HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Official Languages

LANG • NUMBER 135 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Thursday, February 28, 2019

Chair

The Honourable Denis Paradis

Standing Committee on Official Languages

Thursday, February 28, 2019

● (1105)

[*Translation*]

The Chair (Hon. Denis Paradis (Brome—Missisquoi, Lib.)): Pursuant to Standing Order 108(3)(f), we will resume our study of the modernization of the Official Languages Act.

This morning, we are pleased to have Benoît Pelletier, a professor at the University of Ottawa's Faculty of Law.

Welcome back, Mr. Pelletier. You have been here before.

We will proceed as usual.

Mr. Foucher has just arrived.

Mr. Pierre Foucher (Professor, Faculty of Law, University of Ottawa, As an Individual): My apologies. There were delays downstairs.

The Chair: Mr. Foucher is also a professor at the University of Ottawa's Faculty of Law. The U of O is my alma mater. Welcome, Mr. Foucher.

As usual, you will each have about ten minutes for your presentation, followed by questions and comments from the committee members.

Let's start with you, Mr. Pelletier.

Prof. Benoît Pelletier (Professor, Faculty of Law, University of Ottawa, As an Individual): Very good.

I would like to thank the committee for inviting me here today to discuss an important topic, the modernization of the Official Languages Act.

I would like to congratulate you all on your work to promote and develop Canada's linguistic duality. That brings me to my first point. I will touch on just six points, each one briefly so I don't go over my allotted time.

The act does not mention Canada's linguistic duality. It does, of course, refer to English and French as Canada's official languages. It also talks about the development and vitality of English and French linguistic minority communities. All of that implies that Canada has a linguistic duality. However, the act does not specifically mention the concept, which, I'm told, has been losing so much ground that, as Senator Miville-Dechêne said at a recent seminar at the University of Ottawa, attitudes toward linguistic duality in federal institutions are becoming less and less friendly.

What she said really worried seminar participants, and it made me realize how important it is for Parliament and, ultimately, the Government of Canada, to formally recognize the concept of Canadian linguistic duality. As you know, multiculturalism and bilingualism have already been recognized, and it might be time to recognize Canada's linguistic duality as well.

My second point is international immigration. The Official Languages Act says precious little about immigration, which is absolutely crucial to the vitality and development of official language minority communities, especially francophone and Acadian communities. Their demographic weight in this country is shrinking steadily.

It seems to me that the modernization of the act provides an opportunity to include provisions regarding immigration. However, great care must be taken not to compromise the Canada-Quebec accord relating to immigration. Lawmakers will have to be extremely careful when it comes to respecting the agreement Quebec and the federal government have in place.

My third point is about Canada's international image. Perhaps the Commissioner of Official Languages should be mandated to ensure that Canada's institutions and representatives abroad convey an image of our country that respects the linguistic duality I referred to earlier. In other words, up to now, too little consideration has been given to Canada's international image.

The commissioner has well-established responsibilities here in Canada. Sections 23 and 24 of the act relate to travellers and Canada's offices abroad. I am familiar with those provisions, but the commissioner's role with respect to Canada's international image should be much more clearly defined.

I would also note that the act does not prevail in all cases. According to section 82, only some parts of the act prevail over other federal acts and regulations. In my opinion, that partial primacy should no longer be. I think all parts of the act should prevail.

● (1110)

One issue you probably did not expect me to raise is bilingualism in the Supreme Court of Canada. I am thoroughly convinced that bilingualism is possible in the Supreme Court of Canada. I am referring to section 16 of the act, which covers courts other than the Supreme Court of Canada. That means it is possible to institute bilingualism in the Supreme Court of Canada without seeking a formal constitutional amendment. Anyone who says otherwise is, I believe, mistaken. I have no compunction about raising this important subject.

My final point relates to something you have already heard a lot about: the importance of strengthening the act, giving it teeth. At this time, the commissioner does have important powers, it's true. For one, he has the power to investigate, report and make recommendations, but he doesn't have the power to impose sanctions. I think the time has come to focus on that gap in the Official Languages Act and give the commissioner the power to impose sanctions.

I know quite a few people interested in linguistic rights in Canada have proposed creating an administrative tribunal. I think that idea is worth exploring. I can go into more detail when it's time for questions.

That concludes my presentation.

● (1115)

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

I will now give the floor to Pierre Foucher.

Mr. Pierre Foucher: Thank you very much, Mr. Chair.

As the Supreme Court justices say, I concur. I could stop right there, but I will add a few remarks of my own.

The last time I appeared before the committee, we were talking about Air Canada. Now the scope of the discussion has broadened to include the entire act and how to strengthen its application.

As everyone knows, the act is difficult to enforce. More and more things are being allowed to slide. Just yesterday or the day before, a National Energy Board report was published in English only, which is a clear violation of the act. That should not happen. We need to find ways to make sure it doesn't happen again. The Official Languages Act is now 50 years old, and violations like that are completely unacceptable.

That said, how can the Official Languages Act be modernized and improved? I will focus on a few points related to enforcement.

First, I have long called for transferring responsibility for enforcing the act to the Privy Council Office. PCO is crucial to the machinery of government, and making it responsible for enforcement would be very efficient and effective. That's how it worked under Stéphane Dion. Back then, the act worked well. That would be one way to improve enforcement of the act.

Second, and on a similar note, it might be a good idea to clarify Justice Canada's role. The act lists Treasury Board's and Canadian Heritage's responsibilities, but the Department of Justice, though an important player here, is not involved in applying the act.

Third, a number of recent court cases have led to disappointment. In the Air Canada case, for example, the court refused to award damages. Section 77 could be clarified to give judges some ideas. For example, it can state explicitly that, where they find a party to have been in violation of the act, they can award damages if appropriate.

Fourth, there was a lot of talk about administrative penalties during the Air Canada affair. It might be easier to sanction private entities, but the Treasury Board Secretariat can impose administrative or monetary penalties on departments too. Why not adopt a carrot-and-stick approach and make it clear to departmental officials that constant, repeated, ongoing violations of the act may affect their budgets?

The final issue I want to talk about is an administrative tribunal. It could be useful; there are pros and cons. It would be most useful for part IV on language of service, part V on language of work, part VII on positive measures and section 91, a technical provision on linguistic designation of positions. An administrative tribunal's expertise could be very useful in these areas, and having a tribunal deal with matters would be faster and cheaper than going to Federal Court.

There are cons, however, such as potential conflicts with other administrative tribunals that can deal with official languages. There will be legal debates over which body has the power to rule in a particular case. It distances litigants from the court if they decide to seek a judicial review in Federal Court following an administrative tribunal's decision. I don't want to get too technical, but it's important to know that when courts are conducting a judicial review of an administrative body, they tend to respect the administrative tribunal's jurisdiction and decline to intervene unless something unreasonable was done.

● (1120)

In any case, I am not alone in saying that the existence of the court challenges program, if not the details of how it operates, should be included in the act. It's important to remember the court challenges program. If an administrative tribunal were to be created, the court challenges program would have to be authorized to pay for proceedings before the administrative tribunal, not just the courts.

Thank you. I am happy to answer your questions.

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

We will get right into questions and comments.

Mr. Clarke, you have the floor.

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

Mr. Pelletier and Mr. Foucher, I'm very happy to see you here this morning. I was the one who requested your appearance here.

Mr. Pelletier, as I told you, I'm very happy to meet you. Many people have told me that you are an accomplished constitutional expert. I think of myself as an amateur constitutionalist. Maybe we can put that to the test.

I would like to get right down to business. We decided to improve on the Senate's study by focusing on elements related to the tribunal and the positive measures mentioned in part VII. If I understand correctly, when the act was last amended in 2005, lawmakers wanted to make the notion of positive measures more tangible in part VII.

Mr. Pelletier, I've been told that you are an expert on intergovernmental relations. Perhaps you are too, Mr. Foucher. I don't know.

Here's what I'd like to ask you. Take the Université de l'Ontario français, an exceptional undertaking that, for the first time in Canada's history, would give the federal government the opportunity to implement a truly positive measure by circumventing the provincial government and funding the university directly by various means. If that were to happen, what would the consequences be?

