SENATE SÉNAT

CANADA

DEBATES OF THE SENATE

1st SESSION • 41st PARLIAMENT • VOLUME 148 • NUMBER 79

ACCESS TO JUSTICE IN FRENCH

Inquiry—Debate Adjourned

Speech by:

The Honourable Claudette Tardif

Tuesday, May 15, 2012

THE SENATE

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[*Translation*]

ACCESS TO JUSTICE IN FRENCH

INQUIRY—DEBATE ADJOURNED

Hon. Claudette Tardif (Deputy Leader of the Opposition) rose pursuant to notice of May 10, 2012:

> That she would call the attention of the Senate to Justice in French in Francophone Minority Communities.

She said: Honourable senators, I rise today on a very important issue to which I would like to call the attention of all those who believe in a justice system that is more accessible and fair for all Canadians, particularly for francophone minority communities across the country.

I would like to share my concerns about access to justice in French and about the French services offered by our legal system and tell you about access to justice in certain provinces, particularly Alberta.

Since the 1980s, members of francophone minority communities have made important gains in education. Today, French-language schools and school boards managed by francophones are an integral part of the education system in every province and territory.

I would like to point out, honourable senators, that it is evident that most of the progress made in education can be attributed to the claims by francophones that their language rights be recognized and to more liberal interpretations by the courts.

This is how the Honourable Michel Bastarache, an esteemed citizen of New Brunswick and a former justice of the Supreme Court of Canada, interpreted the evolution of our language rights:

> Canada's courts recognized the vision of francophone minority communities and their interpretation of history. Our acquired rights are not based on intolerance and accommodation, but on recognition of our status as francophones and our right to maintain and develop our language and our culture. By their very nature, they are fundamental rights. For that reason these rights, both individual and collective, are subject to a progressive and generous interpretation.

However, as for the right to access to justice in French, which is as fundamental as the right to education, I wonder why, despite the recognition of our rights by the Constitution, the Charter of Rights and Freedoms, our laws and the jurisprudence, there are still too many obstacles and gaps that make it difficult for members of francophone minority communities to have fair access to justice in French.

Across our country, access to justice for francophone minority communities is very unequal.

I would like to draw your attention to some results from a survey of 900 lawyers outside Quebec conducted by the Department of Justice in 2002 on the subject of access to justice in both official languages.

• (1630)

This survey shows that for the jurisdictions where francophones represent a small proportion of the total population, there are very few lawyers able to practise law in French and the demand for legal services in French is very low. Conversely, in jurisdictions where francophones are more organized from a legal perspective, the demand for services remains limited, but is more frequent.

This study also shows that the choice of whether to proceed in French or not is influenced by perceptions whereby proceeding in French might cause additional delays and that this choice would have negative repercussions on the possible ruling and even on the possibility to appeal. We see that lawyers and judges do not always inform accused persons of their linguistic rights even though doing so is a clearly defined requirement in the Criminal Code.

A real policy of active offer of judicial and legal services in the minority official language is rather rare in the majority of the provinces and territories other than Manitoba and Ontario. Even in New Brunswick, an officially bilingual province, there are predominantly anglophone regions where legal services in French leave something to be desired.

In most of the provinces, it is very hard to obtain services in French from officers of the provincial and superior courts and from support staff in courthouses. There is also a glaring lack of bilingual judicial and administrative personnel.

It is clear that access to justice in French is not great even though, honourable senators, our linguistic rights are enshrined in the Constitution, the Charter of Rights and Freedoms, the Criminal Code, the Official Languages Act and even in some provincial laws.

Section 133 of the Constitution Act, 1867, guarantees that English and French may be used equally "in any Pleading or Process" before the courts of Canada or Quebec, and provides that the acts of the Parliament of Canada and the legislature of Quebec shall be printed and published in both languages.

The Canadian Charter of Rights and Freedoms reiterates the obligation set out in section 133 by granting the right to the assistance of an interpreter in section 14, by establishing that English and French are the official languages of Canada and including the principle "to advance the equality of status or use of English and French" in section 16, and by establishing that "either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament" in section 19(1).

