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—
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The Honourable Denis Paradis

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•(1200)

[*Translation*]

The Chair (Hon. Denis Paradis (Brome—Missisquoi, Lib.)): Our hearing is now public.

It is our pleasure this morning to welcome Mr. Sébastien Grammond, Professor, Civil Law Section, University of Ottawa.

Mr. Grammond, welcome to the Standing Committee on Official Languages.

Professor Sébastien Grammond (Professor, Civil Law Section, University of Ottawa, As an Individual): Thank you.

The Chair: We have an hour left. We are going to proceed as we usually do, which is to say that you will have about 10 minutes to make your presentation. Afterwards, we will have questions and comments from the members of the committee.

Prof. Sébastien Grammond: Thank you.

I will make my presentation in French,

[*English*]

but I'll be happy to answer questions in both official languages.

[*Translation*]

The main focus of my presentation today will be the bilingualism of Supreme Court justices.

I know that you are also studying other topics, and it will be my pleasure to speak about them to the extent that I know them, but I mainly examined the issue of bilingualism at the Supreme Court.

On the one hand, I will attempt to explain why it is essential that Supreme Court Justices be bilingual, and on the other, I will endeavour to demonstrate that it is desirable and possible to include that requirement in legislation, since I know that some doubts have been expressed on that.

Let's begin with the issue, from the perspective of political justification, of why Supreme Court justices need to be able to hear cases in French and English.

Let's look first at the hearing stage, when lawyers verbally address the court. There is a simultaneous interpretation service at the Supreme Court, but despite the very high quality of that service, it is mission impossible to do justice to all of the subtlety and details of the legal arguments via simultaneous interpretation.

In a paper I published with my colleague professor Mark Power, we gave examples taken from a case I pleaded before the Supreme

Court. Those examples showed that certain sentences had been mistranslated. In some cases, arguments had been omitted, and in others, the interpreter said exactly the opposite of what I had said. This type of thing is certainly not desirable in a case being pleaded before the Supreme Court.

If my colleague Michel Doucet from the University of Moncton were with us today, he would say the same thing. He happened by chance to hear his submission being interpreted into English on CPAC, and he said that he understood absolutely nothing.

We must also take into account the decision process at the Supreme Court before the hearing. The hearing is as it were the culmination of a whole process at the Supreme Court. There is a whole procedure that precedes the hearing, and this mostly involves written submissions. Each party files a brief of about 40 pages, and the court then analyzes these briefs, that are never translated. If a party files a brief in French, a judge who does not understand French will be unable to understand the written arguments at that stage of the process. The decisions of the appeal court, of the trial court, and the documents, are never translated either. An anglophone judge will not be able to apprise himself of these crucial elements of the file if he does not understand French. Consequently, it is also essential that judges be bilingual at that stage of the process before the Supreme Court.

I would add that the Supreme Court is frequently, if not in most cases, called on to interpret bilingual acts. By "bilingual acts" I mean the Canadian Charter of Rights and Freedoms, the Criminal Code, all of the federal acts, the acts of several provinces—Quebec, Ontario, New Brunswick, and Manitoba—as well as the laws of other provinces whose official texts are in both languages.

In order to interpret the law, you ultimately have to be able to understand both versions. And in fact the Supreme Court sometimes rules on an interpretation issue concerning an act by pointing out that the French version does not contain the ambiguities that are found in the English version and had given rise to certain difficulties, if one had set aside the French version.

•(1205)

I think that a judge should be able to read both versions of the acts he or she is called upon to interpret as a last resort. I also think that as a national institution, the Supreme Court should be able to draw on the legal and non-legal sources everywhere in the country. A judge who speaks only English would be unable to benefit from all of the legal doctrine that has been written in French, and would thus have to ignore a whole swath of the Canadian legal corpus.

Similarly, we expect that judges will be well aware of the state of society. Obviously, an English-speaking judge will not be able to have direct access to francophone society, to read its newspapers or listen to the news and immerse himself in Quebec society and francophone communities. You will agree that you can only have a very partial idea of Quebec society if you only read the *National Post*. By the same token, you will have a very incomplete idea of Canadian society if you only read *Le Devoir*. That is why it is advisable that the justices of the Supreme Court, which is a national institution, be able to understand both languages.

In the process that led up to the appointment of Justice Malcolm Rowe last summer, the Prime Minister announced that he would only choose bilingual candidates. Since such a policy could be changed by a future government, it would be preferable in my opinion to enshrine it in law.

Some doubts were expressed following a well-known ruling of the Supreme Court, the Reference re Supreme Court Act, a judgment which was rendered in 2014. Some of the comments made by the court led a certain number of authors to say that it would from now on be impossible to require that Supreme Court justices be bilingual without amending the Constitution. They based that statement on a brief paragraph where the court stated that the composition of the Supreme Court was now protected from changes made by the legislator without going through the constitutional amending process, and that the composition also included eligibility. In this regard, the court referred to sections 4, 5 and 6 of the Supreme Court Act. Certain authors stated that Parliament could no longer touch sections 4, 5 and 6.