Similarly, if the wording of part VII were to extend beyond the realm of possibility into duty, any community could, at some point, contact the federal government, tell the government the community is dying, and call on the government to take positive measures. My question is really two questions in one.

First, in a case like that, how could the government determine if the community is truly in danger?

Second, if the government were to take positive measures in an area under provincial jurisdiction, what would the consequences be in terms of shared jurisdiction under the Constitution?

Prof. Benoît Pelletier: I picked up on two things you said.

The first is the division of legislative responsibilities, which both levels of government must respect, of course. In other words, Parliament cannot directly legislate in an area such as education, as in your example.

The division of legislative responsibilities is one thing, but federal spending power is another. Although the jurisprudence has not provided a definitive answer to date, the Supreme Court of Canada has, on many occasions, shown itself to be in favour of the federal government using its spending power regardless of the division of legislative responsibilities. In other words, the Supreme Court has found that the federal government can spend money in areas under provincial jurisdiction and has never shown any sign of wanting to restrict that power.

Some may say that such statements are merely obiter dicta, incidental expressions of the Supreme Court of Canada's opinion on federal spending power. I can tell you that in some cases, such as Chaoulli, the Supreme Court went a long way by legitimizing and affirming the Canada Health Act, which, in a way, provides guidelines for federal spending on health. Technically, therefore, Parliament can do a lot with its federal spending power, even in areas under provincial jurisdiction.

That brings us to the political problem of Canadian intergovernmental relations. It would look very bad if the Government of Canada were to intervene directly in matters under provincial jurisdiction against the wishes of a provincial government. I cannot overemphasize how bad that would look in terms of intergovernmental relations.

I also know that a number of provinces, including Quebec—maybe especially Quebec—are very resistant to accountability. What that means is that, when the federal government spends money to help the provinces help official language communities, Ottawa can ask for accountability. Many of the provinces take a pretty vague approach to accountability, and some are downright opposed to the idea of the federal level requiring accountability for areas under provincial jurisdiction.

● (1125)

Mr. Alupa Clarke: Part VII says that the minister “may”. If it said “must” instead of “may”, you're saying that could be politically dangerous.

Given what you've said, do you think it would be a good idea to go that far an put the work “must” in part VII?

Prof. Benoît Pelletier: I don't think so.

I have seen a number of recommendations about swapping “must” for “may” in the act. Every time I see that, I feel that it suggests a lack of political will or of will on the part of the Commissioner of Official Languages himself to fully exercise his powers.

In the specific case you mentioned, no, I don't think it would be a good idea to replace “must” with “may”.

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

Mr. Samson, you have the floor.

Mr. Darrell Samson (Sackville—Preston—Chezzetcook, Lib.): Thank you very much, gentlemen.

Mr. Foucher, we last saw each other a year ago, and before that, it had been quite a while.

Mr. Pelletier, as I said earlier, I don't remember what forum I was at 10 years ago, but you were a minister in Quebec at the time and a key supporter of francophone minorities outside Quebec. That was much appreciated.

Mr. Pelletier, I'd like to follow up on my colleague's question about jurisdiction, the shared powers you mentioned and spending power. I find that very interesting.

Minister Duclos included a clause in the early learning and child care agreement stating that there must be spaces for francophones. This is the first time we've seen something concrete. It's not as much as we would like, but it's a start.

You referred to Quebec, particularly in the context of immigration.

When it comes to spending power, if I give you something, I'd like to know how you're going to spend it.

Do you think we can add something to the act to strengthen that notion of accountability?

Prof. Benoît Pelletier: What I can say is that, when it comes to agreements like the early childhood agreement, it's down to intergovernmental negotiation. The federal government can go as far as possible by including clauses that favour Canada's francophone and Acadian communities.

It has to negotiate, obviously. There has to be an agreement with the province in question. In many cases, the Government of Canada manages to include clauses in agreements to make them stronger and more robust than previous agreements.

● (1130)

Mr. Darrell Samson: For example, for health, in addition to the bilateral agreement, we've added two new investments, and the provinces cannot use that money for anything else.

The first investment is for mental health services, and the second is for home care. We made those investments on condition that the money be used for those purposes. The parties agreed, and that's how it's working, which is extremely good.

Mr. Foucher, I'd like to talk about the debate around the Montfort Hospital in Ontario. The decision in that case is very interesting. The judge clearly stated that institutions are crucial to the vitality and longevity of communities. That is a very important concept. Not long ago, someone talked about how Quebec protects its institutions, but in minority communities, the institutions protect the community.

Would you like to comment on that?

Mr. Pierre Foucher: If I may, I'd like to answer the first question you asked Mr. Pelletier.

I'm thinking of the workforce development agreement with British Columbia, which is currently before the Federal Court of Appeal because the lower court decision was detrimental to communities.

I see two possible responses to the situation. The first would be to clarify section 25 of the act to say that provincial governments that sign agreements act on behalf of the federal government, which makes them responsible for accountability.

The second would be to include a provision in the act to allow communities that feel their province has violated the linguistic conditions of a federal-provincial agreement to seek recourse. The problem is that communities themselves do not sign these agreements. Either they should be included in signing the agreements—which governments may not be open to—or the act must provide a mechanism for third parties that believe provisions directly affecting them have been violated to seek recourse. That would enable communities themselves to hold provinces accountable for violations of an agreement.

That's my answer to the first question.

Mr. Darrell Samson: I like that idea. It would be good to have a community consultation mechanism written in to—

Mr. Pierre Foucher: —make sure their concerns are addressed in agreements without actually having them sign the agreements, which I doubt governments would accept.

Mr. Darrell Samson: I know my time is almost up. How much time do I have left, Mr. Chair?

The Chair: You have about 15 seconds.

Mr. Darrell Samson: I have one last question.

Mr. Pelletier, I agree on the issue of Supreme Court justices. I also think that we should include court challenges, the census, and immigration. The whole issue of real estate is essential as well, since some people across Canada do not have property or access to real estate. I know there may be a possibility in sight with British Columbia. All these issues should be included, but the question is where and how. Perhaps you could tell us some other time.

The Chair: Thank you for your comments, Mr. Samson.

We will now hear from Mr. Choquette.

Mr. François Choquette (Drummond, NDP): I want to thank the witnesses for being here today.

We also thank you for reminding us of the importance of having bilingual judges at the Supreme Court and encouraging us to change the law accordingly. The committee recently tabled a report on the matter, recommending that the current government amend the Official Languages Act or other legislation before the end of the current mandate to make it a requirement for Supreme Court justices to be bilingual. However, I don't think that is going to happen, sadly.

I also want to say a few words about what the National Energy Board did recently. It is horrible and you are right to mention it. I have been following this translation issue since 2014, first with the Energy East pipeline project and now with the Trans Mountain project. I moved a motion in the House of Commons on the matter and I will be filing a new complaint with the Commissioner of Official Languages.

As you said, we now have a problem with some non-compliant agencies or departments. Take the Royal Canadian Mounted Police, for example. The Commissioner of Official Languages made three recommendations to the RCMP that were so simple that my colleague Yvon Godin took it as a slap in the face. However, five or six years later, the RCMP still has not complied with these three simple recommendations, which is disrespectful to the Commissioner of Official Languages. You provided some solutions, but what can we do about agencies like the National Energy Board, which does not respect both official languages, or the RCMP, which does not respect the Commissioner of Official Languages? What can we do to improve this situation?

● (1135)

Mr. Pierre Foucher: We raised the possibility of charging administrative monetary penalties. We also talked about budgetary consequences or even using an administrative tribunal. It would also be possible to have a recommendation by the commissioner registered by the Federal Court, which would be the equivalent of a ruling by that court and would make an agency in contempt of court if it failed to comply. That would be a rather drastic solution, but the option is there.

Mr. François Choquette: I believe you mentioned earlier that the Privy Council Office was responsible for the Official Languages Act. Did I understand that correctly?

Mr. Pierre Foucher: That was when Stéphane Dion was President of the PCO.

Mr. François Choquette: Could you elaborate?

