Advising Clients of their French Language Rights

Lawyers Responsibilities

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The Law Society of Upper Canada | Barreau du Haut-Canada

EQUITY ÉQUITÉ

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"Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which the individual expresses his or her personal identity and sense of individuality."

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at 748-749

Introduction

The mandate of the Law Society is to govern the legal profession in the public interest by upholding its independence, integrity and honour for the purpose of advancing the cause of justice and the rule of law. Canada is an officially bilingual (French/English) country and lawyers in Ontario have the responsibility to act in the public interest and, when appropriate, to advise their clients of their French language rights.

Constitutional law and quasi-constitutional law recognize English and French as the official languages of Canada and as having equal status in all institutions of the Parliament and government of Canada. In Ontario, legislation and case law recognize the right to proceed in French before most judicial, quasi-judicial and administrative tribunals. This right is particularly important to the Francophone community as it allows its members to defend themselves in their language and encourages them to continue making the necessary efforts to prevent assimilation. It also recognizes the important role played by the Francophone community in the history of this province. Language rights are also, however of significance to those who's French is not their mother tongue, but who wish to exercise their rights to proceed in French.

The Justice Paul Rouleau and Paul Le Vay report *Access to Justice in French* noted the following:

> "Over the last 35 years, successive governments have expanded the right to French language service in Ontario's court system. Those rights are broad and comprehensive. Much effort and investment has gone into developing and implementing them, and the courts, Ministry of the Attorney General, and other participants in the justice system, have exhibited goodwill and a commitment of resources in this regard […] The report sets out a road map to make the improvements necessary to allow the justice system to function as it is intended, and as it needs to function, if there is to be effective and meaningful access to justice in French in Ontario. The French Language Services Commissioner recently reported that there continue to be obstacles that make access to justice particularly difficult for French

> speakers in Ontario. Many key participants in the justice system, including judicial officials, court staff, and lawyers are unaware of these obstacles. As a result, the justice system is not as responsive as it could be in addressing the rights and needs of Ontario's French-speaking community and in ensuring meaningful access to justice in French."

In September 2015, The French Language Services Bench and Bar Response Steering Committee, created by the Ministry of the Attorney General, published its *Enhancing Access to Justice in French: A Response to the Access to Justice in French Report*. The report, a response to the first report, outlines practical solutions that have been implemented by the various justice stakeholders, provides strategic advice, discusses the "Seamless Access to Justice in French Pilot Project" in Ottawa and suggests next steps.

The objective of this document is to describe lawyers' responsibilities to advise their clients of their language rights, to discuss when and in what circumstances that responsibility applies, and to ensure that lawyers are aware of their responsibility in this respect.

This document is not a legal opinion and is not exhaustive. It is current to the date of publication, and all members should keep abreast of legislative and jurisprudential changes.

Sources

The Honourable Paul Rouleau and Paul Le Vay, *Access to Justice in French* (Toronto: French Language Services Bench and Bar Advisory Committee to the Attorney General, 2012) available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/bench_bar_advisory_committee/full_report.pdf

The Honourable Julie Thorburn, *Enhancing Access to Justice in French: A Response to the Access to Justice in French Report* (Toronto: French Language Services Bench and Bar Response Steering Committee of the Ministry of the Attorney General, *2015)* available at http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/fls_report_response/index.html

The Rules of Professional Conduct – A Lawyer's Responsibility

A Lawyer should advise clients who speak French of Language Rights

Rule 2.1-1, Commentary - ***Rules of Professional Conduct***

"A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario".

Rule 3.2 – Language Rights

3.2-2A
A lawyer shall, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

3.2-2B
When a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer shall not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary
[1] The lawyer should advise the client of the client's language rights as soon as possible.

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and constitutional law relating to language rights including the *Canadian Charter of Rights and Freedoms*, s. 19(1) and Part XVII of the *Criminal Code* regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

[3] When a lawyer considers whether to provide the required services in the language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related Commentary.

Knowledge of the Commentary

Lawyers should be cognizant of Rule 3.2, and the Commentary to the Rule, and take steps to find out whether their clients want to proceed in French.

Rule 3.2 and the Commentary also apply when other laws and case law, not mentioned specifically in the commentary, recognize language rights of clients in the judicial and quasi-judicial context. For example, the *Official Languages Act* specifies that English and French are the official languages of the federal courts.

Competency to Provide the Services

Lawyers may not be competent to act if they are unable to provide quality legal services in French to clients who have requested such services or appear to require such services. These services include understanding clients in their official language and ensuring that relevant documents and evidence are prepared and provided in the official language of clients wherever possible.