And finally, section 530 of the Criminal Code guarantees that the accused has the right to be tried in the language of his choice.

The accused must be informed of that right. Subsection 530(1) sets out the circumstances warranting a bilingual trial.

In 1999, the Supreme Court of Canada ruled on the application of this Criminal Code provision in *Beaulac*:

> Section 530(1) of the Code creates an absolute right of the accused to equal access to designated courts in the official language that he considers to be his own, providing the application is timely. The courts called upon to deal with criminal matters are therefore required to be institutionally bilingual in order to provide for the equal use of the two official languages of Canada.

Consequently, a criminal trial may be conducted in either language, which imposes the obligation of institutional bilingualism on federal courts. I would remind you that in *Beaulac*, the Supreme Court recognized that language rights are based on the principle of substantive equality between the two official languages. With respect to the courts, the Court ruled that:

> Where institutional bilingualism in the courts is provided for, it refers to equal access to services of equal quality for members of both official language communities in Canada.

In reality, substantive equality therefore supposes an active offer of judicial and legal services in both official languages, which, unfortunately, is lacking across the country.

Ten years later, in *Desrochers* in 2009, the Supreme Court ruled that:

> Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation.

Despite the legislative and constitutional requirements in place, there are numerous limitations to accessing justice in French in federal courts.

The insufficient number of bilingual judges being appointed remains one of the major obstacles to access to justice in French. Pursuant to section 96 of the Constitution Act, 1867, and the Federal Courts Act, the federal government is responsible for appointing judges to federal courts, superior courts and the provincial and territorial appeal courts. Appointing chief justices and associate chief justices is the Prime Minister's prerogative.

In the Report on the Institutional Bilingual Capacity of the Judiciary for Superior Courts in Nova Scotia and Ontario published in June 2011, the Commissioner of Official Languages concluded that the current process for appointing judges does not guarantee the appointment of a sufficient number of bilingual judges to superior courts.

Furthermore, the commissioner suggested that the Department of Justice could play a greater role in evaluating the linguistic capacity of superior courts and making a regular determination as to whether these courts have sufficient linguistic capacity to respond to the needs in each of the targeted jurisdictions.

In 2010, Bill C-232, An Act to amend the Supreme Court Act (understanding the official languages), introduced a new requirement for judges appointed to the Supreme Court to understand English and French without the assistance of an interpreter. The fundamental issue was one of equity and justice for all Canadians. This bill was a logical extension of the recognition of the substantive equality of French and English in our federal institutions. Unfortunately, Bill C-232 died on the Order Paper here in the Senate in 2011.

Another obstacle to access to justice in French is the lack of necessary measures to promote respect for and the application of section 530(1) of the Criminal Code, which guarantees the accused the right to stand trial in the language of his or her choice. According to the participants in a round table on access to justice organized by the Association des juristes d'expression française de l'Alberta on June 30, 2011, it is very difficult to obtain legal or judicial services in French in Alberta.

• (1640)

Many francophones do not know that there is an offer — albeit a virtually non-existent one — of legal and judicial services in French or where to find them. The justice system in Alberta is perceived as being reluctant to provide services in French. Legal experts are not familiar enough with French legal terminology. People have to wait longer to obtain services in French, which discourages francophone clients and prompts them to obtain services in English.

Too often, a person who claims his right to stand trial in French in an Alberta court is told — in English, of course — "We are not in Quebec." or "This is not France."

On top of all that, the instruction manual for preparing transcripts of Alberta court proceedings says that any statements made in a language other than English in an Alberta court must be replaced by one of the following statements: "Other language spoken" or "Foreign language spoken." French is thus considered a foreign language, despite the obligation to recognize the language rights of Albertans who want to speak in French.

The round table participants were also of the opinion that it is important to take prompt action to improve the language skills of people in the justice system, develop an active offer of service, increase the number of defence lawyers who speak French, and increase awareness of the rights conferred by section 530 of the Criminal Code.

