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Chair

The Honourable Denis Paradis

Standing Committee on Official Languages

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● (0945)

[*Translation*]

The Chair: We are resuming the public session.

Pursuant to Standing Order 108(3), we are beginning the briefing on the Official Languages Act and the regulations under the act.

Dear colleagues, Justice Bastarache has not yet arrived. We may create a precedent, but under the circumstances, I will read to you the presentation he was supposed to deliver. Once he gets here, we will put questions to him on this presentation.

> Presentation to the House of Commons Committee on Official Languages, Ottawa, October 30, 2018.
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> I believe there are three ways to address the issue. The first would be to consider the cases that have been brought before the courts and certain analyses of the Commissioner of Official Languages to identify what the current legislation may be lacking. The second would be to examine the scope of the legislation in light of the public's expectations and the principles put forward by the government, and to identify areas where new rights or new obligations should be created. The third way would be to assess the quality of the implementation of the act and to see whether deficiencies could be remedied through legislative amendments.
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> You know that I said before the Senate Committee on Official Languages that I think there is a limited number of areas that could be dealt with through legislation and that many problems are due to an ineffective enforcement of the act. I would point out in passing that it is difficult to read the act and get an idea of its scope without taking into account the legal decisions that have defined its meaning and its scope, especially when its main objective is to implement certain provisions of the Canadian Charter of Rights and Freedoms. For example, what is an “equivalent” school, a service “of equal quality”, “a sufficient number”? The legislation can recommend criteria, but those criteria must be defined.
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> A basic problem comes from the fact that the people involved have different perceptions. For the litigant, it is a matter of recognizing a right. For their lawyer, it is a question of a government obligation. Very often, for the government, it is a problem because the claim is seen as political more than legal.
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> In education, which is a critical area if there ever was one, a 2016 decision of the Supreme Court of British Columbia calls into question a good portion of what the linguistic minority takes for granted. That decision has been largely supported by the Court of Appeal. Justice Russell referred to Supreme Court of Canada decisions that have recognized and clarified the rights, but she provided a surprising application of them, implicitly asserting that only the minimum should be done because assimilation is inevitable either way. She felt that the numbers would be enough to justify the right to a school if it was cost-effective. The justification would be established if an English-language school had to be set up for the same number of anglophone students. The need to do a comparison was accepted, but the comparison would only be done if a similar anglophone school existed in the service area.
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> The Supreme Court of Canada had, however, already decided that the minority language representatives were in a better position to determine when a school was necessary and where it should be located. The court stated that the standards applicable to the majority were not acceptable. However, Justice Russell said that not too much attention should be paid to the opinion of parents because they were not objective. What should be referred to is the hypothetical concept of “reasonable parent”. That case mostly focused on the right to physical facilities comparable to those of the majority. But the justice was of the opinion that the word “facility” rather referred to an “equivalent educational experience” than to a building. That “educational experience” would be analyzed with respect to a number of factors, with the quality and the location of buildings in a physical sense being two among many others. In reality, the deference to the judgment of the minority language school board would be minimal. The justice made that point by stating that the francophone school board's decision could not be accepted if it created obligations that are inconvenient for the government, taking into account the fact that the government is responsible for many other social benefits. This means that the financial considerations extend well beyond those that apply to education. The obligation to consider the past errors and injustices is forgotten.
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> The justice also said that it would not be practical to consider the need for equivalence for all minority schools, and that it would be unacceptable to create new schools simply to prevent the minority from enrolling their children in majority schools. Equivalence, according to her, is a threshold, with the right being that of respecting a proportionality rule.
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> All those expressions and categories seem very artificial to parents who simply want an establishment that is right for their children's education. There was extensive expert evidence on cultural attachment, community ties and the role of schools as gathering places for the minority, but the justice concluded that the socio-linguistic evidence was not useful. Even the opinion of teachers and other members of staff from the minority school was not accepted because, according to the justice, it did not have the hallmark of authenticity. She concluded that chapter by stating that the creation of a school, after all, was not a remedy to a social ill.

● (0950)

I will stop here, as the justice has arrived.

Mr. Michel Bastarache (Legal Counsel, As an Individual): Good morning, ladies and gentlemen.

The Chair: Mr. Justice Bastarache, welcome.

Mr. Michel Bastarache: I'm really sorry about being late. My schedule said 10:45 a.m., and I believed it. Wanting to hurry up, I went to the House of Commons instead of here.

The Chair: No problem. Welcome.

We took the initiative of beginning to read your text in order to save some time.

Mr. Michel Bastarache: Yes.

The Chair: I don't know whether you want to resume it. After all, it is your text.

