by the commitment that Memorial University has made to providing language training. I've been very impressed by the number of students from Memorial University who have taken advantage of those programs, who have gone to spend a semester or a year at St. Pierre and Miquelon. I would note that the CEO of Canada Post, Moya Greene, is from Newfoundland and has spent time in St. Pierre and Miquelon herself.

My own view is that the nature of the country is that it is quite possible for people to spend their career in their province entirely satisfactorily in the dominant language without the need to learn another, but when they decide they want to play on the national stage, it's at that point that the mastery of both official languages becomes critical.

I've been struck by the fact that in some ways the extremes of the country grasp that reality. There is a degree of commitment to immersion education, to providing opportunities for students at Memorial. There's similarly a commitment in British Columbia. There are 30,000 kids in British Columbia who are in immersion. They're lining up to get their kids into immersion. They have to allocate those places by lottery, because people in British Columbia understand that if they want to stay in British Columbia it's not actually critical—although it would be a lot easier to deliver the Olympics in both languages if there were more people who spoke both languages—but to play on the national stage, this is a critical competence.

Ms. Siobhan Coady: Do I still have time?

The Chair: You have half a minute, so it will have to be a really quick question and quick answer.

Ms. Siobhan Coady: I'll pass.

The Chair: Okay, we'll move on to Monsieur Ménard for seven minutes.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chair. It is a pleasure to welcome the commissioner. I am extremely pleased, not to say euphoric, to have heard your testimony, because I was a bit — and I say this with all due respect — disappointed by the previous witness.

I believe that our colleague, Mr. Godin's, bill, is essential in order to send a clear message. It will help prepare the next generation of jurists by informing them of the rules of the game. In our legal system, people do not compete for seats on the Supreme Court, they are appointed. Partisan considerations might sometimes be taken into account, but there is no doubt that the Supreme Court is composed of highly skilled justices. Future members of the judiciary will know that the knowledge of our two official languages will be one of the factors used to assess competency. That is extremely important.

I was somewhat surprised. A colleague whose name I will not mention asked a question earlier that might be of concern to you in your role of commissioner. He asked the justice whether, to his knowledge, complaints had already been filed concerning the use of French before the Supreme Court. With all due respect to the previous witness and his former position, he did not seem to take the matter very seriously.

As the commissioner, are you able to tell us of any representations that were made to you by members of the legal community, regarding the lack of linguistic ability of some justices? I understand that this is a sensitive area, but have you already received complaints in that regard?

● (1700)

Mr. Graham Fraser: I have two things to say about that. First of all, with all due respect to the previous witness, I do not believe that a unilingual person is best suited to evaluate the quality of the interpretation.

When I watch a film in French with English subtitles, I say to myself that I would not have translated a given sentence that way. However, when I watch a film in German with subtitles, I cannot say whether the film has proper subtitles or not.

I know that one of the witnesses this week had concerns about his own submission before the Supreme Court. The witness made similar comments one year ago, when we appeared before a committee. I wondered whether he was exaggerating.

I am often very impressed by the work of the interpreters. Theirs is an extremely difficult job. I greatly admire the work done by interpreters. I know a few of them and find that they do a masterful job. Nevertheless, I remember watching one of my appearances before a committee on CPAC and telling my wife that that was not exactly what I had said.

When you express nuances, it is quite possible that the interpretation might not convey the exact meaning of what you are trying to say. That might happen to a lawyer who pleads his case before the Supreme Court.

We have not received any complaint regarding the interpretation service, but we did receive two complaints regarding certain deficiencies within other federal tribunals, because of a shortage of bilingual justices. I spoke of that problem with the Minister of Justice.

Mr. Réal Ménard: That really is very interesting.

I was a member of the special committee that questioned Justice Rothstein. I asked him a question with my customary elegance and courteousness, as I am incapable of being malicious. He said he would learn French, but I do not think that the workload of a Supreme Court justice makes for ideal conditions to learn a second language. That is why it is better to learn earlier than later.

Do you share my point of view?

● (1705)

Mr. Graham Fraser: I completely agree. I was surprised to learn that language training programs are offered to justices. These programs are not intended for the justices of the Supreme Court of Canada but for those starting out their careers. I have never taken the course, but I have heard very good things about it. The training is available; it is an intensive course in legal French, if I can call it that.