Mr. Pierre Foucher: It did not last long.

Mr. François Choquette: Why not? What changed?

Mr. Pierre Foucher: I don't know. You would have to ask the government.

I'm old enough to remember when Stéphane Dion was President of the Privy Council. He specifically asked to be responsible for official languages and that is when we had the first official languages action plan.

Let's not forget that the clerk of the Privy Council is in charge of all public servants. When an order comes from the Privy Council, public servants obey it. The order has much more weight if it comes from the Privy Council than if it comes from the Deputy Minister of Canadian Heritage, for example. The same goes for the Treasury Board, which has the power to approve budgets. If a department is required to ask for money from the Treasury Board, then we know that the department will meet Treasury Board requirements.

Accordingly, if you want the administrative or bureaucratic implementation of the legislation to be more effective, I suggest you entrust that to the Privy Council Office. You'll see that the public service moves much more quickly.

Mr. François Choquette: You just mentioned the Privy Council Office and the Treasury Board. What are the advantages and inconveniences of each of those agencies?

Mr. Pierre Foucher: The Treasury Board only takes care of the financial aspect. The Privy Council Office has a much broader mandate, in other words, general government policy, the operation of the machinery of government.

I think matters surrounding the implementation of the Official Languages Act exceed simple budgetary considerations. That is why I think it would be better to give that role to the Privy Council Office.

Mr. François Choquette: Mr. Pelletier, do you have anything to add?

Prof. Benoît Pelletier: The Privy Council Office needs to be the central agency responsible. We agree that there are currently structural problems with the implementation of the Official Languages Act. Canadian Heritage has some responsibility, as does the Treasury Board. It would be important to have a central agency to coordinate enforcement of the entire Official Languages Act.

I think the thing going against the Privy Council is its lack of transparency. The thing playing in its favour, however, is its weight within the public service. Both its political weight and authority have value. It has the necessary authority to oblige federal institutions and departments to better comply with the Act. The Privy Council can also have a vision for the future of the Act. It is not just about enforcing the legislation, but also having an idea of what we want to do in the years to come. In that vein, the Privy Council Office could prepare a five-year development plan.

Reference was made to this earlier, but I want to come back to the importance of fully involving Francophone and Acadian communities in all the processes surrounding the modernization of or ad hoc changes to the Act.

● (1140)

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

We will now move on to Mr. Arseneault.

Mr. René Arseneault: Thank you, Mr. Chair.

I thank our guests for being here. It is truly a pleasure to hear their point of view.

I would like to point out that Mr. Foucher had a successful tenure at an Acadian university, the Université de Moncton. He must be the only constitutional expert who can strum a guitar and sing Charlebois at the top of his lungs and he sure did.

I will leave it to my colleagues to talk about the merits of having an administrative tribunal, even though I would like to discuss it, but I will focus on another topic instead.

Mr. Pelletier, the first point you raised in your opening remarks—a point that Mr. Foucher subscribes to—was the following: the concept of linguistic duality seems to have gone quietly into the night. It is not something that seems to be talked about any more in Canada. I think that is the main reason our Official Languages Act is weak and has no teeth. This is not new and I would like you to expand on that. Why are we still discussing this today? I think we need to nip the problem in the bud and talk about it openly.

Before we get into that, however, I would like you to explain the link between this lost concept of linguistic duality and the age old separation of legal powers between the provincial and federal governments. Many witnesses have told us that if they cannot live, breathe, sing, write, and dance in their mother tongue from early childhood and throughout their education and post-secondary education, then they will not be able to thrive and grow. My mother tongue is that of Antonine Maillet.

How do you explain this lack of teeth in the Act or the fact that this concept of linguistic duality seems to be lost in this beautiful and great country of Canada?

Prof. Benoît Pelletier: I will begin by saying that the Commissioner of Official Languages defines linguistic duality as, “the presence of two linguistic majorities cohabiting in the same country, with linguistic minority communities spread across the country”. This evokes a concept we used to hear a lot about, the fact that there are two major host communities. There are two major linguistic groups in Canada and two host societies. These groups have rights that are not only contemporary, but also historic. Let's not forget that.

In my view, we have put too much emphasis in Canada on the right of each individual to choose between English and French and not enough emphasis on the wealth and synergy that stems from the very coexistence of both official languages. In my view, the concept that best translates this dynamic between the two official languages is linguistic duality.

However, I hear that linguistic duality is losing ground in some instances, specifically at federal institutions, as some have mentioned. I think we need political leadership to bring linguistic duality back to the forefront. It is extremely important for linguistic duality to have more of a presence in major official speeches across government, including by the Prime Minister and not just in speeches by the minister responsible for the Canadian Francophonie.

I can assure you that if linguistic duality were truly a fundamental value for Canada, as the Prime Minister, ministers and the entire machinery of government have said, then most Canadians would realize that they all have an interest in having their children learn French and English to ensure that they have the brightest possible future in Canada. For the longest time, that used to be the federal government's message, that if people wanted to get ahead in Canada or give their children the best chances, then they needed to have adequate knowledge of both official languages.

That being said, I hope that the political leadership that I attribute mainly to the federal government will spread across the country and result in more services in French and better collaboration with the provinces. However, there is nothing I can do about the fundamental problem of shared jurisdiction.

● (1145)

Mr. René Arseneault: That's what I was getting at in my question: how do we get there?

Do I have any time left, Mr. Chair?

The Chair: No.

Mr. René Arseneault: I will come back to that.

The Chair: Thank you, Mr. Arseneault.

We will now move on to Mr. Rioux.

Mr. Jean Rioux (Saint-Jean, Lib.): Thank you, Mr. Chair.

I am pleased to see my former colleague from the National Assembly of Quebec again.

Mr. Pelletier, you said at the beginning that bilingualism has declined in government, and the way Act is enforced is a testament to that. As I said earlier, I am new to the committee and I am impressed by what I am seeing. Maybe that's because at some point in Quebec we addressed the issue and decided that French-Canadians from other provinces were not important.

I understand that many communities do not have schools for francophones. I am told that in Vancouver only one in five francophones has access to a spot in the early childhood network. There is a lack of funding and the issue of accountability was raised earlier. Let's not forget the significant number of francophone immigrants. I think that we have all the ingredients to promote bilingualism, but now we need legislation with more teeth.

Mr. Foucher, you started talking about accountability earlier and I found that interesting. The school boards are telling us that even though funding is available they have no say in how the money is distributed. In fact, the money is not devoted to French education and the school boards are disadvantaged. I liked your suggestion that the organizations sign the agreement or have recourse if they do have the right to sign it. How could we include that in the legislation?

Mr. Pierre Foucher: I imagine this could be included in Part VII of the Act as a positive measure. There is also the option of recognizing, as Judge Ouellette did in the case of the Yukon francophone school board, that the federal money is given in trust.

My colleague Mark Power suggested giving federal education funding directly to official language minority school boards. That is currently an option in every province except Quebec, where funding Anglo-Quebec organizations directly requires the approval of the provincial government under a provision of the Loi sur l'exécutif du Québec, if I am not mistaken.

These are different ideas, different ways in which we could solidify this option. We might also incorporate accountability into the Act.

● (1150)

Mr. Jean Rioux: Mr. Pelletier, you talked about the wealth of bilingualism. I think that people in English Canada understand that better than we do if we look at the number of immersion schools. In Quebec, however, we seem to fear bilingualism. We continue to be insecure and fear assimilation instead of looking at the 2.4 million francophones outside Quebec as assets for promoting our language and culture. How could we change the mentality of Quebeckers and their government when it comes to seeing the benefits of bilingualism? I think your political experience will help you answer that question.

Prof. Benoît Pelletier: As you know, bilingualism exists at the federal level and in a more comprehensive way in New Brunswick. As for the other Canadian provinces, a certain form of bilingualism exists in Quebec and Manitoba under section 133 of the Constitution Act, 1867, and section 23 of the Manitoba Act, 1870, respectively. What is more, section 23 of the Canadian Charter of Rights and Freedoms applies to every province in Canada. However, subsection 23(1)(a) will not apply to Quebec until that province accepts that provision.