Mr. Michel Bastarache: I can take over the reading if you tell me where you stopped.

The Chair: I was on page 7. The clerk will tell you where we were in the document.

We are extremely pleased to welcome you this morning, Mr. Justice Bastarache, to discuss such an important issue.

Mr. Michel Bastarache: Thank you.

I will continue the presentation.

Obviously, we were talking about the Supreme Court of British Columbia decision. The justice in that case started the presentation of her ruling by saying that section 23 should not apply because assimilation in British Columbia is inevitable. Simply put, all we were doing was delaying the inevitable and, as long as the inevitable was being delayed, it was preferable to interpret the act in a very restrictive manner. That is how she started the presentation, the summary of which you have read.

In my opinion, what is even more surprising in that case was the justice's decision to apply section 1 of the Charter of Rights and Freedoms to educational institutions. As you know, section 1 is the one that allows the application of a right to be suspended. According to the justice, as the government may have public objectives simultaneous to the duty to enforce section 23, there may be cases where rights stemming from section 23 must be denied. According to her, that is a matter of priority.

In fact, the justice applied section 1 in some cases. As I understood the decision, the public objective she took into account is the need to protect the capital payment system for the building of schools in general. In my opinion, if the system was insufficient to enable the building of mandatory schools under section 23, the system itself is unconstitutional.

It is true that education comes under provincial jurisdiction, but don't forget that it was the federal government that passed legislation on official languages and education in the minority language in the three territories. It is also important to point out that Canadian Heritage funds a very large portion of minority language education in all provinces and territories.

For years, minority representatives have been complaining about the fact that some provinces are not complying with the agreements and are diverting the funds to other areas, and that the government is doing nothing to correct the situation. I met with the responsible minister myself, and she told me she was avoiding conflict with the provinces.

After the failure of Senator Maria Chaput's attempt to remedy the problem of inconsistent application of section 20 of the charter—the section that provides for the right to services when the demand is sufficient or significant—the Société franco-manitobaine filed a lawsuit in federal court, denouncing in particular the formula used to determine the sufficient number to justify the right to federal services in the minority official language at the provincial level. The SFM argues that the official languages regulations provide an unduly restrictive definition of the term “francophone”, which excludes among others people able to request service in French, people who identify as francophones, people recognized by the minority community as belonging to it and people more apt to use a French-language service if the offer is made actively.

We have learned that the Treasury Board had proposed amendments to the official languages regulations five years ago. I have not had an opportunity to look at all the amendments, but I have read the five pages on calculating the population, and that part continues to talk about members of the minority and the demand for services. Why is that important? It is because the charter talks about a demand for services in French outside Quebec. It does not talk about a demand by the linguistic minority. So it is presumed that only the members of the linguistic minority will request services in French outside Quebec, and it is not taken into account that the demand is always low when the government does not provide an active offer. The offer is defined based on objective criteria. For example, it will be said that, in a community with fewer than 500 individuals, services in French will be provided if at least 5% of the population requests services in the minority language. However, how can such a request be made if the service is not offered?

● (0955)

The lack of qualifiers has always been criticized. Ms. Chaput asked that authorities take into account, for example, the community's vitality before removing a service. So a qualifier was added: when the service area of a regional office has fewer than 500 people and there is at least one minority educational institution within the service area, service in French will be provided. But that is not what minorities were asking for. They were asking that objective criteria be removed and replaced by criteria that take into account the community's vitality. They wanted it to be determined whether there are, for example, social services provided in French, francophone old age homes, churches serving the francophone population and, obviously, francophone schools.

Of course, in the new official languages regulations, there are pages and pages on services for travellers, rescue services, immigration services, aeronautical services, services on trains and ferries. I swear that no department employee could answer your questions without referring to the document. It is so complicated and so detailed that no one can learn it by heart. Canadians should be able to know what services they are entitled to and, if people have to consult a specialist every time to know whether they are entitled to a specific service, I don't know how that could ever work. That is my criticism.

I don't know what is provided regarding aviation services. If you buy a plane ticket here at Air Canada's counter, you will be served in French. If you take a direct flight to Vancouver—I go there every two weeks—service in French will be provided on board, but if the plane stops over in Regina, no service in French will be provided. You have to travel from a bilingual airport to another bilingual airport for it to count. Is there any real logic to that? I don't know.

There is another problem. There were no bilingual services in some provincial capitals, such as Fredericton and Regina. I appeared before a committee and told its members that, to really believe in a national bilingualism, that bilingualism should at least exist in provincial capitals. In New Brunswick, there were fewer federal services in French than provincial services in French. I remind you that New Brunswick is an officially bilingual province. I think it's illogical for the federal government to provide fewer services in French than the provincial government.