Some law schools offer specialized courses. The University of Western Ontario, I believe, offers a specialized course for lawyers who want to master the technicalities of legal terminology in French. The earlier you learn a second language, the better.

Mr. Réal Ménard: Thank you, Mr. Chair.

[*English*]

Mr. Brian Storseth: I have a point of order, Mr. Chair.

The Chair: Yes, Mr. Storseth.

Mr. Brian Storseth: On a point of clarification, out of respect to Monsieur Ménard, I waited until the end of his questioning, but I'm not....

Just to make sure there was no problem with the translation, Mr. Fraser, with regard to Mr. Ménard's question as to whether or not there have been complaints about interpretation to the Supreme Court, is it correct that you said there have been no complaints about the interpretation at the Supreme Court, but there have been complaints at lower levels?

Mr. Graham Fraser: Again, not about interpretation, but about certain....

[*Translation*]

I will ask my colleagues.

Have there ever been complaints?

[*English*]

We do not have on file, that I'm aware of, complaints about the interpretation. But one of the problems about interpretation is that—

The Chair: I'm sorry, Mr. Fraser.

Mr. Storseth, that really isn't a point of order. It's a point of debate. You can always follow up with a question later on.

Mr. Brian Storseth: It wasn't a point of debate, Mr. Chair. I asked for a point of clarification. I wasn't sure of the translation that came through.

The Chair: A point of clarification is not a point of order. I just want to clarify that.

We'll move on to Mr. Comartin.

You have seven minutes.

Mr. Joe Comartin: We didn't take any of that out of my time, Mr. Chair.

The Chair: No, we did not.

Mr. Joe Comartin: Good.

Thank you, Mr. Fraser, for being here.

When Justice Major was here, he repeated a fairly common perception—I was going to say “bias”, but that may not be fair—that the skills of a judicial figure are separate from the skills of a linguist. I think I'm fair in categorizing what he said that way.

I think the implication, not so much from what he said, but we heard the argument before, is that the skills of the linguist in being able to speak the other official language are not of assistance in judging judicial skills in this country. I think that's the essence of that argument.

I wonder if you could comment on that.

Mr. Graham Fraser: That's not my view. I think an understanding of both official languages is....

Particularly in a context in which the last court of appeal exists, the last place where a citizen or a lawyer can make a final case before the courts, I think it's very important that the lawyer or the citizen be understood in his or her language.

This is not about benefiting judges. This is about defining the characteristics that are required for the nine most important jobs in the Canadian legal system.

Again, I have a great deal of respect for Judge Major, but I'm not sure that somebody who doesn't speak the other language knows what he doesn't know. Donald Rumsfeld once talked about the known knowns and the unknown knowns. I don't know how a unilingual person can evaluate how important language knowledge is as a professional competence. By its very nature, if you don't speak another language, then you don't understand what you would understand if you did speak that other language.

● (1710)

Mr. Joe Comartin: You made a point in your presentation about the discussions that go on. I think just about everybody here is a lawyer. Those of us who are lawyers know that once the case has been heard, the judges retire to chamber and have a discussion, usually right away, and then subsequently there are discussions in terms of an exchange of views. The point you made in your brief was that when that occurs, it has to be conducted in one of the official languages unless all nine of them are capable of speaking both official languages. I think we understood that point.

What's the significance in terms of linguistic rights, or perhaps cultural rights, of that discussion having to always be conducted, currently, in English, if our understanding that Justice Rothstein is not yet able to speak French is correct?

Mr. Graham Fraser: Some of the judges would have cases and a discourse that had been developed and argued in French. A case that has been argued through the lower courts in French would have the judgments written in French, and the pleadings before the Supreme Court would have been in French. Then, in order to ensure that everybody understood, all of the francophone judges would all of a sudden have to do their analysis of what they had just heard in English. They wouldn't be able to engage in the kind of back-and-forth that you and I are engaging in or that Mr. Ménard and I engaged in earlier. Mr. Ménard and I could have a dialogue in one language and you and I could have a dialogue in another. If it were a requirement that this committee had to function in one language or the other, some people would be at a disadvantage.

Mr. Joe Comartin: Those are all the questions I had.

The Chair: Thank you, Mr. Comartin.

