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**Subject: Modernization of the Official Languages Act so it will better reflect the present-day reality of Canada's linguistic duality**

Dear Ministers,

I am writing to ask you to modernize the Official Languages Act (the Act) to make it an efficient tool that will meet the present-day reality of Canada's linguistic duality.

The Canadian Bar Association (CBA) is a national organization of over 36,000 members, including lawyers, notaries, academics, and law students from the four corners of Canada. Its primary objectives include improving the law and the administration of justice. The CBA has demonstrated a deep and abiding commitment to official bilingualism in the realm of the law. Moreover, I assign special importance to linguistic duality, which constitutes a fundamental value underpinning our national identity and our legal system.

We are addressing this letter to you because you are responsible for the three portfolios that play the biggest roles in the implementation of the Act. The Act expressly devolves a role and imposes obligations on the Minister of Canadian Heritage (Part VII) and the President of the Treasury Board (Part VIII). In addition, access to justice in both official languages (Part III) — an area that is of particular interest to the CBA — is largely entrusted to the Minister of Justice, as the Minister responsible for the administration of justice and judicial appointments.

Initially adopted in 1969 and consolidated in 1988, the Act will celebrate its thirtieth anniversary in 2018. In the last three decades, Canadian society has been significantly transformed and the expectations of minority official language communities have also evolved. The Act was adopted before the advent of the Internet, before the increase in Francophone immigration throughout the

country, and prior to a number of important Supreme Court of Canada decisions on the interpretation of the Canadian Charter of Rights and Freedoms (Charter), including the official language guarantees.

Although the reality of the official languages in the country has been continually evolving, the Act is frozen in time. It is no longer adapted to the current reality of the communities and no longer enables the proper implementation of the language guarantees set out in the Charter.

When it comes to the administration of justice, it is still very difficult for Canadians to gain access to services in both official languages. In particular, this state of affairs is due to a lack of judges who are able to understand both official languages without an interpreter.

In this regard, it is the federal government that is responsible for the appointment of judges on federal courts and judges sitting on the country's superior courts and courts of appeal. However, the rights and obligations established by Part III of the Act are limited to the courts created by federal statute. As the appointment of judges to the superior courts of the provinces is the jurisdiction of the federal government, we believe that Parliament would have the power to stipulate in the Act the linguistic requirements applicable to judges of those courts.

The Act expressly excludes the Supreme Court of Canada from the provision enjoining federal courts to ensure that the judge who hears a case can understand the language of the proceedings without the assistance of an interpreter. The modernization of the Act should repeal the exception stipulated in section 16.

Since at least 1995, the Office of the Official Languages Commissioner of Canada has been raising problems on access to justice in both official languages due to a lack of judges who are able to perform their duties in both official languages in the country's superior courts and courts of appeal<sup>1</sup>. In 2013, the Official Languages Commissioner of Canada published a joint report with the Commissioner of Official Languages for New Brunswick and the French Language Services Commissioner of Ontario<sup>2</sup>. The report makes recommendations to determine the needs of the provinces in terms of having judges who can perform their duties in both official languages. The report also suggests a process for the systematic assessment of the linguistic capabilities of judicial candidates. None of those measures have been implemented.

The federal government should exercise its power to make appointments to the judiciary such that the judicial system meets the demand for judges who are able to perform their duties in both official languages. However, that is not currently the case. The most efficient way to remedy this problem would be to legislate a new mandatory and rigorous assessment of the linguistic abilities of candidates who identified the level of their language skills on their application form to ensure an appropriate bilingual capacity within the judiciary. Accordingly, to achieve this objective, a major revision of Part III of the *Act* is in order.

Certainly, the recent adoption by the Minister of Justice of an action plan designed to "enhance the bilingual capacity of the superior courts"<sup>3</sup> represents a positive step towards improving access to justice in both of the official languages. This measure includes strategies for "enhanced tools to

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<sup>1</sup> See The equitable use of English and French before the courts in Canada: a study by the Commissioner of Official Languages, Ottawa, 1995.