The old official languages regulations had been adopted without any consultation with Canadians and had not been revised or consulted on since 1992. According to the SFM, the incompatibility of thresholds with section 20 of the charter is noted on two levels. First, the thresholds vary in a manifestly arbitrary fashion. The regulations say that it's 5,000 inhabitants for a service area and 500 inhabitants for a village. I have met with the four officials who established those thresholds and I asked them how they came up with the figures. I asked them whether a scientific study had established certain criteria. They said no, the figures were just nice. You can see all those arbitrary rules just by reading the official languages regulations. You have only to think of the example I just mentioned in aviation. I asked those four officials how that was justified and what the federal principles in bilingualism and access to services were based on. They could not answer me, as there had been no studies and they had made the decision themselves. Second, the government has submitted no evidence that this is grounded in any criteria based on rationality of service. In its opinion, it was just a matter of proportionality.

When legislation is adopted, there are all sorts of difficulties related to its interpretation. For instance, can we know whether the legislation applies when it says “demand”? What demand are we talking about? Who is making that demand? Where does that demand apply? Are we talking about demand for a service offered or demand for a service offered actively? That issue has never been resolved in the context of section 20 of the charter.

Since then, there have been two decisions by the Supreme Court of Canada where the government's obligation has been interpreted in the following way: for there to be equality in access to services, there must be an active offer.

● (1000)

As I said, we are starting to define the community as a minority community. In Beaulac, the Supreme Court faced the same problem. It ruled that litigants have a right to a trial in their own language, but what language is that? The court decided that the litigant can choose the language they wish to use, the only restriction being that they must be able to communicate with their lawyers. Pursuant to the decision in Beaulac, if the lawyer argues the case in French, the litigant must speak French well enough to have a conversation with him. If that is the Supreme Court's philosophy, why are regulations being proposed that are contrary with respect to general services?

In summary, the first method, the famous method in the Official Languages Regulations, divides the population into watertight compartments, one for francophones and one for anglophones. Yet only francophones from minority communities fall under the category of “francophones”. An anglophone who is perfectly bilingual doesn't count.

There is another problem, although I did not include it in my presentation. As you know, there is a huge number of mixed marriages outside Quebec. Various terms are used to describe these marriages, but the principle is the same: a francophone is married to an anglophone. Let's say the mother is anglophone and the couple sends their children to an immersion school or a French school, as they have the right to do. Those children are perfectly bilingual, yet none of them are considered francophone under the Official Languages Regulations. Why? Because the test is which language is spoken at home most often.

Regardless of which language they speak, the fact is that children speak to their mother more often than their father. If the mother is anglophone, even if she is bilingual, her children will speak to her in English more often. All those people are not included in the definition of who is francophone.

That might not seem like a big problem if it is just one family, but in Manitoba more than 60% of francophones are married to an anglophone. That means a lot of people don't count.

I have a question and I know that people at justice will debate with me endlessly about what the act says and whether it applies. Independent of legal discourses, what is the underlying philosophy of the official languages? Do we really want to define Canada as a country with bilingual federal institutions? If so, why do we always make everything so difficult and complicated? Why do we try to take shortcuts? Is it just to save money? Is it because we are afraid of being required to have far too many bilingual public servants?

The other matter I did not have time to broach is the criterion of equal quality. If we hire anglophones and send them on language training, for the whole time they are on training, the service will necessarily be unequal. Even if they finish their language training and become truly bilingual, my personal experience tells me that in at least every other case, they will change jobs and we will have to start over again. The service will always be inferior.

Several years ago, Rodrigue Landry conducted sociological studies in Nova Scotia. He is an expert who has given testimony in many cases. He studied the issue of service counters in Nova Scotia. Mr. Landry found that when there was a bilingual service sign on the counter, about 25% of francophones requested service in French. When there was a French counter and an English counter, that percentage doubled. When an Acadian from Nova Scotia was providing service at one counter and an anglophone at the other, the percentage doubled yet again.

In other words, perception is tremendously important. If people think they will receive inferior service, if they are in too much of a hurry and just want quick service, for example if they just want to get their driver's licence without having a debate about the official languages, that is what happens. The service is inferior service. Services are then reduced because there is no demand. There is something illogical about the way the act is implemented.

That is why I said in my presentation that, even if we amend the Official Languages Act and add another definition, we will be fighting about the meaning of the words in that definition. These things never end.

● (1005)

The real issue is the political will to truly implement legislation.