In order to provide competent services, the communication should be effective for the client for whom it is intended. A lawyer who is incapable of effectively communicating with clients who request services, or who appear to require or to wish to receive such services, in French may not have the "ability and capacity" to deal adequately with legal matters on behalf of the client.

The lawyer who offers services in Ontario in the French language should have sufficient knowledge of the language, including sufficient knowledge of French common law terminology (as opposed to civil law), to competently act for the client. The lawyer should be able to,

- communicate effectively, orally and in writing, with the client;
- where applicable, effectively represent the client before courts, tribunals and/or quasi-judicial tribunals.

If a lawyer does not feel competent to undertake the matter for reasons described above, the lawyer should recognize his or her lack of competence for a particular task and the disservice that would be done to the client by undertaking the task. In such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task.

Checklist

- ❑ *Ascertain whether the client speaks French*
- ❑ *Ascertain whether the client wishes to receive legal services in French*
- ❑ *Ascertain whether the client wishes to be represented in French*
- ❑ *Ascertain your clients rights by:*
    - *Considering applicable legislation and jurisprudence, if appropriate*
    - *Considering applicable rules of conduct*
- ❑ *If you are not competent to offer services to the client in French, provide assistance in finding a lawyer or paralegal who is competent to offer the services to the client in French.*

Sources

Rules of Professional Conduct, Law Society of Upper Canada, November 1, 2000, http://www.lsuc.on.ca/with.aspx?id=671

Constitutional and Quasi-Constitutional Language Rights

> "Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law. 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."
>
> *R. v. Beaulac*, [1999] S.C.R. 768

French Language in Federally Created Courts

The use of the French language is guaranteed in the courts created by the federal Parliament.

The *Official Languages Act* defines "Federal court" to mean "any court, tribunal or other body that carries out adjudicative functions and is established by or pursuant to an Act of Parliament."

"Court of Canada", as defined by the Supreme Court of Canada, means "court established by Parliament" and/or "federal court" and encompasses any federal institution that, by virtue of its organic statute, holds the authority to judge matters affecting the rights or interests of the individual and applies the principles of law. Federal courts are judicial tribunals and administrative tribunals performing quasi-judicial functions.

"Federal courts" include:

- Supreme Court of Canada;
- Federal Court of Appeal of Canada;
- Federal Court of Canada;
- Tax Court of Canada;
- Court Martial Appeal Court.

Federal tribunals are subject to the *Official Languages Act* and include the following:

- Board of Arbitration and Review Tribunal;

- Canada Industrial Relations Board;
- Canadian Artists' and Producers' Professional Relations Tribunal;
- Canadian International Trade Tribunal;
- Canadian Radio-Telecommunications Commission;
- Competition Tribunal;
- Copyright Board of Canada;
- Canadian Human Rights Tribunal;
- National Energy Board;
- National Parole Board;
- Canadian Transportation Agency;
- Immigration and Refugee Board;
- Pensions Appeal Board.

When considering language rights at the Supreme Court of Canada, section 11 of the *Rules of the Supreme Court,* [SOR/2002-156], provides for the use of English or French in oral or written communications before the Court. Services for simultaneous interpretation in both official languages are provided during hearings. In the case of motions heard by a judge or the Registrar, simultaneous interpretation is provided upon request of any party to the motion.

A Client's Constitutional and Quasi-Constitutional Language Rights

Closely linked to the constitutional language rights provided by the *Constitution Act, 1867* and the *Charter of Rights,* the *Official Languages Act* is the focal piece of legislation enacted to protect language rights in Canada. The purpose of the *Official Languages Act* is to,

> (*a*) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;
>
> (*b*) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and
>
> (*c*) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

Part III of the Official Languages Act specifies that "English and French are the official languages of the federal courts, and either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court."

It also *imposes* obligations on the government, including,

- the duty on every federal court to ensure that a person giving evidence be heard in the official language of his or her choice;
- the duty on every federal court at the request of any party to the proceedings, to make available simultaneous interpretation of the proceedings, including evidence given and taken;
- the duty on every federal court other than the Supreme Court of Canada, to ensure that every judge or other officer who hears the proceedings is able to understand the official language of the proceeding without the assistance of an interpreter. If both languages are the languages of the proceeding, the judge or other officer must understand both languages without the assistance of an interpreter.