In other words, like Quebec, which chose to have just one official language, French, most Canadian provinces make their own choices on linguistic matters. However, that is no reason to stop promoting bilingualism across Canada, including in several sectors of the federal government. We must promote bilingualism. We have seen some positive signs, including the fact that immersion schools are bursting at the seams and there is demand for more immersion schools, or the fact that every province except British Columbia, I believe, has legislation on receiving services in French. That is significant progress across the country.

The other good news is that the Official Languages Act is much better perceived these days than it was when it was passed and it is accepted by the vast majority of Canadians. The bad news is the gradual decline in the demographic weight of francophones in Canada.

I would like to briefly come back to immigration, Mr. Chair. It would indeed be important for the commissioner to be responsible for maintaining the demographic weight of official language minority communities across the country. It would also be important for the Government of Canada to make an extra effort to achieve the immigration targets that have been set. This would help mitigate or counter the loss of demographic weight, which is the biggest threat for francophones in Canada, which, unfortunately, is an argument that plays against Canadian federalism.

The Chair: If I may, Mr. Pelletier, I will interrupt you so that everyone can intervene because we are running out of time. You can finish your comments by answering the questions from the other members of the committee.

We will now continue with Mr. Bernard Généreux for two minutes.

I would like to point out that those two minutes include time for answers.

Mr. Généreux, you have the floor.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Do we have the two hours or just one hour?

The Chair: We have one hour, after which we are receiving another witness from France.

Mr. Jacques Gourde (Lévis—Lotbinière, CPC): For witnesses of that caliber we need to have two hours.

The Chair: Mr. Pelletier told us he had to leave at noon. If Mr. Foucher can stay a bit longer, I have no problem with that either.

Mr. Bernard Généreux: Yes, that would be great.

The Chair: I am told that Mr. Foucher cannot stay longer either. Mr. Pelletier and Mr. Foucher notified us that they could not stay any later than noon.

● (1155)

Go ahead, Mr. Généreux.

Mr. Bernard Généreux: Mr. Pelletier, Mr. Foucher, thank you for being here.

I want to quickly come back to the Commissioner of Official Languages.

Personally — I am not speaking for my party — I have always had a problem with the idea of a monetary penalty of any kind. The question is quite simple: if the Commissioner of Official Languages obtains the power to fine the government — regardless the department — for non-compliance with the Act, who will pay? We can all agree that the money will come out of the left pocket only to be put in the right pocket.

I can't imagine a scenario where the Commissioner of Official Languages would give a department X fine only to then have the Treasury Board asked to disperse the funds required to pay the fine. Something doesn't add up there. However, if the commissioner asked the Treasury Board to reduce the budget of a department or a given project as a form of penalty, then the department would be sure to react differently than if it were to receive a simple fine because money talks. In any case, it comes out of the same pocket.

Fining Air Canada is different. By the way, Air Canada is the only airline subject to the Act. The others can do what they want and will no longer be penalized in any way, which will do nothing to improve the French situation in Canada.

See what I mean? I understand the idea of using some sort of pressure on all the departments, but the reality is — as you said, Mr. Pelletier — that it takes political will to enforce the Act.

Mr. Pierre Foucher: The important thing is to hit the pocketbook, as you said. So far, departments only get recommendations. These punishments would apply only to repeat offenders, those who still do not understand after 4, 5, 6, or 10 investigations, that they are still in breech of the Act and have still not corrected the problem. It is up to you to consider the political possibility of addressing this with fines or reduced budgets. My main argument is the need for immediate, direct, financial consequences for the departments.

The Chair: It is noon, the time at which we promised to release you. However, this discussion is truly very interesting. Can we invite you to come back to resume this discussion? If so, I will ask the clerk to work out a time for you to appear again.

Mr. Darrell Samson: We need to schedule two hours.

Mr. Bernard Généreux: Yes, we need to schedule two hours, especially at your going rate.

Some hon. members: Ha, ha!

The Chair: Are you okay with that, Mr. Foucher, Mr. Pelletier?

Mr. Pierre Foucher: Yes, Mr. Chair.

The Chair: There are a lot of outstanding issues and your very interesting testimony gives the committee food for thought.

Thank you very much for being here this morning.

We will now suspend the meeting.

● (1155)

(Pause)

● (1210)

The Vice-Chair (Mr. Alupa Clarke (Beauport—Limoilou, CPC)): Honourable colleagues, we will resume the meeting later.

Mr. François Larocque is here with us. He is a professor at the Common Law Section of the Faculty of Law at the University of Ottawa.

Welcome, Mr. Larocque. Can you hear us?

Dr. François Larocque (Professor, Faculty of Law, Common Law Section, University of Ottawa, As an Individual): I can hear you just fine.

The Vice-Chair (Mr. Alupa Clarke): That is great.

I will give you some context. Our committee asked the Standing Senate Committee on Official Languages, which is conducting a parallel study on modernization of the Act, to indicate to us the areas it did not have time to explore or delve into. That committee recommended a number of possible topics and our committee decided to address the concept of an administrative tribunal and the positive measures provided for in Part VII of the Act. I think I am the one who gave your name to the clerk because it seemed to me that you are an expert on issues related to tribunals and Part VII.

Mr. Larocque, you have 10 minutes for your testimony. Then we will do an enthusiastic tour of the table.

You have the floor.

Dr. François Larocque: That is very kind of you.

Hello, Mr. Chair and honourable members of the committee. Thank you for inviting me to take part in this meeting of the House of Commons Standing Committee on Official Languages.

I also want to thank the committee's technical and administrative team for going to such great lengths to allow me to testify remotely by video conference. It is truly a privilege to be here with you even though I am currently in Montpellier in the south of France. I hope my contribution helps you a bit in your study on modernizing the Official Languages Act.

Once I was connected online, I was fortunate enough to catch the end of the comments by my eminent colleagues Mr. Pierre Foucher and Mr. Benoît Pelletier. They are scholars and I'm not sure if can say much more than they did. I might even repeat some of the things you've already heard. You will let me know if it is helpful or not.

Let me quickly introduce myself to give you a better idea of who you are talking to. My name is François Larocque and I am a Franco-Ontarian from Sturgeon Falls, in Northeastern Ontario. It's a small, francophone majority community that is very engaged. I was raised and educated in French thanks to some fierce linguistic battles and certain events that occurred in that community in the 1970s.

I also had the good fortune of being born to a very engaged family that is very proud of its language and culture, even though we were Franco-Ontarians. My parents instilled in me the desire to preserve my language and culture for myself and I even made a career out of it.

I did all of my education in French except for my doctorate, which I did in English at Cambridge in the United Kingdom. I had no choice. I studied law in French at the University of Ottawa before doing an internship at the Ontario Court of Appeal with francophone judges who were on the bench at the time, including Justice Charron before she was appointed to the Supreme Court, as well as Justice Labrosse. I was there from 2000 to 2001, which means I was lucky enough to be the only francophone clerk at the Court of Appeal during the Montfort hospital case, which I am sure you are familiar with. That was a highly educational experience. I then did an internship at the Supreme Court of Canada with Justice Louise Arbour, before doing my doctoral studies. I have been a lawyer since 2002 and a professor at the common law program in French at the Faculty of Law at the University of Ottawa since 2005. I have held several administrative positions at the faculty, including two terms as associate dean in addition to being acting dean for nearly two years.

There have been two phases to the research component of my career so far. In the first, I worked on international law and human rights. Since 2010, nearly 10 years now, I have been focused on linguistic rights. Both my research and my professional practice as a lawyer focus primarily on linguistic rights. I have worked pro bono for clients who have linguistic rights claims and appeared before every court of the land, from trial courts all the way to the Supreme Court of Canada.

Since July 2018, I have held the Canadian Francophonie Research Chair in Language Rights. This is therefore a recent move and my project is just getting off the ground. I would be pleased to talk to you about it if you are interested.

I was told that the committee would like to focus on matters of legal mechanisms to ensure that federal institutions are compliant with the Act. If I may, I believe it would be useful to provide context by going over some basic principles before diving in. As I keep telling my students, the merits of our arguments and findings inevitably depend on the merits of our premise.