As is the case for all of the decisions of the court, those comments by the Supreme Court must be read in light of the case that was submitted to it, which was the appointment of Judge Nadon and the necessary conditions for a judge to be considered to be a judge from Quebec, if I may put it that way. The court was not called on to rule on whether Parliament could still add the requirement of bilingualism to the Supreme Court Act.

In order to understand my advice on this topic, we have to make a distinction between two effects of the Constitutional amending formula. What I'm going to say is somewhat technical, and will likely be published soon in a law review, with a lot of explanations.

Basically, the constitutional amending formula does two things. First, it enables a certain number of legislative bodies, such as Parliament and the legislative assemblies of a certain number of provinces, to amend the text of the Constitution if that is what they want to do. It has an enabling function.

●(1210)

The constitutional amending formula also shields certain matters or certain areas from unilateral action by the federal Parliament. It excludes certain things from the jurisdiction of Parliament. That is what the Supreme Court stated in the decision I just cited. However, the areas that are excluded from Parliamentary jurisdiction are much more limited and restricted than those that would fall within the scope of the enabling function, that is to say all those things you could include in the Constitution if you wanted to do so.

These areas that are excluded from parliamentary jurisdiction must be delineated according to the objectives sought by those who agreed on the constitutional amending formula in 1981-1982. That is in fact what the Supreme Court says in the Reference re the Supreme Court Act. The objective was to protect Quebec representation at the court, for all sorts of obvious reasons, and not to pursue other purposes.

In my opinion, the bilingualism requirement for Supreme Court justices is not one of the areas that has been excluded from the jurisdiction of Parliament by the constitutional amending formula. Today, Parliament could still adopt an act establishing such a requirement. I would add, even for those who feel that sections 4, 5 and 6 of the Supreme Court Act have been “constitutionalized”, that there is nothing that prevents you from adding criteria, if those that currently exist are not amended.

Sections 97 and 98 of the 1867 Constitution state that the judges of superior courts must be appointed by the Bar of each province, but it is not specified that you have to have been a member of the Bar for 10 years. That condition was added by an act of Parliament, section 3 of the Judges Act, and to my knowledge no one is suggesting that that section is invalid because it adds a condition to the requirements contained in sections 97 and 98 of the Constitution.

The fact remains that the opinion I am expressing today is not shared by all constitutional law specialists. That is why it would be advisable for the federal government to refer this issue to the Supreme Court, so that it may clarify the consequences of its 2014 decision regarding Parliament's capacity to legislate on the Supreme Court.

We must understand that in this matter, the Supreme Court spoke in very general terms, and this may raise considerable doubts, for instance on whether Parliament may amend certain aspects of the court's jurisdiction. In fact, Parliament did so in 1991 and 1996. If we push the rationale too far, those amendments would be invalid.

Consequently, there are good reasons to ask the Supreme Court to clarify the scope of its 2014 ruling, as well as the limits of that famous area which is determined to be outside the jurisdiction of Parliament. I am also thinking of the issue of regional representation on the Supreme Court. Currently, nothing in the law discusses that, with the exception of Quebec, of course, but there are people nevertheless who have claimed that that has been constitutionalized.

●(1215)

I think that for all of these reasons, it would be advisable that the government ask the Supreme Court to clarify these issues.

Thank you.

The Chair: Thank you very much, Professor Grammond. This is a timely issue.

We will now have the questions and comments period.

Mr. Généreux, you have the floor.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Thank you, Mr. Chair.

Mr. Grammond, thank you for being here with us today.

I am married to an anglophone with whom I discuss things in English, as well as in French. Some people I speak to could believe that I am bilingual because I manage relatively well in English. In my opinion, however, I am far from bilingual. I don't have the vocabulary that would allow me to discuss anything from nuclear energy to dogs, or many other topics. Obviously, there are topics about which I could not hold a conversation, because I don't have the necessary vocabulary.

At the Office of the Commissioner for Federal Judicial Affairs Canada, there is a brief form that asks people to answer four questions that basically ask them if, without further training, they would be able to read or understand court documents in French. For my part, I would answer "yes", obviously. All of these questions are asked in English and in French. I could answer "yes", because I can read the questions and understand them without additional training. I would be able to understand most of what is in English, even if that is not my first language.

That said, does the fact that I answered "yes" to these questions make me a bilingual person?

In the form, it says that in order to meet the linguistic requirements for potential judges, their working knowledge of both languages may be evaluated. That is what it says in the documents we were given. If that is the only means used to determine if a lawyer is bilingual enough to become a judge, I have some serious misgivings.

