

# Access to Justice in English in the Judicial District of Montréal — A Unique Experience

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*La Constitution canadienne autorise l'emploi du français et de l'anglais dans toute plaidoirie ou pièce de procédure émanant d'un tribunal établi par le Parlement canadien ou l'Assemblée législative du Québec. À titre d'ancien bâtonnier de Montréal, l'auteur relate sa compréhension du bilinguisme judiciaire pratiqué au Québec et le compare avec la dualité qui caractérise dans ce domaine l'appareil judiciaire à Bruxelles, en Belgique.*

## I. CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE IN ENGLISH IN QUÉBEC

The fundamental right to use either the English language or the French language or both in the Parliament of Canada and the National Assembly of Québec resides in the *Constitution Act, 1867*<sup>1</sup> at section 133. Likewise, the right to use those languages by any person or in any pleading or process in or issuing from any Court of Canada established under the *Constitution Act, 1867* and in or from any of the Courts of Québec is recognized and entrenched by section 133.

Furthermore, all legislative Acts of the Parliament of Canada and of the Québec National Assembly must be printed and published in both official languages.

The importance attributed to Canada's two official languages, while owing its source to the *Constitution Act, 1867*, also finds further rein-

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<sup>1</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II. No. 5.

forcement in the *Canadian Charter of Rights and Freedoms*<sup>2</sup> and the *Official Languages Act*.<sup>3</sup>

## II. CONSEQUENCES FLOWING FROM THIS RIGHT

### A. For Members of the Public

In Québec, the consequences have particular significance for the minority language community, that being the English-speaking community. In practical terms it translates into ready access to the judicial process in the English language. The judicial process starts with a comprehension of one's rights and recourses through the availability of all statutory legislation and the civil law as well as accompanying regulations and administrative directives in English, and continues with the availability of counsel who can communicate easily in the English language, the freedom to have proceedings drafted in English, and the ability to present one's case before the courts, both orally and in writing, in English. Thereafter it would mean receiving judgment in the English language or a translation in the English language. It also implies the availability of the necessary legal forms and bilingual personnel in the court houses in order to inform, to advise and generally to guide an English-speaking member of the public through the legal maze.

### B. For Members of the Bar

For Members of the Bar, who should all be bilingual but some of whom are unfortunately not, English-speaking lawyers should be able to find meaningful employment and carry on a productive practice provided they are functionally bilingual. Proceedings may be drafted in English and pleadings, oral and written, may be done in English. Of course, the other party is likewise free to choose the official language of his or her choice which implies that a comprehension, at least, of French is required.

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>3</sup> R.S.C. 1985 (4th Supp.), c. 31.

Those lawyers who choose a field of practice other than litigation are only constrained linguistically by the requirements of their clientele, their colleagues and the practice itself.

### **C. For Members of the Bench and Tribunals**

Members of the Judiciary, in theory, are bilingual. It strikes me as a given, for those who must on a daily basis confront and deal with proceedings in both official languages, that they be bilingual. Of course, over the past number of years, more and more cases are being heard by bodies which are not courts subject to constitutional constraints. Tribunals of all nature have been created, presided over by persons other than members of the judiciary, for whom the requirement to speak and understand English is more a practical than a legal obligation.

## **III. THE REALITY**

Let me now turn to the reality of the situation facing the public, the Bar and the Bench in Québec. But first, allow me to provide some background in order to persuade you that what I portray to you as reality has its source in more than my own personal observations.

In 1993-1994, when I was *Bâtonnier* of the Bar of Montréal, I was concerned by what I considered an unfortunate flaw in what was otherwise one of Canada's showcase treasures. The bilingual nature of Québec's system of justice is unique not only in Canada, but also throughout the world. It is something in which all Quebecers, indeed all Canadians, can take immense pride. However, I was concerned by some disturbing elements which characterized our system of justice and its accessibility in a real and meaningful way to the English-speaking community.

Since the English-speaking community in Québec is concentrated principally in the Greater Montreal area and since the *Barreau de Montréal* represents more than one-half of the Québec Bar, a committee was created under Chief Justice of the Québec Superior Court, the late Honourable Alan B. Gold, to canvass the experience, views, feelings and impressions of a substantial cross-section of English-speaking lawyers in the Greater Montreal area. A report was filed with the Council of the

Bar of Montréal together with some 50 odd recommendations.<sup>4</sup> The report and the recommendations were then submitted to an implementation committee under Bâtonnier Pierre Sébastien which culled and synthesized the recommendations into more manageable proportions.

At this point, the chairmanship of the Implementation Committee was passed to former Chief Justice of the Québec Superior Court, the Honourable Lawrence A. Poitras, who for two years did an outstanding job in carrying out the mandate for implementation.

After two years the chairmanship was passed to Gérald Tremblay, C.M., c.r. and myself. Our first act was to call for a consolidation of the various reports which had been prepared over the two previous years containing the results of the many interviews, meetings, enquiries, investigations, *etc.*, under Chief Justice Poitras and his committee. This was done and the consolidated report sent to each of the various contributing persons and bodies to verify the accuracy of the reports and inviting their comments, corrections and modifications, if required. This process was completed with all respondents having commented.