I would like to quickly go over some of the historical premises on which I base the opinions I would like to present to you today.

● (1215)

The first premise is that linguistic duality and protecting minorities is truly part of Canada's DNA. It has always been part of how we identify ourselves as a country, our history, and our future. The Supreme Court said in Mercure that linguistic rights "are basic to the continued viability of the nation".

The second premise has to do with the Constitution Act, 1867, formerly called the British North America Act. That legislation established the first official federal bilingualism in legislative and judicial matters only. A century later, with the Official Languages Act in 1969, that official bilingualism extended to the entire federal government. At the same time, the first oversight mechanism was established, namely the Office of the Commissioner of Official Languages, as it was called at the time.

In 1982, Canada patriated the Constitution and adopted the Canadian Charter of Rights and Freedoms. As you know, section 16 makes English and French Canada's two official languages and gives them equality of status and equal rights and privileges. That is very important.

Six years later, in 1988, Parliament adopted a new Official Languages Act that enhanced the protection of linguistic rights by allowing, for the first time, recourse to the courts — namely the Federal Court — in the event of any failure to comply with the requirements of the Act. In 2005, this provision was enhanced by making Part VII justiciable.

As you can see, there has been a gradual progression since 1867 in developing legal mechanisms to protect linguistic rights in Canada. If I had to pick a moment that was a real game changer, it would obviously be 1982. Enshrining French and English as official and equal in the Constitution of Canada changed everything.

The importance of that moment cannot be overstated. With section 16 of the Charter, official bilingualism and the resulting rights are among the structural principles of Canadian law and order. Official bilingualism is no longer part of a simple administrative policy, as it was under the Pearson government, nor is it just legislative text, as it had been since at least 1969.

By codifying language rights within the Canadian Charter of Rights and Freedoms, the framers made fundamental rights guaranteed and protected by the highest law of the land. As the Federal Court puts it in Viola, the Official Languages Act of 1988 is truly an extension of the Charter. The starting point remains the Charter.

I believe that it is in this light that modernization of the Official Languages Act should be considered in 2019. It is also in this light that consideration should be given to the extent of existing legal mechanisms and the potential to ensure implementation of the amended legislation. We must account for the historic progression and constitutional foundation of linguistic rights by establishing implementation mechanisms for the next official languages act that are both accessible and robust.

You know as well as I do that the Official Languages Act currently provides for two major implementation mechanisms. First, there are the complaints to the Commissioner of Official Languages — in Part IX of the Act — which pave the way to investigations and reports. Second, there is the recourse to the Federal Court — in Part X — stating that if a person appeals to the court within the prescribed timeline and according to the prescribed procedures, they can obtain a remedy that the court determines to be “appropriate and just in the circumstances”. That is provided for under the legislation.

I would quickly like to make a few observations and recommendations regarding these two mechanisms. First, regarding the Commissioner of Official Languages, it is interesting to note that he is the first linguistic ombudsman in the world. That is a fact we do not emphasize enough and of which Canada can be very proud. The Office of the Commissioner of Official Languages has served as a model and paradigm, even archetype, for other language commissioners that exist elsewhere in Canada and around the world. Ireland and Wales come to mind, but there are others as well.

● (1220)

In my opinion, the Commissioner of Official Languages currently has the necessary skills and power to appropriately carry out the mandate he is given under the Official Languages Act. I believe that there are existing proposals to give the commissioner new powers, including the power to issue fines or other administrative financial penalties. I personally do not agree with those proposals. I think it sacrifices the very essence of the role of the language commissioner. I would be pleased to discuss that further with you.

The Commissioner of Official Languages is not a police officer or a judge. The Larendeau-Dunton Commission that proposed the creation of the Office of the Commissioner of Official Languages in 1968, described the role of the commissioner as the active conscience of the federal government on matters of official languages. The commissioner is a promoter of official languages and an ombudsman.

As a promoter, he proactively educates the public on bilingualism from coast to coast to coast. That is very important and that role must not be lost. As an independent ombudsman, he receives complaints and is equipped with rather significant investigative powers that allow him to shed light on systemic problems or even isolated shortcomings of the Official Languages Act. This also allows him to propose informal solutions to remedy the problems and to report directly to Parliament, which gives him independence.

The Vice-Chair (Mr. Alupa Clarke): Mr. Larocque, you have one minute left.

Dr. François Larocque: Okay, I will go faster.

The commissioner's recommendations are not binding, but in the next official languages act, at a minimum, the duty of federal institutions to respond to the recommendations in writing should be codified and describe how the federal institution intends to comply, or not, with the recommendation. This is an important step that is currently missing. Right now, federal institutions can respond, but they are not required to do so.

My second comment pertains to the second mechanism, namely referral to the Federal Court. I would do away with that and replace it with a newly created administrative tribunal. Others have made that recommendation and I agree that it would be an excellent idea. An administrative mechanism could be faster and more accessible. It could have powers that would be very satisfactory for complainants and could also support the commissioner in his duties. It would be complementary to the commissioner's role but would serve a distinct function.

I would be pleased to talk about other recommendations with you in due course. Since I don't have much time, I will stop here.

The Vice-Chair (Mr. Alupa Clarke): Thank you, Mr. Larocque, for your historical overview.

These are very important premises. For a few minutes there I felt I was back at Université Laval and it was very nice to be in the classroom.

We will now move on quickly to Mr. Généreux.

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

Thank you, Mr. Larocque.

Your testimony was very compelling. The few points of context you just gave us were very useful. You and I will get along famously, because I agree with you that the Commissioner of Official Languages is not in a position to possibly fine a department or suggest such fines, when the department that is supposed to pay is part of the same family and the money comes from the same pot.

The idea of an administrative tribunal sounds more sensible to me than the concept of having the commissioner both promote official languages and impose penalties. You very eloquently made the distinction between the two.

Still, do you think that creating such an administrative tribunal should be literally enshrined in law to follow up on what has been done so far, according to what you've mentioned?

● (1225)

Dr. François Larocque: Absolutely.

There should be a separate part in the new official languages act—if the idea is to create a new act—that establishes this tribunal, provides a framework for it and protects it.

Mr. Bernard Généreux: What powers do you think this tribunal would have, officially?

Dr. François Larocque: There are several ways of considering it. I envision it as a mechanism that would give complainants a means of access, whether they had previously filed a complaint with the commissioner or not. Depending on the response they received, they could follow up by resorting to the tribunal. It would be a bit like appealing the commissioner's decision.

In addition, if the commissioner failed to make the appropriate recommendations, the complainants could then seek more appropriate remedy from such a tribunal.

Mr. Bernard Généreux: Do you envision a mechanism in place like the one at Air Canada, where there have been complainants on multiple occasions? Do you actually see the same principle for a department?

Dr. François Larocque: Yes, absolutely. A department could be a respondent in an application or proceeding before the tribunal.

Mr. Bernard Généreux: The department could be required to compensate someone who might have been wronged, for instance.

Dr. François Larocque: Precisely.

Mr. Bernard Généreux: However, we know that at this time the Treasury Board acts somewhat like an adjudicator when it comes to enforcing the act within the government administration. We also know it has fallen short on multiple occasions, as have several other departments, especially in their communications, for instance.

From the moment this administrative tribunal received a complaint from a citizen, I'm trying to see how the government, within its own institutions, could manage the situation. In fact, complaints do not always come from outside the government. Public servants could well complain about various situations.

Dr. François Larocque: That's right.

Mr. Bernard Généreux: They have already done so in the past, and they will surely do it again.

How do you see this mechanism working under these circumstances?

Dr. François Larocque: A public servant going to court is something we see at the Federal Court right now. Being a public servant does not mean you stop being a citizen and having rights. We have the charter and it protects everyone's rights, including the rights of public servants.

As a citizen, anyone could resort to the tribunal, which would conduct a hearing and hear the evidence. If there was a commissioner's investigation, the hearing could consider the materials used in that investigation and the file could be entered into evidence. At the end of the hearing the tribunal could order a remedy, as the Federal Court does now. This would be done by an administrative tribunal, which would certainly be quicker and probably less costly for everybody.