Any person may use either English or French in any pleading or process issuing from any federal court. Written pleadings include allegations by parties appearing for the applicant and the respondent, oral pleadings, memorandums and briefs. However, it does not cover evidence given in connection with written pleadings, since witnesses may testify in the official language of their choice.

Sources

Laws

Section 133 of the *Constitution Act, 1867*, 30 & 31 Vict, c.3
http://www.canlii.ca/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html

Subsection 19(1) of the *Charter of Rights and Freedoms, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c. 11
http://www.canlii.ca/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html

Part III of the *Official Languages Act*, RSC 1985, c.31 (4th Supp)
http://www.canlii.ca/en/ca/laws/stat/rsc-1985-c-31-4th-supp/latest/rsc-1985-c-31-4th-supp.html

Section 11 of the *Rules of the Supreme Court*, SOR/2002-156
http://www.canlii.ca/en/ca/laws/regu/sor-2002-156/latest/sor-2002-156.html

Other sources

Vanessa Gruben, "Bilingualism and the Judicial System" in Michel Bastarache, ed., *Language Rights in Canada*, 2nd edition (Cowansville: Les éditions Yvon Blais, 2004) at 157-158.

Official Languages Act, Annotated Version, 2001

Criminal Law

"Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada."[1]

R. v. Beaulac, [1999]1 S.C.R. 768

Language rights protections in the *Criminal Code* are largely set out in Part XVII – Language of Accused, sections 530 and 530.1, Part XXVIII – Miscellaneous, and subsection 849(3) of the *Criminal Code.*

Section 530 sets out the conditions for granting an application by an accused for a judge or a jury who speak the official language of the accused. Section 530.1 enumerates the rights to which an accused is entitled once a section 530 order has been rendered.

The leading authority regarding the rights of the accused under the *Criminal Code* is the Supreme Court of Canada decision in *R. v. Beaulac,* which confirmed that section 530 confers upon the accused an absolute right, upon timely application, to be tried in his or her official language. The following provides an overview of the principles in *R. v. Beaulac.*

Trial in official language

- In order to be tried in the official language of his or her choice, the accused must assert his or her official language by bringing forward an application within the timelines established in section 530 of the *Criminal Code,* with some exceptions.

- The application need not be formal: see *R. v. Dow* (2009), 245 C.C.C. (3d) 368 (Que. C.A.), leave to appeal to S.C.C. refused 245 C.C.C. (3d) vi.

- The "language of the accused" is the official language to which the accused has a sufficient connection. The accused must be afforded the right to make a choice between the two official languages based on his or her subjective ties with the language itself. The test to determine whether the accused has a right to a trial in his or her official language is whether the accused has sufficient knowledge of the official language to instruct counsel.

[1] Principle adopted in the criminal law case of *R. v. Beaulac*, *ibid.*, reiterated by the Supreme Court of Canada in the context of the New-Brunswick *Official Languages Act*, S.N.B. 2002, c. 0-0.5 (see *Charlebois* v. *City of Saint John*, [2005] 3 S.C.R. 563).

- The accused has a right to a trial in the official language of his or her choice even if the language chosen is not the dominant language. The ability of the accused to speak the other official language is also not relevant.

- An absolute right to a trial in one's official language exists, provided the application is made in a timely manner. The application must be made within delays established in paragraphs 530(1) a), b) and c), which vary with the type of infraction. When the accused fails to apply for an order and it is in the best interest of justice to make an order, the tribunal has the discretion to order the trial of an accused in the official language of his or her choice.

<u>Application in a "timely manner"</u>

- An accused has automatic access to a trial in one's official language when an application is made in a timely manner (within the delays established in section 530 (1) a), b) and c)). When the application is not timely, the judge has the discretion to order the trial in the official language of the accused. In exercising his or her discretion, the judge should consider factors to determine the reasons for the delay. The following questions are considered:
    - when the accused was made aware of his or her right?
    - whether he or she waived the right and later changed his or her mind?
    - why he or she changed his or her mind?
    - whether it was because of difficulties encountered during the proceedings?

- Once the reason for the delay has been examined, the trial judge should consider a number of factors that relate to the conduct of the trial, such as,
    - whether the accused is represented by counsel;
    - the language in which the evidence is available;
    - the language of witnesses;
    - whether a jury has been empanelled;
    - whether witnesses have already testified;
    - whether they are still available;
    - whether proceedings can continue in a different language without the need to start the trial afresh;
    - the fact that there may be one or more co-accused (which may indicate the need for separate trials);
    - changes of counsel by the accused;
    - the need for the Crown to change counsel; and
    - the language ability of the presiding judge.