Personally, I travel two weeks per month because I am looking after the issue of female members of the RCMP who have been sexually harassed. Most of the cases I deal with are in Vancouver, so I travel there a lot. When I fly, the services in French are rarely of the same quality as those in English, even though Air Canada has been required to provide service in French for 50 years. What constitutes service in French? A person reading out a little card without understanding what they are reading and who has trouble pronouncing the words. Sometimes it is correct, sometimes not. To my mind, that means that people do not believe in the equal service policy.

The current commissioner and his predecessors have denounced Air Canada at least 50 times over the years and, as you know, nothing has ever come of it. People are now calling for this to be changed and for the commissioner to have the power to impose fines. In Air Canada's case, how much of a fine would it take to get a response? A fine of $500 seems ridiculous. Even $5,000 is ridiculous. For these large organizations, that is just pocket change. We need something more than fines.

You gave the example of section 20, but there is another one that really bothered me. I represented an environmental organization in Quebec. It asked me to sue the National Energy Board regarding the public hearings it held in Montreal about Energy East. Believe it or not, the public hearings in Montreal were conducted in English and all the documents prepared by TransCanada were in English. Why? Because the NEB is a judicial body. That is what the vice-chair and the legal affairs team told me when I met them. This is surprising because the National Energy Board does not make decisions; it issues recommendations.

The NEB officials then said that the act provides for public consultation and that it is mandatory. To their minds, if it is stipulated in the act, it is part of the NEB's judicial process, so part III of the Official Languages Act applies. Part III provides that a citizen may present their evidence in a trial in their preferred language. The NEB said that TransCanada is comparable to an individual presenting evidence in a trial, and that it could do so in their preferred language. I replied that, even if that is true, the NEB could at least have the documents translated upon which it would base its decision. I was told that this was not its responsibility. The NEB refused to do it. In the end, we negotiated with TransCanada, which provided the translation voluntarily. It was not an official translation, however, and it was not provided until three months after the English-language documents were presented.

So once again, the service was not equal.

The other area that concerns me of course is the courts. It is complicated because the administration of justice is under provincial and not federal jurisdiction. The administration of justice is under federal jurisdiction for federal courts. They can indirectly control proceedings in criminal matters because they have jurisdiction in matters related to the Criminal Code.

A litigant does have the legal right to request that proceedings be conducted in their language at a trial court in criminal cases. What about preliminary procedures, motions, appearances and filing procedural documents though? There are no provisions in that regard. Then, if the litigant wins or loses their case and there is an appeal, they no longer have the right to proceedings in their language.

I know it's complicated, but we have to think about what we really want with respect to the courts, and question what the federal policy really is.

● (1010)

Another difficulty arose in a case launched in Moncton, New Brunswick. I do not remember if it was resolved. A litigant requested a trial in French. I think it was a jury trial. In any case, it was a criminal trial. The case was assigned to an anglophone judge who had done language training in Quebec. Throughout the trial, the accused and his lawyer thought the judge did not really understand what they were saying. They had difficulties throughout the trial. In the end, the accused was found guilty. He then applied to have a mistrial declared because the judge did not understand the language well enough.

To my mind, this means that we have to do like the Europeans and have mechanisms for language quality control before a judge can be appointed. Yet we hear all kinds of strange arguments. For example, people argue that it is part of judicial independence. That is patently false, in my opinion.

The last thing we have to look at, although I may not have the time to talk about it here, is the powers of the Commissioner of Official Languages. The Office of the Commissioner of Official Languages has existed for a long time. As you know, as a result of changes, the commissioner may now launch actions before the Federal Court and take part in other cases as an intervenor, although the commissioner himself does not have the power to issue sanctions. When the commissioner examines something and determines there has been a violation of the Official Languages Act, all he can do is draft a report. From time to time, he can also submit reports directly to Parliament, when there are systemic problems regarding certain activities.

Some people have said the commissioner must be given the power to issue sanctions. Others have argued that it should be like the Canadian Human Rights Commission, where the commission and an administrative tribunal share the work. There are all kinds of solutions, but we have never looked for any.

I think this truly warrants consideration. Personally, I don't think the current system is effective. I would never file a complaint with the Commissioner of Official Languages because I don't think it would really serve any purpose. If I made a complaint every time I flew Air Canada and did not understand the announcements in French, what exactly could he do? I don't know. That is reality.

There are of course more flagrant cases where an investigation has to be requested to determine the facts. That said, it is hard to accept that this is the only way to implement the Official Languages Act.