Mr. Bernard Généreux: No doubt.

Do I have any time left, Mr. Chair?

The Vice-Chair (Mr. Alupa Clarke): You have two and a half minutes remaining.

Mr. Bernard Généreux: That's fine.

Earlier on, we briefly touched on the positive measures set out in part VII with Mr. Pelletier and Mr. Foucher. These measures could be used to facilitate the implementation or use of the act.

How do you think this definition could be made more concrete or targeted to ensure that more direct measures could be taken? That's very broad language.

● (1230)

Dr. François Larocque: The wording selected by Parliament when these part VII provisions were codified in 2005 included "positive measures" and the duty of federal institutions to ensure positive measures are taken for the implementation of the government commitments under section 41 of the act. I agree this is very broad wording.

One only has to read Justice Gascon's Federal Court ruling in *Fédération des francophones de la Colombie-Britannique v. Canada (Employment and Social Development)*. His main finding was that the term is too broad and there isn't sufficient substance for a decision-maker to work with. One may disagree with Justice Gascon on that point, but the overall gist of the ruling was that part VII gives the Governor in Council the power to make regulations precisely to clarify and substantiate these terms. To date, this power that has never been exercised. That would then be a way to do just that.

Another mechanism would be to clarify the wording yourselves, when you work on the draft of a future official languages act. You could specify certain positive measures, give examples, and on that basis, a decision-maker could rule on whether a federal institution has taken positive measures, as is currently its duty to do.

The Vice-Chair (Mr. Alupa Clarke): Your time is up, Mr. Généreux.

I now recognize Mr. Rioux.

Mr. Jean Rioux: Thank you, Mr. Chair.

Hello, Dr. Larocque, and thank you for joining us on video conference from Montpellier. We are a bit envious.

I think everyone agrees that the act must be more binding. You talked about the legal context. There is one thing we realized pretty much everywhere during our tours. There is no accountability when it comes to bilateral agreements, for one. I'm thinking particularly of minority French school boards, which have no control over money. In fact, most of them have told us that they do not receive the full amounts provided by the federal government.

What could we do to ensure that there is accountability and that all minority groups, not just those in this specific case, are not shortchanged?

Dr. François Larocque: I want to make sure I'm understanding your question properly, Mr. Rioux.

Are you asking me what we could do in the context of a bilateral agreement to ensure better accountability?

Mr. Jean Rioux: That's correct.

Dr. François Larocque: That would involve explicitly including in the agreement a duty to report and perhaps also providing for the Treasury Board to take a more active role in terms of tracking the money and ensure it is used properly. There is the case of some transfers made to the Yukon, for example, where the money wasn't used for the originally intended purposes. This was only done when the courts got involved. It seems to me that this could have been avoided if the obligations had been explicitly set out in the agreement. This is just an idea that came to mind.

I will admit that my research has not yet addressed this subject in much detail. My main focus to date has been on claims mechanisms for litigants.

Mr. Jean Rioux: I would like to come back to the specific case of Ontario's French-language university. Just how much can the federal government do to ensure that Ontario's francophone minorities, especially those in the Toronto area, can have those courses?

Would it be possible to have a mechanism in the official languages act for extraordinary situations, as is currently the case? We know that education is a provincial jurisdiction. Would there be a mechanism to further expand the positive measures?

Dr. François Larocque: You are asking me an excellent question that I haven't really thought much about.

Off the top of my head, there are a couple of things to consider. You first said that education is a provincial jurisdiction. That is true. However, official languages are not. They constitute a matter secondarily associated with the subjects listed in sections 91 and 92. Certain Supreme Court decisions dating back to the 1970s tell us that. The Jones ruling comes to mind.

The Supreme Court put forward the idea, without elaborating on it, that it would not be impossible for Parliament to legislate on official languages in an area of provincial jurisdiction, on the grounds of its overall authority to make laws for peace, order and good government, and that official languages issues are sufficiently related to national unity as to justify federal intervention. Therefore we would need a Parliament that would try to do this and see whether a province would actually challenge that action. Perhaps we would find that the Province would be happy to see money coming in, even in one of its own areas of jurisdiction.

Also, we should not forget about the possibility of negotiating. Everything can be negotiated. That would be an easier way to get there.

In short, I've always found interesting this Supreme Court idea that Parliament has the overall authority to legislate on official languages. In fact, another related issue that interests me is the role that Parliament could play in regard to the City of Ottawa. Municipalities constitute another matter very much under provincial purview, but the nation's capital is a distinct city. The City of Ottawa is different from other cities. Could Parliament then pass a law or take positive measures to promote official languages in the City of Ottawa, when municipalities fall under provincial jurisdiction?

I wrote a paper on the subject and I think that the answer is yes, based primarily on section 16 of the Constitution Act, 1867, which declares Ottawa to be the seat of government, and on section 16 of the Charter of Rights and Freedoms, which stipulates that English and French are the official languages of Canada. I can envision federal legislation, on the grounds of those provisions. The capital city belongs to everyone. It's not strictly an Ontario city, even if it is in Ontario. Ottawa belongs to all Canadians.

I think that could justify financial and legislative federal action to promote bilingualism in the City of Ottawa. In fact, that is something I would like to see in the next official languages act. My colleague Linda Cardinal and I submitted a brief on this issue to the Senate, and we are preparing to submit one to you as well.

● (1235)

The Vice-Chair (Mr. Alupa Clarke): Thank you Dr. Larocque. We would really like to see that document.

We will now move on to Mr. Choquette.

Mr. François Choquette: Good afternoon, Dr. Larocque.

Thank you very much for your presentation.

I would like to come back to the commissioner's powers. You mentioned that in your opinion, the commissioner currently has enough powers, and there is no need to give him more. I have a question about the commissioner's powers.

You are probably aware that the commissioner has the power to investigate, among others, and the power to obtain information upon request. For example, any department or organization may need documents and request that they be sent over.

I'm giving you that example because in the Netflix case, which concerns me a great deal, there was an agreement between Canadian Heritage and Netflix. Under this agreement $25 million would be added for francophone-related investments. We do not really know what those investments will be. There were complaints. I made such a complaint, to find out what would be the approach taken in terms of the positive measures cited in part VII.

To my knowledge, the commissioner did not exercise his investigative power to demand the documents that would enable him to properly conclude his report. To my knowledge, the power to demand documentation has never been used by the commissioners. Am I mistaken? Why don't the commissioners exercise that power? They have gone to court several times on a few files.

When they do request documents, however, they are told those are confidential and they make no further efforts. They don't demand the documents, even if they would keep them confidential afterward. I understand that these documents would probably not be made public because they are confidential, but they could at least be properly used to inform investigations.

As you said, the commissioner does have certain powers, but it seems that he never uses them. Why is that, in your view?

● (1240)

Dr. François Larocque: I can't really explain it, either.

I've just completed a comparative study of Canada's various language laws and I looked precisely at the issue of the commissioners' powers to secure evidence, compel certain witnesses to appear, force them to appear when they refuse or are reluctant to do so, and to demand that documents be produced. All commissioners have these powers.

They have the power to do this. Why don't they use it? My take is that perhaps the individuals who occupy these positions see their role in a certain way. On an idiosyncratic level, it may be that they just behave that way. They prefer to act more strategically and they tell themselves that they will not insist too much on one thing because they will ask for more on something else. Maybe that's the kind of calculation that goes on. We would need to ask the people who have served in these positions either at the federal level, in Ontario or elsewhere in Canada.

Also, one thing is interesting. Under the New Brunswick Official Languages Act, the Commissioner of Official Languages for New Brunswick has all the powers of a public investigator, in accordance with the New Brunswick Inquiries Act. When we look at this law, we can see that the powers of the public investigator include summoning people to appear and, if they refuse, send them to jail until they change their minds. The commissioner then has the power to temporarily imprison someone. The federal commissioner has no such power. To my knowledge, the Commissioner of Official Languages for New Brunswick is the only one that has that power—which has never been used.