We'll move on to Mr. Rathgeber. You have seven minutes.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Thank you, Mr. Chairman.

Thank you, Mr. Fraser, and your legal counsel, for your attendance here before the committee and for your presentation.

I'm going to start by indicating that I am troubled by both your evidence and this bill. I am going to probably take my questioning from a tack that is slightly different from that of my friends on the other side.

I'm quoting from your brief. You indicate that "Parliament has recognized the need for every federal court to be able to conduct proceedings in either English or in French." Am I incorrect in assuming that the Supreme Court of Canada does conduct its proceedings in either English or French, and a clear distinction has to be made between conducting its proceedings and mandating that all nine members of the bench be fluently bilingual in both official languages?

Mr. Graham Fraser: There is a distinction, and you're correct that people are able to make presentations before the Supreme Court, but they know when they do so that they have to make a strategic decision, evaluating whether they can afford to use the language in which they will be more fluent against whether they are going to pay a penalty for doing that because some of the nuance is not going to be understood. That's not the case in the federal courts, where people have the right to be heard and to be understood.

This issue of the right to not only be heard but to be understood is one on which the Supreme Court itself has evolved its own view of the right to a trial in French. In the Société des Acadiens case back in the 1980s, I think, the court at that point ruled that one had a right to be heard, but one did not have a right to be understood. Subsequent decisions in the Supreme Court have altered that view.

I will defer to Madame Giguère to explain a bit of the evolution of that Supreme Court position in terms of the right to be understood.

● (1715)

Mr. Brent Rathgeber: Please go ahead, very briefly.

Ms. Pascale Giguère (Acting Director and General Counsel, Legal Affairs Branch, Office of the Commissioner of Official Languages): Very briefly, yes, indeed there was a decision in the Société des Acadiens case. That decision still stands on the interpretation of the law. What has changed since then is the manner of interpretation that the court applies.

The court has interpreted the importance of language, and it has expressed a different view. In Beaulac, for example, where language played a major part, it has recognized the importance of that in that context. In a criminal case, I think if the Société des Acadiens case were to be heard again, there is a possibility that with the evolution of jurisprudence today, the court would reach a different result from the one it reached back then.

Mr. Brent Rathgeber: Mr. Fraser, I come from Alberta. I was until recently a practising lawyer with the Law Society of Alberta. I am concerned, quite frankly, that if this bill were to become law, the Attorney General would have a difficult time finding a competent jurist from the jurisdiction that I used to practise law in for an appointment to the Supreme Court of Canada.

You might know better than I. I don't know if your office maintains statistics on bilingual judges in western Canada—and I know there are some—but my suggestion to you is that there are not many. But perhaps you have data to prove me wrong.

Mr. Graham Fraser: Mr. Chairman, through you, I would observe that the Chief Justice is from Alberta and is fully competent in being able to hear cases in both languages. She learned it as an adult because she decided it was a critical competency for her to have a full and complete understanding of the law.

There is a bilingual judge in Alberta. There are 39 lawyers who are members of the Association des juristes d'expression française de l'Alberta. My sense is that if this private member's bill were to become law, you would be surprised at how many lawyers or judges would decide that it would be worth their while to learn the other official language.

Mr. Brent Rathgeber: I appreciate that you're not a lawyer, Mr. Fraser, but certainly your legal counsel are. You have a sense of what happens at the Supreme Court of Canada. You realize that it's appellate advocacy, that they don't hear evidence, that their decisions are based on written factums that are filed in advance, that upon the conclusion of a hearing they deliberate, often for months and months. I'm not convinced yet that this language barrier, the inability of an esteemed justice like retired Justice Major, is a disadvantage, even if the litigant....

It's not the client. It's not the litigant who's in front of him at the Supreme Court level; it's his counsel. He has the benefit of time and the benefit of being able to ponder and reponder and read a factum that has been translated. I'm just not convinced that a litigant is prejudiced through the translation services.

Could you or perhaps one of your legal counsel help me see where the problem is when a justice has the benefit of a written factum and the benefit of time to deliberate and reconsider?