Are there much more complete procedures used to analyze the quality of the French or English of the candidates before they are appointed?

Prof. Sébastien Grammond: I know that there are ways to assess the linguistic competency of people. I'm not a specialist in these evaluation methods. I think this is a matter for translation or education specialists.

I believe I understood that in the context of the process you mention, questions are put to the candidates, and that the government, through the Office of the Commissioner for Federal Judicial Affairs, reserves the right to have them undergo tests. I don't know if that was ever done, but I expect that it was not necessary for certain candidates, given their experience. In the case of someone who has diplomas from both an anglophone university and a francophone one, it may have been deemed unnecessary to go further, given the circumstances. I don't know what policy the Office of the Commissioner for Federal Judicial Affairs adopted in such cases. It could be useful to administer various types of tests.

Mr. Bernard Généreux: Let me be the devil's advocate. Earlier you referred to interpreters in one particular case. I imagine that was in the context of one of your representations before the court. You said that the interpretation did not render what you had said. You also mentioned that the interpreters were very qualified, and could provide quality interpretation, and so on.

Human beings are what they are, with their imperfections and, in many cases, perfections. People who are really specialized in interpretation go easily from one language to the other. But despite their considerable experience and competence and fluency, these people cannot translate the submissions in question.

Given these facts, how can we ask a judge or lawyer to understand exactly what is said in French or in English?

Does such a capacity even really exist?

Prof. Sébastien Grammond: Of course. I think we must make a clear distinction between the various points raised in your question. You said that even the best interpreter doesn't get the job done. However, the interpreter is asked not only to understand what was said, but also to immediately express exactly the same idea in another language, which is extremely difficult.

• (1220)

Mr. Bernard Généreux: Isn't the judge able to do the same thing?

Prof. Sébastien Grammond: No, I don't think so.

Mr. Bernard Généreux: No?

Prof. Sébastien Grammond: The idea is that the judge must be able to understand without the help of an interpreter. I think it's entirely possible.

Mr. Bernard Généreux: Sorry, but when a lawyer argues a case before the Supreme Court judges, shouldn't the judges be able to do the same thing as an interpreter?

Prof. Sébastien Grammond: No. When I listen to someone speaking English, I don't translate what the person is saying into French in my head. I understand the person in their language.

Mr. Bernard Généreux: In their language.

Prof. Sébastien Grammond: When I argue cases before the Supreme Court, I'm sure the bilingual anglophone judges understand me and know exactly what I'm saying. I'm sure of this. I understand it's accepted that perfection doesn't exist and that I'll argue cases before people who won't necessarily be called "perfectly bilingual". However, I think—

Mr. Bernard Généreux: Sorry, I'll stop you—

The Chair: Mr. Généreux, I have to move on to the next turn. Maybe you can let Mr. Grammond finish responding.

Mr. Bernard Généreux: You said that perfection doesn't exist and that I should understand this.

Prof. Sébastien Grammond: I meant that, when I speak to the Supreme Court judges, I'm sure they understand both languages and fully understand my legal arguments.

I have major problems when someone doesn't understand what I'm saying in the language I'm speaking. I don't like the fact that the person must rely on an interpreter who, despite their best intentions, makes significant errors when translating what I'm saying. I have a great deal of difficulty accepting this.

The Chair: Thank you.

Mr. Arseneault, you have the floor.

Mr. René Arseneault (Madawaska—Restigouche, Lib.): Mr. Grammond, thank you for meeting with us. We have only six minutes, and time is going quickly.

What do you think is the easiest way to immediately ensure the Supreme Court of Canada judges are bilingual?

Prof. Sébastien Grammond: I think we've been saying it for a long time. We must adopt legislation that makes bilingualism a requirement or condition for appointment.

Mr. René Arseneault: Okay.

In light of the Nadon case, would the government be able to adopt legislation without having to amend the Constitution?

Prof. Sébastien Grammond: For the reasons I provided earlier, I think it's indeed possible.

Mr. René Arseneault: Okay.

I want you to summarize again what you explained earlier, because I didn't quite catch it.

Prof. Sébastien Grammond: In my view, in the Nadon case, the Supreme Court realized that, when creating the formula for amending the Constitution in 1981-82, the governments in Canada didn't simply say how the Constitution could be amended.

In other words, they didn't simply provide a recipe. They also removed a small area from Parliament's jurisdiction. As a result, once the amending formula was adopted, Parliament could no longer do certain things alone. However, the area is more limited than we think. It must be established based on the goals that the governments at the time, meaning in 1981-82, were pursuing by identifying a certain number of characteristics in sections 41 and 42 of the Constitution Act, 1982. The Supreme Court told us that the goal of paragraph 41(d), the composition of the Supreme Court, is obviously to make sure Quebec is represented on the Supreme Court. The amendments proposed by Parliament at that time—I think they were adopted when the court heard the Nadon case—affected the eligibility requirements that helped determine who was a judge from Quebec and who wasn't. Therefore, the Court said that, in this case, it had touched the so-called limited area, the area that was removed from Parliament's jurisdiction.