That is the point you have made, Mr. Choquette. They have the powers, but they do not use them. I think this can be explained by a lot of strategic factors at play that may vary from one file to another. It could be a matter of not being bold enough or of not being certain of their right to exercise those powers. This has not been tested yet. One thing is certain, and the law is clear on this: they do have the powers.

Mr. François Choquette: The commissioner recently concluded its investigation of the RCMP and bilingual services on the Hill. That took five or six years.

The recommendations that came out of that are quite simple. They include making an inventory of bilingual staff, a biennial reminder of linguistic obligations and an action plan when complaints are received. There is nothing hard about that. In my opinion, it's inexplicable that the RCMP has not even followed up on these three recommendations. Faced with that fact, the commissioner issued a report indicating that no action was taken and that there is nothing more that can be done.

That is the problem we are facing. The same applies to the National Energy Board, which has once again trampled on language rights by publishing the Trans Mountain report in English only. I will file a complaint with the Office of the Commissioner of Official Languages, but unfortunately I fear there will be no consequences.

Would the administrative tribunal you talked about be able to resolve these problems that keep coming up in organizations reluctant to apply the Official Languages Act?

The Vice-Chair (Mr. Alupa Clarke): Please give a brief answer.

● (1245)

Dr. François Larocque: Absolutely.

First, we have to understand that in the federal and New Brunswick official languages laws, as well as in the language legislation of other Canadian provinces and territories, for instance the Northwest Territories or Nunavut, there are certain mechanisms that enable the respective language commissioners to exert more pressure as cases progress and move forward.

The work of the Commissioner of Official Languages of Canada culminates in the tabling of a report to Parliament, drawing the attention of the public and issuing public comments on the recalcitrance of the federal institution concerned. At the end of the day, that does not carry much weight. Very often it can work, but it's still soft power, and the results can be less than convincing.

This is where an administrative tribunal, which would have the power to issue interim orders and orders following a proper and full process, could order the issuance of those reports as well as a remedy. It could even impose administrative or monetary penalties.

The Vice-Chair (Mr. Alupa Clarke): Thank you, Dr. Larocque.

You may continue your remarks by answering a question from another member. I'm truly sorry, but we have to move on because of time constraints.

Mr. Arseneault, you have the floor.

Mr. René Arseneault: Thank you, Mr. Chair.

Good afternoon, Dr. Larocque. How are you?

Dr. François Larocque: I'm fine, thank you.

How are you?

Mr. René Arseneault: I'm doing fine.

We all understand that it must be very hard for you to work from Montpellier. We can see that you're very sad and feeling terrible about being in the south of France with all the good wine they have there.

I'm from New Brunswick. I share a mother tongue with Antonine, an Acadian from New Brunswick. If I were in your neck of the woods I would say Robert Paquette, because I love music.

With respect to positive measures, we heard plenty of testimony suggesting that the problem lies with the federal transfers, and that often the money does not get to the right place. The funds transferred to provincial governments end up eventually shrinking or disappearing. For example, the money is given to the province for education or health, and the province is responsible for disbursing it to the communities. Often, it's the francophone communities that get shortchanged.

Is it possible to discern in subsection 41(2) on positive measures a federal obligation to direct money to where it should go in linguistic communities, whether they be official language minority communities in Alberta, in Yukon, in Ontario or in Nova Scotia, as well as the anglophone minority community in Quebec? Would it be possible, under this part VII obligation, to reduce or withhold the general transfers to the provinces, if necessary, according to what the federal government should have to transfer or will transfer to the communities?

I'm not sure whether my question is clear and you follow what I'm saying.

Dr. François Larocque: I think so.

Mr. René Arseneault: To put it another way, could we do some legal manoeuvring without opening the Constitution, by saying that British Columbia must take care of its linguistic minority communities or, in any case, that the federal government must step in?

For example, the federal government could find that the Province is not meeting its education obligations and that the communities need a new school. If a secondary school cost $15 million to build, the federal level could build it and then remove those $15 million from the federal transfers for education, since it took on the project itself.

Could this considered as a positive measure?

Dr. François Larocque: I think so; that is a positive measure.

Mr. René Arseneault: Would this measure hold up, legally?

Dr. François Larocque: Yes.

I'm coming back to Justice Gascon's ruling, which will be heard very soon at the Federal Court of Appeal. We may get a more detailed and intelligent answer to your question than the response I'm about to give you.

At trial, Justice Gascon said that the term was not defined and was therefore too vague. Personally, as a law researcher, I see this as an opportunity with plenty of potential. When a definition or a term is too vague, that means there is a certain discretion in selecting the positive measure that would meet the part VII obligation and commitment.

In my view, the intention of part VII was to take the positive measures that are likely to meet the commitment objective. The commitment is to enhance the vitality of these communities. If the money is sent directly to the communities and the transfers are reduced accordingly, this would be a positive measure that can achieve the objective of part VII.

● (1250)

Mr. René Arseneault: Although, in terms of education or health, we would be touching on that sacrosanct division of provincial and federal powers.

In the official languages act, is it a constitutional breach to say that the federal government has obligations and that the money will go exactly where the linguistic community needs it?

There are calls for accountability—I'm thinking of British Columbia as an example—but no one knows where the money is going to meet the needs of minority communities.

You are a constitutional expert. Do you think it would be tenable, from a legal standpoint, to insert this element in the official languages act?

Dr. François Larocque: I would need to study it in more depth, but instinctively my immediate answer would be yes, that would hold up. I think that people who are more intelligent than I am and who certainly have given it a lot more thought have made that suggestion. I also trust their judgment.

Mr. René Arseneault: I brought you to this topic, but I would also like you to tell us about the administrative mechanisms, in a practical sense, relative to the reluctance for administrative tribunals.

In regard to the mechanisms as opposed to tribunals I will ask: why, how and how many?

Dr. François Larocque: I want to make sure this is clear.

When I talk about administrative mechanisms I mean that the ombudsman and the commissioner are administrative mechanisms, in the sense that they are not legal ones. Do you see?

Mr. René Arseneault: Yes.

Dr. François Larocque: Administrative tribunals are somewhere in between the commissioner and the courts. They are therefore quasi-legal.

As for the number, we need a tribunal that would administer the act in its entirety. At this time the remedies mentioned in part X apply only to certain parts of the act. I—

Mr. René Arseneault: I have to interrupt you, Dr. Larocque, because I only have 20 seconds left.

We heard testimony from the commissioners of Ontario and New Brunswick, and if memory serves, they were not too keen on administrative tribunals. They said the only effect would be that it would become standard practice to refer delicate cases to the tribunal, where they would get lost in all the constraints and procedure. Instead, they wanted us to strengthen the act and give it some teeth. I'd like to hear what you think.

Dr. François Larocque: I think it's possible to create an act with teeth that sends cases to an administrative tribunal. You just have to make sure that that part of the act is carefully thought out and that the procedure is simple. It has to be accessible and straightforward for users. By users, I mean Canadians and the commissioner. The commissioner needs to be able to access the tribunal too. In some cases, he may even have to intervene to support a party that might not have representation.

I think there is a way to draft an act that wouldn't create an administrative morass for cases to get lost in, and that would instead be simple to apply quickly and effectively.

The Vice-Chair (Mr. Alupa Clarke): Thank you, Dr. Larocque.

We now have the honour of moving on to northern Nova Scotia.

Mr. Samson, you have the floor.

Mr. Darrell Samson: Thank you, Mr. Chair.

Thank you very much for your presentation, Dr. Larocque. You did a great job of walking us through the history to give us some background. I have two points I want to raise.

Everyone seems uncomfortable with the decision handed down by Justice Gascon, whose position seems to be that if something isn't specified in the act, it doesn't have to be done. That runs counter to everything that's come out of the courts over the past century, especially at the Supreme Court. The conclusions or approach of that court are almost always more liberal. Its position is that even if something isn't specified, it should be done by default, because that's probably what the legislator intended at the time but wasn't sure about.