Mr. Graham Fraser: I will defer to my legal counsel, but my strong belief is that because we live in a country with a bijural system and two concurrent legal systems that meet at the Supreme Court, and we have jurisprudence that is written and developed in both official languages, and laws that are written in both official languages in which the final arbitrator adds to the nuance as to which version is going to have precedence, having a judge who understands only half of the jurisprudence, half of the decisions that are written, and only the left-hand column of the law means that they are not as competent as somebody who can read both columns, both separate issues, both sets of jurisprudence.

● (1720)

[*Translation*]

Could you give us more information about that?

[*English*]

Ms. Christine Ruest Norrena (Legal Counsel, Legal Affairs Branch, Office of the Commissioner of Official Languages): Yes. To my knowledge, there is simultaneous interpretation during the hearings before the court, but it's my understanding that the parties can submit their memorandums in the language of their choice, so there's no guarantee that the judge will understand the facta that the party has submitted.

Mr. Brent Rathgeber: Will interpretative services not interpret the factum?

Ms. Christine Ruest Norrena: They interpret the oral arguments before the court at the hearing.

Mr. Brent Rathgeber: But not the factum? Is it up to the litigants to translate the factum if they so choose?

Ms. Christine Ruest Norrena: It's my understanding that the litigants will submit it in the language of their choice and then it would be up to the judge to—

Mr. Brent Rathgeber: Or both.

Ms. Christine Ruest Norrena: Yes. To have his services.

Mr. Graham Fraser: But again, what that means is that the burden of bilingualism, I think, is being put on the lawyer, and ultimately the citizen who is paying for that lawyer, rather than on the court.

The Chair: Thank you.

If I could just ask for one clarification, you mentioned that Chief Justice McLachlin was appointed from Alberta. She was my evidence professor in law school. I recall her being appointed from the Court of Appeal of British Columbia.

Mr. Graham Fraser: I stand corrected. I think she also served on the courts of Alberta. She practised in Alberta. She's from Alberta, but I stand corrected.

The Chair: All right. We'll move on to Monsieur Lemay.

You have five minutes.

[*Translation*]

Mr. Marc Lemay: I would first like to thank you for appearing before us.

In your presentation, you mentioned the Supreme Court decision in the Ford case in 1988, but you did not give a reference to it. References are usually given in footnotes. Would it be possible to obtain it?

Mr. Graham Fraser: I apologize, we will send that to you.

Mr. Marc Lemay: Obviously, that is exactly what I told the Honourable Justice Major.

By the way, what was the object of that case? Do you recall?

Mr. Graham Fraser: It was a linguistic case. It dealt with signage in Quebec, I believe.

Mr. Marc Lemay: I would much appreciate having a reference to that decision. If it is the one I am thinking of, it is an indication that the subtleties of language and translation are such that the signs have one meaning in English and another in French. In my view, it would be important for my colleagues to have a copy or, at least, the reference.

Mr. Graham Fraser: Mr. Chair, we can probably find the decision and send you a copy.

Mr. Marc Lemay: I once accompanied a colleague to the Supreme Court. My experience there is limited to that one time.

Would you agree to say that the important thing at the Supreme Court is not to be heard but to be understood?

Mr. Graham Fraser: Yes, absolutely.

Mr. Marc Lemay: I consider myself to be bilingual and able to understand English, but I must say that when I was listening to the English version of what was being said earlier in French, with all dues respect to our interpreters, who do remarkable work, I noticed that they had a hard time keeping up with the faster pace. In such circumstances, proceedings might clearly take more time or become difficult and complicated. The same is true for the Supreme Court. Those who have been there know: in a given case, a justice takes the lead and asks the questions. During your presentation, other justices can exchange among themselves, but generally speaking, there is one justice, and when he is very knowledgeable of the file, those exchanges take place. The problem is with the translation, that is where the subtleties come into play. The factum is submitted in the language of one's choice, but if it is not translated, that is it.

Are you sure that the Canadian Bar and Quebec Bar, in particular, did not call for an increased level of bilingualism at the Supreme Court, which is the tribunal of last resort?

● (1725)

Mr. Graham Fraser: I must correct the record: there was a unanimous vote on that at the National Assembly around the time when Justice Bastarache retired. When I was speaking of complaints, I was specifically referring to those that we received at the Office of the Commissioner of Official Languages.