- 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 should not be considered.

Bilingual proceedings

- The accused may also have the right to a bilingual proceeding in some circumstances, such as ,
    - where counsel for the accused speaks only one official language and speaks a different language than the accused; or
    - where the official language of the accused is different from the majority of the witnesses.

Translation of Information/Indictment and other documents

- Where an order for a French or bilingual trial has been made under s. 530, "on application by the accused," s. 530.01 requires that the prosecutor provide the accused with a written translation of portions of the Information or Indictment. If the s. 530 application need not be formal, then surely the s. 530.01 application need not be either.

- While the Crown is not obligated to provide a translated version of every document in the disclosure, it may be that the Court has discretion to order that certain documents be translated in order to allow the accused to "make full answer and defence." See *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455 (Y.T.S.C.), aff'd 95 C.C.C. (3d) 129 (Y.T.C.A.), leave to appeal to S.C.C. refused 99 C.C.C. (3d) vi.

- In order to ensure an accused's right to a fair trial, a trial judge can refuse to accept into evidence a document that is written in a language other than the accused's chosen official language without the accused's consent or translation: *Boudreau v. New Brunswick* (1990), 59 C.C.C. (3d) 436 (N.B.C.A.)

Self-represented accused

- A judge or justice of the peace must inform a self-represented accused of the right to choose French or English as the language for the preliminary inquiry and trial.

Where an order is granted under section 530 directing that the accused be tried before someone who speaks the official language of Canada that is the language of the accused, section 530.1 applies. It provides as follows:

Written pleadings or documents

- The accused and his or her counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused, in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial.

Witnesses

- Any witness may give evidence in either official language during the preliminary inquiry or trial.

Interpreters

- The court must make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial.

- Counsel should be familiar with s. 14 of the *Charter of Rights and Freedoms* which entrenches the right to the assistance of an interpreter in the constitution. Counsel should also be familiar with jurisprudence concerning the right to *competent* interpretation and the *voir dire* procedure as to a court interpreter's qualifications: *R. v. Tran* (1994), 92 C.C.C. (3d) 218 (S.C.C.), *R. v. Rybak* (2008), 233 C.C.C. (3d) 58 (Ont. C.A.), *R. v. Dutt*, 2011 ONSC 3329 (voir dires) and *R. v. Dutt*, 2011 ONSC 5358 (mistrial due to issues of interpretation).

Judgment

- Any trial judgment, including any reasons given for it, issued in writing must be in either official languages and made available by the court in the official language of the accused.

Judges, juries, prosecutors and other court staff

- Judges, juries, prosecutors (except where the prosecutor is a private prosecutor) and other court staff must be available in either official language.

The *Criminal Code* also provides that any pre-printed portions of a form set out in Part XXVIII of the *Code*, such as warrants and summons, will be printed in both official languages.

Sources

Sections 530 and 530.1, Part XXVIII – Miscellaneous, and subsection 849(3) of the *Criminal Code*, R.S.C. 1985, c. C-46
http://www.canlii.ca/en/ca/laws/stat/rsc-1985-c-c-46/latest/

R. v. Beaulac, [1999] S.C.R. 768
http://csc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1700/index.do

Languages of the Courts of Ontario

"If linguistic duality were a person, today it would be an adult who communicates with others, participates in the democratic process, and cherishes tolerance and diversity; who travels, having acquired experience that is, in many respects, recognized and sought out around the world; who embodies one of Canada's strongest values and works with determination in a changing world. This person still faces many challenges in preserving past achievements and obtaining justice on as yet unexplored fronts."

Office of the Commissioner of Official Languages
Annual Report, Special Edition, 35th Anniversary 1969-2004, Volume 1 at 115

Courts of Justice Act –

Use of French and English in proceedings before Courts of Ontario

Sections 125 and 126 of the *Courts of Justice Act* [C.J.A.] provide for the use of English and French in civil proceedings before the courts of Ontario. Sections 125 and 126(5) apply to proceedings under the *Criminal Code.*

The word "court" in the C.J.A. does not include administrative or quasi-judicial tribunals. See below for a discussion of the language requirements applying to such tribunals.

Sections 125 and 126 of the C.J.A. apply to:

- natural persons;
- corporations;
- partnerships; and
- sole proprietorships.

The following summarizes the language rights provided under sections 125 and 126 of the *Courts of Justice Act*.