The study was relatively exhaustive considering that all participants, both those conducting the study and those being studied, did it voluntarily. These included representatives of all the courts, from the clerical staff to the Chief Justice, representatives of the various administrative tribunals, the Québec Bar, the Montréal Bar and the Chamber of Notaries. The co-operation received was overwhelming, with the odd exception.

Now that the report has been finalized, we plan to meet with the Québec Minister of Justice to apprise him of our findings and to develop with him a plan of action. I am particularly pleased and proud to report that a pre-eminent jurist, the Honourable Michel Robert, Chief Justice of Québec, at his insistence joined our Committee this year and will be joining a very small delegation meeting with the Minister.

It should be noted that the exercise which we have undertaken over the past few years has already had a salutary effect in sensitizing the various stakeholders in the judicial system to what I referred to earlier as a perceived flaw, and has already resulted in changes which have ren-

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<sup>4</sup> *Report of the Ad Hoc Committee on Access to Justice in the English Language in the District of Montreal*, commonly known as the Gold Report, Government of Canada, 1995 (President: The Honourable Alan B. Gold). The report is discussed briefly by Catherine Duff-Caron, "Affidavits Should be Drafted in English and French" (1997) 29:18 J. Barreau, online at: <<http://www.barreau.qc.ca/journal/vol29/no18/affidavits.html>> (last accessed 4 November 2005).

dered our system more user-friendly to the English-speaking community of Québec.

#### IV. COMPARISON WITH BRUSSELS

When reference is made to operative bilingual judicial systems, most often, if not exclusively, reference is being made to the courts of Montréal and Brussels. It was therefore out of more than pure curiosity that the Chief Justice of the Québec Superior Court, the Honourable Lawrence Poitras, mandated a member of his Court and four lawyers, including myself, at that time Bâtonnier of Montréal, to compare our respective systems while we were in Brussels for the opening of their courts. This proved to be a very interesting exercise and, in short, we concluded that while Montréal's courts were truly bilingual the Brussels courts were rather of a dual nature. Trials in a Montréal court may be conducted in English or French or both, including all the written proceedings. In Brussels, a court room would be reserved for one or the other of French or Flemish but not both. A trial in French would be exclusively so from beginning to end as would one conducted in Flemish, including all written pleadings. On the other hand the Court of Appeal and the Cour de Cassation can operate bilingually. An extensive report on the subject was presented to Chief Justice Poitras on our return.

This duality in Brussels is also reflected in their law societies which are divided between l'Ordre français and l'Ordre néerlandais.

There are nevertheless certain features of their system which should give Québec administrators and legislators pause for thought. Firstly, contrary to the restrictions contained in the *Charter of the French Language*,<sup>5</sup> commonly known as Law 101, signage in the courthouses is all bilingual. Another positive feature which Anglo-Quebeckers can only wish for is the requirement for all court clerks, courthouse personnel and personnel of the Ministry of Justice to be bilingual. Finally, correspondence from the Ministry of Justice is in the language of the recipient as are reports destined for the various unilingual regions of Belgium.

A practical problem affecting the dual nature of Brussels legal administration is the fact that more and more of the Flemish body of jurists and auxiliary personnel are bilingual while their counterparts in the

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<sup>5</sup> R.S.Q., c. C-11.

French community are increasingly unilingual. This, of course, is a reflection of the status of the two languages on the international scene.

## V. THE CIVIL CODE OF QUÉBEC

You may be aware that a major revision of the *Civil Code of Québec* was adopted January 1, 1994. It was soon remarked that in many respects the English version, which was merely a translation, was unacceptable, containing many literal translations, bad grammar and choice of words, nonexistent expressions, and incomprehensible language and so on.

About 1996, I was asked by the Québec Bar to form a committee to examine this matter further. This turned out to be a monumental undertaking. Early in the mandate I invited the Québec Chamber of Notaries to join in. The committee comprises some 60 to 70 mostly senior and carefully selected lawyers and notaries who have been split into 10 teams, one for each book of the Code, each team having a leader and composed of specialists in the particular subject matter of that book. Overseeing the whole project is an Advisory Council, under my chairmanship, of about 10 senior and respected members of the Bar and Chamber of Notaries, as well as a judge of the Québec Court of Appeal and a dean of law.

We are at the stage now where each team has completed its task and we are putting it all together into one coherent, cohesive whole. Otherwise, you can well imagine, we could end up with 10 separate codes in English, which would be worse than the original 1994 version.

Once this is done, it is to be submitted to the Québec Department of Justice for discussion, debate and, finally, approval. It would then have to be presented to the National Assembly for adoption.

This is another example of the recognition of the importance of the two official languages in the Québec judicial system and the application of the linguistic principles entrenched in the Constitution.