Mr. Marc Lemay: With all due respect, as a lawyer who could argue a case before the Supreme Court, I would never file a complaint, I would never say that I have been badly served. I believe that, for strategic reasons, no one would do so. A lawyer who has argued a case before the Supreme Court would never file a complaint. That would have to be taken up by an association of defence counsel or the Canadian Bar Association. They are of interest to me.

Have you received any comments in that regard?

Mr. Graham Fraser: I think that those organizations came out with clear positions at the time when the issue began to be debated. You received several witnesses. I will ask Ms. Giguère to speak to that, there are perhaps other institutions that I did not hear about.

Ms. Pascale Giguère: I think that the association of French-Speaking jurists of Ontario issued a statement at the time Justice Bastarache's successor was being appointed. But it also expressed the need for there to be bilingual justices on the Supreme Court. The Canadian Bar Association also issued a very clear statement to the media in that regard. In fact, it had adopted a resolution that was made public.

Mr. Marc Lemay: I am not sure if it is the case, but it seems that when you argue a case before the Supreme Court, simultaneous interpretation is provided. However, there is no simultaneous interpretation when justices meet to discuss cases with their research assistants. All justices benefit from their services. These are highly-skilled colleagues.

Mr. Graham Fraser: Not to my knowledge, but I will ask the question.

Mr. Marc Lemay: There is none, is that not so?

[*English*]

The Chair: We have to move on. The last question will go to Monsieur Petit.

You have three minutes.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good afternoon, Mr. Fraser. We meet regularly in a number of committees. Welcome to the Standing Committee on Justice and Human Rights.

You know that this issue is of interest to us, especially since we are dealing with a private member's bill. Of course, you know that the bill is very straightforward. More words would not necessarily amount to more meaning. At times, few words can mean a whole lot.

I am interested in a few words that are taken directly from the bill, and I quote: "[...] who understands French and English without the assistance of an interpreter."

I already asked this question during a meeting that dealt with the same topic. You know that I come from a unilingual French province. Bill 101 is in effect everywhere, even in the court system, etc. My colleague who introduced the bill comes from an officially bilingual province. You understand the difference between the two. Naturally, Bill C-232 intends to establish institutional bilingualism. You are here to speak to that. The bill states "without the assistance of an interpreter". Earlier, you heard that there were a number of lawyers on this committee. Mr. Dosanjh might have been the Attorney General of his province. But being a unilingual anglophone, he could not be appointed to the Supreme Court. Although I am bilingual, I might not be considered for such a position because I might not have the skills required. There is more to this, you see? There is much more.

You might know the Supreme Court. Lawyers send written submissions, requests, there are procedures to obtain the authorization to appear before the Supreme Court, etc. All that is done in the language of origin, for example, French. My counterpart might be anglophone, but I will speak in my own language. However, as Mr. Lemay pointed out a little earlier, a person handles the files. If the words “without the assistance of an interpreter” are used, that would mean that the justice who would be reading my file would have to read all the submissions in the language of the council or client, whether in French or in English. The justice would have to read all the requests in the language of the individual, regardless of his origins, He would have to understand not only when listening, but would also have to have a good written understanding. If it says “without the assistance of an interpreter”, that does not only apply to someone who is speaking to us, but also to all the written material that we receive.

What is your understanding of the expression “without the assistance of an interpreter”? Is it only for oral communications, or for written material as well? Do not forget, this is important. These are expensive considerations.

● (1730)

Mr. Graham Fraser: In our view, the expression refers to oral discourse. If the bill spoke of translation, that would be different. Interpretation refers to oral communications, therefore to what is submitted orally to a justice.

The three criteria of linguistic ability that are used for public service employees are reading, understanding and verbal interaction. Generally speaking, candidates have much greater difficulty with verbal interaction. Justices are not required to exhibit verbal interaction skills. Justices are not expected to be able to ask questions in the other language, but they must be able to understand the verbal submission.

In general, I have met many public servants who have told me that they had no problem reading or understanding, but they found it far more difficult to express themselves or write.

We would not expect that justices draft their decisions in both languages. Justices have the right to render their decisions in the language of their choice; that is currently the case.

The requirement to be able to understand the arguments in the language chosen by those submitting them to the court is in fact quite simple.

[*English*]

The Chair: Thank you.

We're at the end of our time, unfortunately. I want to thank all three of you for your testimony today. We'll certainly take it under consideration as we move forward with this bill.

We're adjourned.