My conclusion is very simple. It took a very long time before language rights were established and implemented in Canada. It took a long time for them to be recognized as fundamental rights that are rooted in the values we hold dear as a nation. In my opinion, we cannot continue resisting the application of these rights, as though it was taking something away from members of the majority.

Thank you.

● (1015)

The Chair: Thank you very much, sir. That is extremely informative.

We are checking to see if we can continue the meeting until 11 o'clock. Would that be a problem for anyone? I am trying to allocate the time as fairly as possible.

Mr. Jacques Gourde (Lévis—Lotbinière, CPC): I will have to go to another room, but it is just next door, so we can continue until 10:57.

The Chair: Okay. We will try to give each speaker about five minutes.

Without further ado, let us start immediately with Mr. Clarke.

Mr. Alupa Clarke (Beauport—Limoilou, CPC): Thank you, Mr. Chair.

It is an honour to welcome you to the committee, sir, given the breadth of your knowledge of the official languages.

You eloquently addressed nearly all the topics that I would have liked to ask you about. I was a bit confused by some of your remarks, however.

For example, you said it is really the political will that is missing, and I think that's right. No matter which party is in power, this has been going on for 50 years. You said, however, that even if we amend the Official Languages Act we would still be debating the meaning of words.

On the whole, do you think we should go ahead and modernize the act or do you completely reject that option?

Mr. Michel Bastarache: I think certain things in the act need to be changed. We could also include some elements resulting from court decisions, such as the need for an active offer. Further, we could probably come up with a better definition of Treasury Board's internal monitoring duties. It is up to Treasury Board to monitor the implementation of the act among public servants and in government. For its part, Canadian Heritage is responsible for the application of the act outside government, and in other governments and minority groups. I do not think that needs to be changed to make a single body responsible for all that. I think the current division of responsibilities makes sense. I do not know how we could change the act to enable Canadian Heritage to withhold funds or take other measures in instances where entities do not comply with agreements.

As to the Northwest Territories, I think the federal government provides 95% of their funding. So it has to have some control over how they do things. I don't know if you are aware, by the Supreme Court of the Northwest Territories issued a decision three months ago. Alberta's chief justice, Mary Moreau, was presiding. She ruled that they were in violation of nearly every section of the Official Languages Act. It was a very long and very detailed decision. At the end, she went so far as to order that a government committee be created and public consultations held in order to come up with a work plan to correct these deficiencies.

As to the judiciary, I think the government needs to think carefully about what it wants. Does it want to limit the application of the Official Languages Act to trial courts in criminal cases? Even if it wanted to do just that, the question arises as to whether judges should be required to publish their decisions in the litigant's language. Right now, they are not required to do that. The Federal Court could also be required to publish online all its decisions in both official languages at the same time. Right now they are published in one language first, and then in the other language later on, or not at all if the decision is not of a fundamental nature or something like that.

I do not recall all the internal rules precisely, but I think we need to determine exactly which changes have to be made in each area.

● (1020)

Mr. Alupa Clarke: You also talked about the changes made to the Official Languages Regulations. You touched on the calculation being more quantitative than qualitative. I thought including qualitative elements for the first time was a good thing, but you seem to be saying that is not enough.

Could you elaborate on that?

Mr. Michel Bastarache: That is not enough, because clause 4 still states that the population to be served is made up of people who are a part of the category of francophones outside Quebec; what is meant by that is any person who is culturally francophone and for whom French is the first language learned, still understood and spoken at home most of the time. However, that is not what the charter says. It states that services must be provided when there is demand; it does not specify who makes the demand.

Why do we want children in Canada to go to immersion schools to learn French if afterwards we tell them that they never ask for services in French, and that they don't count? If they want to ask for services in French, that is their right.

Mr. Alupa Clarke: And if those individuals were included in the count, would that be part of the quantitative parameter or the qualitative one?

Mr. Michel Bastarache: In fact, it's neither one nor the other. We are trying here to define the group of people to be taken into account. Some parts of the Official Languages Regulations determine how many of those people must make a request for the service to be provided. Afterwards, that is divided according to whether the catchment area includes 1 million persons, fewer than 500,000 or fewer than 5,000. Afterwards, there are other criteria.

The Chair: Thank you very, Mr. Clarke.

Mr. Arseneault, you have the floor.

Mr. René Arseneault (Madawaska—Restigouche, Lib.): Good morning, Mr. Bastarache.

Do we now call you Mr. Bastarache, since you have come back to the practice of law, or should we address you as “Your Lordship”, Mr. Justice?

Mr. Michel Bastarache: I suppose so. Apparently one never loses one's title now.

Mr. René Arseneault: Like a parish priest.

Mr. Michel Bastarache: Yes, perhaps. I hope not.