<sup>2</sup> Office of the Official Languages Commissioner of Canada, Access to Justice in Both Official Languages: Improving the Bilingual Capacity of the Superior Court Judiciary, 2013.

<sup>3</sup> Canada, Department of Justice Canada, Action Plan: Enhancing the Bilingual Capacity of the Superior Courts, Action Plan, Ottawa, Department of Justice, September 25, 2017, [online: \(http://ow.ly/Zhbw30fW6r9\)](http://ow.ly/Zhbw30fW6r9).

verify and assess the bilingual capacity of judicial applicants, examine language training for current members of the judiciary, and confirmation of the Minister's commitment to collaborative consultations with Chief Justices with respect to the bilingual capacity needs of their courts"<sup>4</sup>. Although this is a step in the right direction, it is essential that measures designed to improve the linguistic abilities of candidates for the judiciary be incorporated into the Act to make them effective and enforceable.

The Act also has a number of other shortcomings. Among other things, Part IV, which deals with services in the official language of the minority, does not require the federal government to take into account the vitality of the minority official language community in its assessment of the demand for services. The result of this shortcoming is that all too often, dynamic communities lose their access to federal services in their language, as their numbers are not growing at the same rate as the rest of the population.

Moreover, Part VII of the Act, which imposes an obligation on federal institutions to take "positive measures" to enhance the vitality of official language communities, does not define this term or specify specific mechanisms for consultation with such communities. Consequently, decisions of importance to the future of the communities are often taken by federal institutions without truly considering the impact of the decisions on those communities.

Finally, as regards the implementation of the Act, the Office of the Commissioner of Official Languages of Canada is one of the principal mechanisms established. In particular, the Commissioner is responsible for investigating complaints received from the public and reporting on compliance with the Act by federal institutions subject to the Act. The Commissioner also has standing to appear before the courts.

When the Act was adopted, it was expected that the Commissioner of Official Languages of Canada would assume a leading role before the courts, notably as a plaintiff. This point of view was justified in view of the Commissioner's official language expertise, as well as the office's budget<sup>5</sup>. However, in actual fact, the Commissioner appears before the courts only sporadically, and almost exclusively as an intervener. The result of this trend is that litigants wishing to exercise their rights must do so on their own and generally with their own financial means<sup>6</sup>.

A modernization of the Act must improve its implementation mechanisms and ensure that the Commissioner plays a more active role, for example by specifying the circumstances in which the Commissioner *must* (not only *may*) institute and participate in court actions. A more active role by the Commissioner is essential in order to advance the interpretation of language rights and foster a progression towards the equality of French and English.

In closing, it is worth emphasizing that access to justice in the two official languages and the effective implementation of the other language rights stipulated in the Charter is a priority for the CBA. However, we note that, notwithstanding the good intentions of those who, in the 1980s, drafted the

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<sup>4</sup> Department of Justice Canada, news release, "Government of Canada Launches Action Plan to Enhance Bilingual Capacity of Canada's Superior Courts" (September 25, 2017), [online: \(http://ow.ly/mj4B3OfW6ei\)](http://ow.ly/mj4B3OfW6ei)

<sup>5</sup> See Mark Power and Justine Mageau, "Réflexions sur le rôle du Commissaire aux langues officielles devant les tribunaux" (2011) 14: 1 RGD 179.

<sup>6</sup> See also, in particular, the case of *Thibodeau v Air Canada*, 2011 FC 876, partially overturned by the Federal Court of Appeal: 2012 FCA 246. The decision by the Federal Court of Appeal was affirmed by the Supreme Court of Canada: 2014 SCC 67. In Federal Court, Mr. Thibodeau was awarded costs of \$5,375.95: 2005 FC 1621.

current Act, it is a struggle for those rights to be respected. Modernization is necessary. The future of linguistic duality and the vitality of minority official language communities depend on it.

Yours sincerely,

*(original letter signed by Kerry L. Simmons)*

Kerry L. Simmons, Q.C.

c.c. The Honourable Denis Paradis, P.C., M.P.  
Chair of the House of Commons Standing Committee on Official Languages  
The Honourable Claudette Tardif, Ph.D,  
Chair of the Senate Standing Committee on Official Languages