However, Justice Gascon opted for a more restrained interpretation. Everyone was disappointed, but not you, and I find that interesting. You said there was an opportunity to be seized, because in your view, the fact that the judge found the definition of “positive measure” too vague means that this definition is broad enough to give the federal government plenty of discretion in choosing such measures.

I'd like us to spend a few minutes on that issue.

Dr. François Larocque: I want to make it very clear that I too was disappointed by Justice Gascon's decision, because I think it's too formal and restrictive. As you said, Mr. Samson, in the past, the courts have taken a broader, more liberal and very generous approach in their interpretation of the act. It's just a theory, but this whole issue could just be a matter of judicial philosophy.

With all due respect to the honourable members of the committee who are from Quebec, Justice Gascon is a specialist in civil law. Lawyers from civil law rely on a code and would be reluctant to interpret anything that's not written into that code.

● (1255)

Mr. René Arseneault: They would be lost.

Dr. François Larocque: Whereas lawyers from common law, like me, would be more comfortable dealing with grey areas and would be able to find a way forward by relying on broader, more general concepts.

Mr. Darrell Samson: Exactly. That's what I think too, that civil law is different and much more prescriptive. It comes out of another jurisdiction, and it may also be a little conservative.

Dr. François Larocque: In a blog post I wrote recently about this decision, I mentioned how much I admire Justice Gascon. He's good at civil law, and his judgment is very sound and logical. He presents a premise and develops his arguments very fully.

Mr. Darrell Samson: This is the first time we've met, but I already like you, because you stay positive and you're always looking for the positive side.

I'd like to ask you one last question that I think is very important. When judges make rulings, they have the power under common law to retain jurisdiction in order to monitor compliance with their orders, so why don't they invoke that power more often?

That's what happened in Nova Scotia in a case pitting francophone parents against the provincial government and the Acadian school board. The case was heard by Justice LeBlanc. I just want to mention that he's from Isle Madame, the same region as me, and he's now Lieutenant Governor of Nova Scotia, the first Acadian to be appointed to that position. When the defendants appeared before him, he ordered them to build schools and chose to retain jurisdiction by making them come back to see him in six months to report on the progress they had made. The province fought the ruling all the way to the Supreme Court, but the highest court in the land confirmed that Justice LeBlanc was entitled to maintain his jurisdiction.

Why don't judges use that power to help us out?

Dr. François Larocque: You'd have to ask them, Mr. Samson. That question comes up all the time, but unfortunately I don't have an answer for you. What we do know is that the Supreme Court has confirmed the right to retain jurisdiction and that it's perfectly valid to do so where circumstances warrant.

I can think of other cases where a court or tribunal maintained its jurisdiction. For example, in the case about underfunding of services to indigenous children, the Canadian Human Rights Tribunal retained jurisdiction in order to require periodic reports.

The next Official Languages Act could grant this power to an administrative official languages tribunal, if it creates one. That would allow the tribunal to retain its jurisdiction, remain seized of certain cases, and require periodic reports. The House of Commons has the power to write that into a bill, and I encourage you to do so.

Mr. Darrell Samson: It's always up to us, isn't it?

Thanks anyway. I really appreciated your comments.

The Vice-Chair (Mr. Alupa Clarke): Thank you, Mr. Samson.

I have one more question, Dr. Larocque. We have one or two minutes left.

Going back to the Netflix issue that Mr. Choquette was talking about, the commissioner had the power to require certain documents to be produced, but he didn't use it. You said that it could be a matter of idiosyncrasy and strategy. Would it be advisable to take that power away from the commissioner? That would show him that we don't really care about his personal opinion and idiosyncrasy and that he has to take action and do what he has to do.

Dr. François Larocque: You could proceed in a more prescriptive fashion through the act, by using a wording that would encourage the commissioner not to hesitate to use the powers conferred by the act. If that act gives him the necessary tools, he needs to use them.

● (1300)

The Vice-Chair (Mr. Alupa Clarke): Does the act specifically state that the commissioner has the discretion to choose for himself?

Dr. François Larocque: Yes.

The Vice-Chair (Mr. Alupa Clarke): Would it be better if he didn't have so much discretion?

Dr. François Larocque: As an ombudsman, the commissioner conducts investigations. If you put that question to Ontario commissioner François Boileau or former federal commissioner Graham Fraser, both of whom conducted many investigations, they'll tell you that every investigation is different, so they need a certain amount of leeway in order to adapt accordingly. That means that this discretionary power should be maintained, but at the same time, you should be educating commissioners on the importance of the powers they have, to encourage them to make use of them.

The Vice-Chair (Mr. Alupa Clarke): Dr. Larocque, on behalf of the committee, thank you so much for sharing your valuable time with us. We may invite you back soon.

Until then, we wish you the best of luck with your research. Have a great day.

Dr. François Larocque: Thank you, Mr. Clarke, and thanks to all the members.

The Vice-Chair (Mr. Alupa Clarke): The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

The proceedings of the House of Commons and its Committees are hereby made available to provide greater public access. The parliamentary privilege of the House of Commons to control the publication and broadcast of the proceedings of the House of Commons and its Committees is nonetheless reserved. All copyrights therein are also reserved.

Reproduction of the proceedings of the House of Commons and its Committees, in whole or in part and in any medium, is hereby permitted provided that the reproduction is accurate and is not presented as official. This permission does not extend to reproduction, distribution or use for commercial purpose of financial gain. Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the *Copyright Act*. Authorization may be obtained on written application to the Office of the Speaker of the House of Commons.

Reproduction in accordance with this permission does not constitute publication under the authority of the House of Commons. The absolute privilege that applies to the proceedings of the House of Commons does not extend to these permitted reproductions. Where a reproduction includes briefs to a Committee of the House of Commons, authorization for reproduction may be required from the authors in accordance with the *Copyright Act*.

Nothing in this permission abrogates or derogates from the privileges, powers, immunities and rights of the House of Commons and its Committees. For greater certainty, this permission does not affect the prohibition against impeaching or questioning the proceedings of the House of Commons in courts or otherwise. The House of Commons retains the right and privilege to find users in contempt of Parliament if a reproduction or use is not in accordance with this permission.

Also available on the House of Commons website at the following address: http://www.ourcommons.ca

Publié en conformité de l'autorité du Président de la Chambre des communes

PERMISSION DU PRÉSIDENT

Les délibérations de la Chambre des communes et de ses comités sont mises à la disposition du public pour mieux le renseigner. La Chambre conserve néanmoins son privilège parlementaire de contrôler la publication et la diffusion des délibérations et elle possède tous les droits d'auteur sur celles-ci.

Il est permis de reproduire les délibérations de la Chambre et de ses comités, en tout ou en partie, sur n'importe quel support, pourvu que la reproduction soit exacte et qu'elle ne soit pas présentée comme version officielle. Il n'est toutefois pas permis de reproduire, de distribuer ou d'utiliser les délibérations à des fins commerciales visant la réalisation d'un profit financier. Toute reproduction ou utilisation non permise ou non formellement autorisée peut être considérée comme une violation du droit d'auteur aux termes de la *Loi sur le droit d'auteur*. Une autorisation formelle peut être obtenue sur présentation d'une demande écrite au Bureau du Président de la Chambre.

La reproduction conforme à la présente permission ne constitue pas une publication sous l'autorité de la Chambre. Le privilège absolu qui s'applique aux délibérations de la Chambre ne s'étend pas aux reproductions permises. Lorsqu'une reproduction comprend des mémoires présentés à un comité de la Chambre, il peut être nécessaire d'obtenir de leurs auteurs l'autorisation de les reproduire, conformément à la *Loi sur le droit d'auteur.*

La présente permission ne porte pas atteinte aux privilèges, pouvoirs, immunités et droits de la Chambre et de ses comités. Il est entendu que cette permission ne touche pas l'interdiction de contester ou de mettre en cause les délibérations de la Chambre devant les tribunaux ou autrement. La Chambre conserve le droit et le privilège de déclarer l'utilisateur coupable d'outrage au Parlement lorsque la reproduction ou l'utilisation n'est pas conforme à la présente permission.

Aussi disponible sur le site Web de la Chambre des communes à l'adresse suivante : http://www.noscommunes.ca