Mr. René Arseneault: Mr. Bastarache, I am going to be brief,and I will share my time with my friend Mr. Samson, so that all of my colleagues may have an opportunity to put a question to you.

My question is naive. In a short period of time, you explained all of the challenges faced by linguistic minorities in Canada, in connection with the Official Languages Act. All of these challenges relate to the political level. The spirit of the act speaks to a desire to achieve some concrete results. According to what I understood, the act is clear, but the political will to apply it is not quite there.

In your opinion, what is the most important thing we should study or do in the course of this exercise to amend the act?

● (1025)

Mr. Michel Bastarache: I think that would be section 20 of the charter, which concerns services provided to the public. It should include various things. Mandatory active offer would be one, and service of equal quality.

I'll give you an example. The last amendment to the Official Languages Act aimed to make the application of part VII mandatory. That part states that the government has the obligation to take steps to foster the development of minorities, and to protect them. Who controls that? What does that mean?

I have always said that if we want to offer service of equal quality, we must, right from the beginning of the planning process, take into account the fact that there are two communities to be served. Currently, a program is prepared in English, it is discussed in English, its parameters are established in English, and then it is sent to the translation bureau; and presto, you have a French version of the program. That way of doing things is impossible, since the communities do not have the same needs.

In preparing a new program, you should be able to say that it will look like this for the anglophones, and like that for the francophones. The Supreme Court has already confirmed that that is the only way to establish service of equal quality. Equal quality service does not mean that you will provide exactly the same service, but that the community will derive the same benefit from it given its particular circumstances. If you did that, I think there would be far fewer complaints. At this time, programs are developed, and then documents are distributed that get translated into French. People then say that that is of no use in their communities, and they file complaints.

A system based on complaints is never effective, especially since that takes up time and money. Remember that the reinstatement of the court challenges program was promised two years ago, but it is still not back.

Mr. René Arseneault: Thank you.

I will yield the rest of my speaking time to my colleague.

Mr. Darrell Samson (Sackville—Preston—Chezzetcook, Lib.): Good morning, Mr. Bastarache.

Mr. Michel Bastarache: Good morning.

Mr. Darrell Samson: It is a pleasure to have you here.

Your first profession was law. Afterwards, you aspired to become a justice of the Supreme Court, and you succeeded in that. Now, you are back as a lawyer. And so you have an overarching perspective, which is very interesting. Your testimony is extremely important to us as we consider the modernization of the Official Languages Act.

I will try to ask some questions quickly, because time is flying by.

You have always been in favour of having bilingual Supreme Court justices, and I imagine that that is still the case.

Mr. Michel Bastarache: Over the past two years, we have had the proof that that is possible. Two bilingual justices were appointed, one from the west and one from Newfoundland and Labrador.

Mr. Darrell Samson: Should that bilingual obligation be included in the act?

Mr. Michel Bastarache: I believe it should.

Mr. Darrell Samson: Very well.

You have always spoken about the creation of administrative tribunals, and you did so again today. How important is that? How can we do that quickly?

Mr. Michel Bastarache: A detailed study needs to be done to see how that could apply in this area, but it is certainly one of the possibilities. Some people think that all that is needed is that the commissioner have powers of sanction and refer things more often to federal court. The problem is that if cases are referred to the courts, it will take two years and cost $100,000. The communities are always short of money to take their cases before the courts. That is why the court challenges program is important. Administrative tribunals are generally faster and cost less.

Mr. Darrell Samson: You referred to the Beaulac decision, which you drafted yourself with your colleagues the other justices. This is what you said:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.

Should we add a section in the Official Languages Act to codify that principle?

You said it; now we have to determine how we are going to do that.

Mr. Michel Bastarache: Those are general principles. Most of the time, general principles are found in the preamble of an act, where its objectives are defined. I've never really thought about this.

Mr. Beaulac's case was interesting. He was a francophone from Quebec who lived and worked in British Columbia. Of course, he worked there in English. He asked that legal proceedings take place in French, since he was a francophone. The court asked him, since he understood English, why it should bother to find a bilingual judge, the services of bilingual clerks and so on. That was the gist of the problem.

A fourth trial was ordered. The issue was whether that trial should be annulled because of what British Columbia anglophones considered a procedural irregularity. We maintained that this was not a procedural irregularity but a fundamental right, and that if there had to be a fourth trial, then there would be a fourth trial. It was the only way to stop things.

Mr. Darrell Samson: Should you have the time to think about it, could you send us a note about that?

● (1030)

Mr. Michel Bastarache: Yes.