The Hon. the Speaker *pro tempore***:** Honourable senators, Senator Tardif's time has expired.

Senator Tardif: Honourable senators, may I request an additional five minutes?

The Hon. the Speaker *pro tempore***:** Is it the pleasure of the Senate to grant Senator Tardif another five minutes?

Hon. Senators: Agreed.

Senator Tardif: It is important that the defendant be informed of his or her linguistic rights, informed in French of the charges against him or her and that he or she obtain a transcript of the hearing in French.

The Fédération des associations des juristes d'expression française agrees. It stresses the importance of raising awareness about access to justice in French both at the community level and within the machinery of justice.

In 1988, Alberta passed legislation making English the only official language and making section 110 — which made Alberta officially bilingual when it entered into Canadian Confederation in 1905 — inapplicable in its provincial constitution.

Subsection 4(2) of the language law alludes to regulations that give effect to the right to use French or English in Alberta's courts. In 1988, a regulations committee was created to develop regulations for exercising linguistic rights before the courts in Alberta, including the right to use French. Unfortunately, no procedure or policy has been implemented to guarantee francophone rights.

To that end, it is important to recall that the ruling in *Beaulac*, in 1999, specifies that the very existence of language rights requires the government to comply with the provisions of the law, and I quote:

> I wish to emphasize that mere administrative inconvenience is not a relevant factor. The availability of court stenographers and court reporters, the workload of bilingual prosecutors or judges, the additional financial costs of rescheduling are not to be considered because the existence of language rights requires that the government comply with the provisions of the Act by maintaining a proper institutional infrastructure and providing services in both official languages on an equal basis.

Recently, on March 4, 2011, in *R. v. Pooran*, Judge Anne Brown of the Provincial Court of Alberta reminded Alberta's justice minister that the language rights in section 4 of Alberta's Languages Act are in no way diminished by the fact that the provincial government failed to pass regulatory provisions necessary to implementing it.

According to the ruling, it is clear that the Government of Alberta's failure to enact regulations limits the right of litigants to speak French before the courts.

Regardless of case law, the Alberta legislature has done very little to eliminate obstacles to the use of French in Alberta courts.

On January 12, 2012, an Ontario Superior Court ruling charted a course for improved access to justice for Ontario francophones, including those who do not reside in one of the province's 25 designated bilingual regions. According to the ruling, the basic right of access to justice in French takes precedence regardless of whether the litigant resides in a designated bilingual region or not.

In my opinion, this decision reinforces the fact that access to justice in French is a basic right. The highest court in the land having recognized substantive equality, litigants have the right to a hearing in the language of their choice, regardless of where they live.

At the federal level, the government allocated $4 million over five years in its Roadmap for Canada's Linguistic Duality to develop language rights training tools for Justice Canada's legal advisors; to encourage young people who speak both official languages fluently to pursue careers in justice; and to offer language training to court clerks, stenographers, justices of the peace and mediators. Those are good intentions.

However, I am sceptical about the results of such initiatives. How would the language training taken by legal staff be of benefit and put into practice if, at the top, there are not enough bilingual judges appointed and trials therefore cannot be held in French?

The federal government does not just have a responsibility to provide access to justice in French; it has legal obligations in this regard. In my opinion, since language rights are legally recognized, litigants should have the right to stand trial in French, the right to a representative of the Crown who speaks French, the right to have legal transcripts that reflect statements made in French and the right to legal and judicial resources in French.

Honourable senators, each of us aspires to a society in which everyone's rights are respected. There are good intentions and efforts worthy of recognition, but political will is often lacking. Litigants have the right to have, or to have access to, a trial in the language of their choice.

Honourable senators, I would like to remind you that the Canadian legal system is a source of inspiration around the world. I would like to end this inquiry with this last thought: respect for language rights cannot be separated from a concern for the culture associated with the language. Former Chief Justice Dickson recognized this fact in *Mahé* when he said:

> Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

Ensuring that all Canadians have access to justice in both official languages is an issue that a society that cares about respect for rights must immediately address.