<u>Right to bilingual proceeding</u>

- A party who speaks French has the right to request a bilingual proceeding including a judge or judges who speak English and French.

- The right to a bilingual proceeding is a substantive right available to individuals who speak French. However, case law provides that the court has the discretion to order a bilingual proceeding even if the party does not speak French.

- A bilingual proceeding includes the following elements:
    - that the proceeding is heard by a judge who speaks English and French;
    - a hearing held before a bilingual judge and jury is only available in the designated areas mentioned below;
    - if the bilingual hearing is held without a jury, or with a jury in an area named in the designated area below, the evidence given and submissions made in English or French are received, recorded and transcribed in the language in which they are given;
    - in a proceeding that is not a bilingual hearing without a jury or with a jury in an area named in the designated area below, the court will provide interpretation of any submissions in French or any evidence given by a witness in French, into English;
    - a judge has a discretion to conduct any other part of the hearing in French if it can be conducted in that language;
    - oral evidence given in English or French in an out-of-court examination is to be received, recorded and transcribed in the language it is given;
    - the party does not necessarily have the right to file pleadings in French. For the right to file pleadings in French, see below.

<u>Designated areas for hearing before bilingual judge and jury and pleadings and other documents filed in French</u>

- The right to request a hearing before a bilingual judge and jury is, as of right, available in all areas below (this list may be subject to change from time to time). Pleadings and other documents written in French may be filed in the following areas:
    - The counties of Essex, Middlesex, Prescott and Russell, Renfrew, Simcoe, Stormont, Dundas and Glengarry.
    - The territorial districts of Algoma, Cochrane, Kenora, Nipissing, Sudbury, Thunder Bay, Timiskaming.
    - The area of the County of Welland as it existed on December 31, 1969.
    - The Municipality of Chatham Kent.
    - The City of Hamilton.
    - The City of Ottawa.
    - The Regional Municipality of Peel.
    - The City of Greater Sudbury.

- The City of Toronto.

Pleadings and other documents filed in French

- The right to file pleadings and other documents written in French may be filed in the designated areas specified above. Outside the designated areas, consent is required from the other party to file the pleadings and other documents in French.

- Opposing parties or their lawyers do not have to file their pleadings and other documents, make submissions in, or communicate with the party who requested a bilingual proceeding, in the language of that party's choice.

- At hearings before a judge and jury in the designated areas mentioned above, at a hearing without a jury, or at examinations out of court, a party or counsel who speaks English or French but not both may request, and the court will provide, interpretation of anything given orally in the other language and translation of reasons for a decision written in the other language.

- Reasons for a decision may be written in English or French. Translations of decisions, judgments or orders are not required, but when requested by a party or counsel who speaks English or French but not both, the court will provide interpretation of anything given orally in the other language at hearings and at examinations out of court, and translation of reasons for a decision written in the other language.

- Costs of translation will not be awarded against the unsuccessful party.

- A document filed by a party before a hearing in a proceeding in the Family Court of the Superior Court of Justice, in the Ontario Court of Justice or in the Small Claims Court may be written in French. A process issued in or giving rise to a criminal proceeding or a proceeding in the Family Court of the Superior Court of Justice or in the Ontario Court (Provincial Division) may be written in French.

The *Provincial Offences Act*

Where a defendant is served with an "offence notice, parking infraction notice or notice of impending conviction in a proceeding under the *Provincial Offences Act*," and that defendant makes a written request that the trial be held in French, the proceeding in those cases must be conducted as a bilingual proceeding and be presided over by a judge or officer who speaks both official languages. The defendant is deemed to have exercised his right under section 126(1) of the *Courts of Justice Act*.

Sources

Sections 125 and 126 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43
http://www.canlii.ca/en/on/laws/stat/rso-1990-c-c43/latest/rso-1990-c-c43.html

Provincial Offences Act, R.S.O. 1990, c. P.33
http://www.canlii.ca/en/on/laws/stat/rso-1990-c-p33/latest/rso-1990-c-p33.html

Bilingual Proceedings, O. Reg. 53/01, s. 4. (The defendant is deemed to have exercised his right under section 126(1) of the *Courts of Justice Act.*)
http://www.canlii.ca/en/on/laws/regu/o-reg-53-01/latest/o-reg-53-01.html

Quasi-Judicial or Administrative Tribunals

> "One of the underlying purposes and objectives of the *French Language Services Act* was the protection of the minority Francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. As already stated, underlying constitutional principles may in certain circumstances give rise to substantive legal obligations because of their powerful normative force."
>
> *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505

Official Languages Act

As mentioned above in the section on *Constitutional and Quasi-Constitutional Language Rights,* the *Official Languages Act* applies to federal courts (defined to include tribunals) or other bodies that carry out adjudicative functions and are established by or pursuant to an Act of Parliament.