Mr. Darrell Samson: Some changes have been announced to the public services provision criteria set out in Official Languages Regulations. Among other things, the possibility of adding 600 bilingual offices was raised.

Is this really a proper response to the issue of providing services to the public in both languages?

Mr. Michel Bastarache: Of course, if there are more offices, things will be better, but the criteria used to open or close offices have to be very clear.

The reason behind the proceedings launched by SFM in Manitoba was the federal government's formula for the calculations. There had to be 500 people who spoke French. The percentage was also mentioned—2% or 5%, I can't quite remember. According to that formula, if there were 498 people, the services could be reduced the following year, even though all of the bilingual public servants were in place. And that is what was done in some places.

Mr. Darrell Samson: The proposed changes take the vitality of a community into account. For instance, the number of schools is taken into consideration.

Mr. Michel Bastarache: Yes. The presence of a school was added to the criteria. That should improve things greatly.

Mr. Darrell Samson: Thank you.

The Chair: Thank you, Mr. Samson.

Mr. Choquette, you have the floor.

Mr. François Choquette (Drummond, NDP): Mr. Bastarache, thank you very much for being here with us today.

I have a clear recollection of your presence at the committee when we studied the amendment that would have required that Supreme Court Justices be bilingual in order to ensure access to justice in both official languages. I am pleased that you reminded our committee about the importance of amending the Official Languages Act to ensure that all justices of the Supreme Court will be bilingual, and that everyone will have access to justice.

According to your presentation, there are three ways of approaching changes to the law. First of all, we may consider the courts. I'll get back to that later. We may also take into account the public's expectations. This involves, among other things, section 20 of the charter, which deals with services to the public. Finally, we can evaluate the quality of the act's implementation, of course.

We talked a little about the Commissioner of Official Languages. He is our watchdog for linguistic duality, or at least that is what we hope.

Recently, in British Columbia, the federal court handed down a decision about much bandied-about part VII of the Official Languages Act, which is about the engagement of the federal level, but is not accompanied by any regulations. According to that decision, part VII does not mean much, because there is no clear definition of what a positive measure looks like. In other words, if the measures don't hinder anything, there is no problem. There is no real engagement on the part of the government.

Mr. Michel Bastarache: It's worse than that.

Department of Justice representatives appeared before the Standing Senate Committee on Official Languages and said that withdrawing services from a minority did not run counter to part VII, insofar as the government's overall activities contained important measures to promote minorities. This means that nothing would ever contravene part VII, since the government is always doing something positive somewhere.

In my opinion, this really showed that there was no intention, at least not on the part of the Department of Justice, of implementing part VII.

Mr. François Choquette: How should we modernize part VII of the Official Languages Act? It is true that positive measures have never been defined. The fact remains that the decision, even though it is currently being appealed, has some very serious consequences. For instance, in his recently published preliminary report on Netflix, the Commissioner of Official Languages concluded that there are positive measures, since the government has an official languages plan. It's like what you just said. Since there are measures, no one cares much about the agreement concerning Netflix.

What points should we improve? What could you suggest to make part VII mean something that could be translated into concrete improvements in the daily life of communities?

● (1035)

Mr. Michel Bastarache: I think that could be done through the Official Languages Regulations, since that is how the act is applied. Obviously, the regulations should specify how the Official Languages Act should be interpreted. In my opinion, the first thing that should be done would be to define what constitutes a positive measure, and how government organizations that have the duty to adopt positive measures should be overseen.

I think that the very first step in a positive measure is to take into account the consequences on minority communities of all decisions that are made, and of all programs that are put into effect. Things should be considered upstream. We should not wait for things to be done, and then wonder if something else needs to be done to correct the mistakes. We should be avoiding the mistakes right from the outset. When a department has a program, whether it's an economic development program or something else, the positive measure consists in studying the positive impact that program will have on the community, and ensuring that some elements of the program will meet the specific needs of that community.

Mr. François Choquette: In fact, one Commissioner of Official Languages report mentioned that there had been cuts everywhere to all programs without thought about the consequences this would have on services in official language communities, nor of the fact that this contravenes the act.

When Treasury Board prepares a budget, should it not ensure that special consideration be given to official languages?

Mr. Michel Bastarache: Yes, and I believe that is Treasury Board's responsibility now. Indeed, when particular obligations are created, it must ensure that the various departments and organizations obey the law.

The Chair: Thank you, Mr. Choquette.

I would ask you to divide your speaking time, Ms. Fortier and Ms. Lambropoulos.

Ms. Lambropoulos, you have the floor.

[*English*]

Ms. Emmanuella Lambropoulos (Saint-Laurent, Lib.): Thank you for being with us today.

Obviously the English minority in Quebec hasn't been mentioned once, so I'm going to be asking questions about that. In Quebec there's one official language and that's what they consider the norm, and this is what the provincial government is very adamant about.

On section 45, you mentioned that people should have access to federal, provincial, municipal and educational services in both languages. Obviously we have less authority over those other areas, but what are some ways that our government can negotiate with other governments to try to push for these rights to be given to anglophone Quebeckers?

Mr. Michel Bastarache: There are two ways. The first would be a negotiation with the provincial government to create areas where you get both federal and provincial services at the same place. It would be easier this way to give access in English to some of the provincial programs.

The other thing is that, in dealing with the minority, it should have to do with access to federal services in their language, rather than trying to involve the federal government in things that are really a provincial jurisdiction. This prolongs the conflicts all the time.

It really depends on the political will of both governments to act together, in a sense. It seems to me that the provincial government in Quebec is willing to coordinate some services when they really benefit the population. When I met with people from Quebec just last year, they were mostly insisting on access to health services and services for elderly people. They were losing ground in this area, but they were presenting this before federal people who said, “Well, our hands are tied. This is not our area of jurisdiction.”

● (1040)

Ms. Emmanuella Lambropoulos: I have spoken to federal agencies when making calls for constituents. Very often, it's the exact same problem you mentioned for Air Canada. Different federal agencies in Quebec have francophones and they speak a very broken English, if any at all. They say, “I'm sorry, do you speak French?”, and I say, “I do, but some others don't and they don't have access to this.”

Definitely, there are some ways to improve on our end, for sure. The *commissaire* has a lot to do with that as well. When we mentioned it last week, I don't know how....

Mr. Michel Bastarache: It is very difficult for him to deal with the quality of service in English in provincial jurisdiction areas. Even under the provincial legislation, when there's a right to a service, it means the right to a service of equal quality.

I don't know if you're aware of this, but the bar association of Quebec started a lawsuit against the Government of Quebec with regard to the quality of the Code of Civil Procedure. I gave the bar association the legal opinion. You don't have to do it, but if you do it, you have to do it with equal quality, because you're not providing access.

In the case of the code of procedure, it has to be done under section 133 of the Constitution. Even if it's not there, if legislation is created giving the anglophones any type of right, then automatically, that right has to be of equal value. It has to be good enough that you don't need to refer to the French version to understand what you have the right to.

[*Translation*]

The Chair: Thank you, Ms. Lambropoulos.

I now give the floor to Ms. Fortier for two minutes.

Mrs. Mona Fortier (Ottawa—Vanier, Lib.): I will be brief.

Mr. Bastarache, thank you very much for being here today. This is our first meeting with you and we are pleased to be able to call on your expertise.

Over the past 50 years, a lot of work has been done, and a number of things were accomplished. Today, we are modernizing the act, and for my part, I am turned toward the future. The government will be providing digital services. When I read the bill, however, I see that there is a lot of talk about offices and agencies, and not about the digital provision of services.

Do you think that the act should contain some way of protecting official languages while taking into account the fact that the government will increasingly be offering digital services in French and English throughout the country?

Mr. Michel Bastarache: I am not aware of what has been done, nor of what will be done. I have often been told that the digital provision of services would not diminish access to those services in both languages. I think that the obligation of publishing in both languages applies also to digital formats. Normally, that should be done simultaneously.

What is complicated, however, is that our entire system is based on institutional bilingualism and not on personal bilingualism. The French-speaking population is proportionally decreasing in Canada. And so we must resist the idea that Canada is a multicultural society where everything is uniform. We can't forget history, no more than we can forget the fact that there are two official languages.

In my opinion, the provision of services in French should not be based on numbers. It is rooted, rather, on fundamental principles established when the decision was made that our country would be bilingual at certain levels. Even though the government must be encouraged to do better, I think it will be increasingly difficult, simply because there aren't enough bilingual people, at the individual level.

● (1045)

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

On behalf of all my colleagues, I would sincerely like to thank you for being here, for your presentation this morning, for your comments, and for answering our questions. Please know that our committee is very grateful to you.

If we wanted to continue this discussion with you, could we invite you again?

Mr. Michel Bastarache: I am available, and quite determined to help you to the extent that is possible, and to share some of my experience. However, I want to reiterate that I am not representing anyone besides myself here.

The Chair: That is not a problem. You do indeed have a lot of experience.

Mr. Michel Bastarache: That's true.

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

Mr. Michel Bastarache: Thank you.

The Chair: With that, the meeting is adjourned.