The following summarizes the language rights of individuals appearing before a federal administrative or quasi-judicial tribunal:

Official languages

- English and French are the official languages of the federal tribunals and any person may use those languages in any pleading in, or process issuing from, any federal tribunal.

- A party has the right to speak and be understood by the court/tribunal in the official language of his or her choice.

Judge and other officers

- Every judge or every officer who hear the proceeding must understand the language chosen by the parties without the assistance of an interpreter. The same duties are imposed on the tribunal where the parties choose a bilingual proceeding. This is limited to the adjudicative functions carried out by the tribunal.

Witnesses

- Witnesses have a right to give evidence and be cross-examined in the official language of their choice.

Simultaneous interpretation

- When a party makes a request for translation, simultaneous interpretation of proceedings will be available from one official language to the other, including the evidence given and taken.

Crown

- The Crown must, when it is a party to a proceeding, use in oral and written pleadings before a federal tribunal, the official language chosen by the other party, unless reasonable notice of language chosen has not been given or where the other parties fail to choose or agree on the official language to be used in the pleadings.

Pleadings, forms, decisions

- The term "pleadings" includes oral and written arguments, but excludes evidence presented to the court.

- Pre-printed portions of any form that is used in proceedings and is required to be served by the institution that is a party to the proceedings on the other party must be in both official languages. The details in the form may be added in the official language of the issuer but must indicate that translation is available upon request.

- Every final decision, order or judgment, including reasons must be given simultaneously in both official languages where the decision, order or judgment determines a question of law of general public interest or importance or the proceedings leading to its issuance were conducted in whole or in part in both official languages. Such decisions, orders or judgments do not have to be available simultaneously in both official languages if delays prejudicial to the public interest or resulting in injustice or hardship to any party to the proceedings.

Tribunals Created by the Ontario Government

There are few obligations and very little guidance provided to administrative or quasi-judicial tribunals in the *Statutory Powers Procedure Act,* which only states that summonses and warrants must be in the "prescribed form (in English or in French)", and that a tribunal has the obligation to make its rules available to the public in both languages. Obligations related to services offered in official languages of administrative tribunals are found under the *French Language Services Act* (the *F.L.S.A.*), supported by unwritten constitutional principles and other principles of interpretation.

The preamble to the Ontario's *French Language Services Act* sets out its underlying rationale as follows:

> Whereas the French language is an historic and honoured language in Ontario and recognized by the Constitution as an official language in Canada; and whereas in Ontario the French language is recognized as an official language in the courts and in education; and whereas the Legislative Assembly recognizes the contribution of the cultural heritage of the French speaking population and wishes to preserve it for future generations; and whereas it is desirable to guarantee the use of the French language in institutions of the Legislature and the Government of Ontario, as provided in this Act […]

Subsection 5(1) of the *French Language Services Act* provides a right to communicate in French with government agencies or institutions of the Legislature.

The definition of "government agency" in the *French Language Services Act* includes a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council. A government agency includes administrative tribunals, defined by the Ministry of the Attorney General as "an autonomous agency that is independent of the provincial government and is responsible for settling disputes between the Province of Ontario and its citizens. An administrative tribunal is also known as an agency, board or commission." There are approximately 235 administrative tribunals in Ontario.[2]

The Ministry of the Attorney General provides the following online information about French language rights before administrative tribunals:[3]

Under which Act do administrative tribunals have obligations to provide French Language Services?

Section 5. (1) of the French Language Services Act states that : "A person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency […]". Section 1. (b) indicates that "government agency" means "a board, commission or corporation the majority of whose members or directors are appointed by the Lieutenant Governor in Council". Therefore, the administrative tribunals, which are boards and commissions, must offer French Language Services in accordance with the French Language Services Act.

[2] They are listed at http://www.sciencessociales.uottawa.ca/crfpp/pdf/annexes_10-2005.pdf

[3] http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/french_language_services/services/administrative_tribunals.asp

What services do administrative tribunals have to offer in French?

The French Language Services Act requires that administrative tribunals provide French language services to the public. This responsibility includes both the services provided to the public by the administrative tribunal's secretariat and the proceedings conducted by an agency, board or commission (i.e. telephone, correspondence, brochures, websites, etc.).

Do designated areas apply to administrative tribunals?

As is the case for services provided by the Government of Ontario, administrative tribunals are required to provide their services in French in accordance with the French Language Services Act. However, the Act also states that "a person has the right in accordance with this Act to communicate in French with, and to receive available services in French from, any head or central office of a government agency […]". Since, in most cases, the services of an administrative tribunal are only offered in one location, this means that French Language Services must be offered even if the tribunal is not located in a designated area, if it serves a designated area.

Who pays the costs attributable to meeting linguistic requirements?

Where there is no legal or other requirements, costs attributable to meeting linguistic requirements must be paid by agencies, boards and commissions and cannot be passed along to parties.

Must the secretariat of the administrative tribunals be able to offer French Language Services?

The secretariat of every agency, board and commission must be capable of pro-actively providing French Language Services:

Signs, literature, information and advice should be available in French,

There should be a system of filing and exchanging documents which includes, if necessary, the provision of linguistic assistance or the translation of documents into either English or French,

Agencies, boards and commissions should ensure that French-speaking staff are available on a permanent and reliable basis whether services are delivered by tribunal staff or a private sector service provider.

Why is it important to ensure that the obligations of administrative tribunals under the French Language Services Act are met?

In addition to the importance of providing equal access to tribunal services in French, procedures should reflect the principle that meeting the tribunal's obligations under the French Language Services Act is one of the components of providing a fair hearing.

What are the consequences if the administrative tribunals fail to offer French Language Services?

Failure to meet the legislative obligations could impact on the fairness of proceedings with resulting inconvenience for citizens and for the Government of Ontario, investigation by the Ombudsman, the French Language Services Commissioner or recourse to the courts. Moreover, confidence in the proceedings within the Francophone community could be undermined.

PROCEEDINGS
Do parties have the right to be heard in French?

Parties can choose to be heard in the language of their choice, English or French.

Do proceedings have to be conducted in French if the parties are not French-speaking?

Where there is a public interest, administrative tribunals will have to meet the linguistic requirements of both French and English communities who wish to avail themselves of the right to participate.

Administrative tribunals must conduct proceedings designed in whole or in part:

- *To provide opportunity for participation by individual citizens as members of a community or by organizations representing communities;*
- *To inform a community of the plans or activities of the government or of one of its agencies;*
- *To ensure that a decision process is public.*

Do parties and officials have the right to speak and to be understood in French?

Linguistic requirements will be met at proceedings where all officials and parties can both understand and be understood in either French or English. In other words, all participants – adjudicators, counsel, parties and support personnel – must be able to make the contribution required of them in linguistic comfort.

DOCUMENTS

Do notices sent to parties have to be written in French?

Parties have the right to receive notice in either English or French. Given time constraints and possible mix-ups, the most effective notification will be in both languages in the first instance. If instead, a unilingual notice is given, the English notice should advise in French that notice is also available in French, and the French notice should advise in English that notice is also available in English.

Do notices sent to the public through the media have to be available in French?

Where notice is given through the media, both the French-speaking and English-speaking public should be notified. French-speaking media should be included in the communication strategy of the administrative tribunal.

Should notices advise the parties of their right to a bilingual proceeding?

Notices should advise that participation can be in either language and should ask participants to indicate their language of choice. A mail-back form might be used.

Do the documents used during the hearings have to be available in French?

All aspects of hearings – the use of documents, the making of arguments and submissions, examination and cross-examination – should be available in French or in English. However, any hearing decision has to be conveyed in the language of choice of the client.

Do tribunals have the responsibility to translate ALL documents from the client or in the client's file (referred as Complainant or Appellant in some instances)?

No, the tribunal's responsibility is to provide a translation of any correspondence, response or hearing decisions that they are making and conveying it to the Client, which means documents that the tribunal is producing only.

Do the administrative tribunals' decisions have to be published in French?

Decisions relative to hearings held in both English and French should be published simultaneously in both languages.

Do the administrative tribunals' reports have to be published in French?

Where agencies, boards or commissions publish a report of actual decisions or a summary of decisions, publication should be in both French and English. Where decisions have an impact on the public, both the French-speaking and the English-speaking public should be advised of decisions simultaneously. If a tribunal makes its decisions available to the public by request only, it must make those decisions available in French if so requested and in a timely manner.

LINGUISTIC NEEDS

Are administrative tribunals required to have French-speaking staff?

Administrative tribunals should have appropriate support services in place throughout the entire process to facilitate the participation of French-speaking clients in hearings. This means French-speaking support staff, arbitrators, prosecutors, as well as any equipment required.

The availability of staff with linguistic competencies eliminates unnecessary translation costs and enables members of the public to understand untranslated lengthy written submissions.

When a panel makes decisions, do all of the members have to understand French?

Some members of the panel must understand the language of the proceedings, others can be assisted by interpreters.

Are there guidelines within respect to the use of linguistic assistance or interpretation services?

There are no specific guidelines in respect with the use of linguistic assistance. But, certain methods of linguistic assistance such as consecutive interpretation, simultaneous interpretation, use of

professionals of various backgrounds and qualifications are recognized as being best practices. Different circumstances will require different approaches. At all times, however, linguistic assistance must enable participation by French-speaking persons without prejudice to them and it must be given by professionals. The ad hoc assistance of relatives or other participants is inappropriate and not recommended in a forum where rights are at issue.

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Statutory Powers Procedure Act

There are few language obligations and very little guidance provided to administrative or quasi-judicial tribunals in the *Statutory Powers Procedure Act,* which only states that summonses and warrants must be in the "prescribed form (in English or in French)", and that tribunals must make their rules governing their practice and procedure available to the public in both languages.

Sources

Official Languages Act, R.S.C. 1985, c. 31 (4th Supp)
http://www.canlii.ca/en/ca/laws/stat/rsc-1985-c-31-4th-supp/latest/rsc-1985-c-31-4th-supp.html

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
http://www.canlii.ca/en/on/laws/stat/rso-1990-c-s22/latest/rso-1990-c-s22.html

French Language Services Act, R.S.O. 1990, c. F. 32
http://www.canlii.ca/en/on/laws/stat/rso-1990-c-f32/latest/rso-1990-c-f32.html

Resources

To find a lawyer who provides legal services to clients in French, you may contact the following:

Law Society Referral Service

The Law Society Referral Service (LSRS) provides members of the public with the name of a lawyer or licensed paralegal who will provide a free consultation of up to 30 minutes to help you determine your rights and options.

If a member of the public needs a licensed paralegal or a lawyer – for anything from a traffic ticket to buying your first home – but don't know where to find one, the LSRS can help.

The new LSRS also includes number of service enhancements that ensure members of the public will have even greater access to legal service providers.

And with the Internet increasingly playing a role in making justice more widely accessible, it is possible for more people to obtain referrals online.

The service can be accessed by calling 1-800-268-8326 or 416-947-3330 (within the GTA) or by accessing the on-line request form.

The service is available from 9 am to 5 pm Monday to Friday.

The phone call, the referral process, and the initial consultation of up to 30 minutes are all free. However consultation is meant to help the client determine her or his rights and options. A lawyer or paralegal should not be expected to do any free work during this time — that is not the purpose of the LSRS. However, the member of the public can certainly ask during the consultation what it might cost to have legal work done.

On-line information about the Law Society Referral Service:
http://www.lsuc.on.ca/faq.aspx?id=2147486372

On-line information in French about the Law Society Referral Service:
http://www.lsuc.on.ca/faq.aspx?id=2147486372&langtype=1036

The Law Society's Lawyer and Paralegal Directory

The online Lawyer and Paralegal Directory is useful if a member of the public has the name of a lawyer or a paralegal and wants to know how to contact him or her. The Directory also allows to

find out whether the lawyer or paralegal is capable of offering legal services in the French language.

To access the Directory in English or in French:

http://www2.lsuc.on.ca/LawyerParalegalDirectory/

Contact the Law Society of Upper Canada

General Inquiries

Toll-free: 1-800-668-7380
General line: 416-947-3300
Facsimile: 416-947-5263
E-mail: lawsociety@lsuc.on.ca

Write to the Law Society of Upper Canada

The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N6

Consult the Directory of the Association des juristes d'expression française de l'Ontario

Available online at : www.ajefo.ca

Consult the Directory of the Ontario Bar Association

Available online at: http://www.oba.org/For-the-Public/Find-a-Lawyer

Rules of Professional Conduct

For information about the *Rules of Professional Conduct,* please contact the Law Society of Upper Canada's Practice Management Helpline at : http://mrc.lsuc.on.ca/jsp/pmhelpline/index.jsp or Call 416-947-3315 or 1-800-668-7380 extension 3315.

Information about the Equity Initiatives Department of the Law Society of Upper Canada is available at www.lsuc.on.ca.