My point is that the bilingualism requirement isn't related to Quebec's representation. In practice, the bilingualism requirement will particularly affect judges from outside Quebec, although the reverse is possible. Adding a bilingualism requirement doesn't in any way change Quebec's representation on the Supreme Court, which is protected by paragraph 41(d) of the Constitution.

I think we would give too much leeway to the Supreme Court's decision by saying that we can no longer touch the Supreme Court Act or anything related to sections 4, 5 and 6.

•(1225)

Mr. René Arseneault: Especially since the Nadon case wasn't the right time at all to study the possibility of having bilingual judges at the Supreme Court of Canada.

Prof. Sébastien Grammond: Indeed.

Mr. René Arseneault: It wasn't the right time at all. Do you know of any constitutional experts who agree with you and who have publications that could address this issue?

Prof. Sébastien Grammond: Some people have expressed a contrary opinion, but it's still early. To my knowledge, none of the prominent constitutional experts, including Peter Hogg and Patrick

Monahan, have ruled on this issue or expressed an opinion yet. I haven't seen anything from them regarding this issue.

Mr. René Arseneault: Earlier, you mentioned that you would publish an article in a journal.

Prof. Sébastien Grammond: Yes. The article was submitted to a journal. I'm waiting for the assessments. The process is ongoing.

Mr. René Arseneault: Which university journal?

Prof. Sébastien Grammond: The University of Ottawa's *Revue générale de droit*.

Mr. René Arseneault: Okay. When will the article be published?

Prof. Sébastien Grammond: I hope the article will be published in June. If it interests you, we can let you know.

Mr. René Arseneault: We would appreciate it if you could let the committee know when the article will be published.

Prof. Sébastien Grammond: Okay.

Mr. René Arseneault: I know it's in the public domain, but we tend to forget.

The Chair: The clerk will follow up with Mr. Grammond.

Prof. Sébastien Grammond: Okay.

Mr. René Arseneault: What level of court has the greatest challenge when it comes to justice in the official languages? It's not all the courts.

Prof. Sébastien Grammond: I would have a hard time commenting on that. I haven't looked at that. I mostly focused on the Supreme Court as a topic of study.

I didn't study this type of challenge in the provincial courts or the superior courts of the different provinces, for example. I suppose that, from the perspective of the person being tried, the important thing is the option of having a trial in their language.

I believe that, in certain provinces, this is still a challenge. However, I won't go further than that in terms of an overall assessment.

Mr. René Arseneault: Thank you.

The Chair: Mr. Choquette, you have the floor.

Mr. François Choquette (Drummond, NDP): Thank you, Mr. Grammond, for your explanation. You clearly set out why Supreme Court judges must be bilingual.

You mentioned that the interpretation issue isn't the only thing at stake. I know we focus on interpretation a great deal, but it's not the only aspect. You said so yourself. There's also the fact that many publications, which the judges would need to consult, are available only in French. There are also all the documents submitted as evidence that are in only one of the two official languages. The judges must read and understand the two written languages, because the two languages are equal. They must be able to compare the two languages to interpret things properly.

I know the Liberals, New Democrats and a number of Conservatives, I believe, also think only bilingual judges should be appointed to the Supreme Court. I think it's a fairly common view.

At this time, the difficulty is knowing whether we want legislation on the bilingualism of Supreme Court judges. You mentioned that people say that this could be unconstitutional. I don't have the Nadon decision before me, but I know it clearly states that, as you said, the focus is only on cases of judge eligibility in relation to Quebec. However, all other eligibility requirements remain discretionary. The judges haven't made any decisions on them.

Can you comment on this?

•(1230)

Prof. Sébastien Grammond: In a justice system strongly inspired by common law, court decisions establish laws to the extent necessary to resolve the case before the court.

Obviously, the Supreme Court will make a slightly broader ruling. However, if we respect the philosophy of common law systems, we must still read the decision based on the question asked and the particular context of the question.

As you said, the particular context of the Nadon case is the protection of Quebec's representation on the Supreme Court. The court told us that a historic compromise was reached that helped establish the Supreme Court in 1875. Clearly, the authors of the 1982 Constitution still had this compromise in mind. Essentially, the text gives Quebec a right of veto with regard to its representation on the court.

This shows us the importance of paragraph 41(d). The Nadon decision must be read from this perspective. Obviously, the reasoning doesn't apply when we're no longer talking about Quebec's representation on the court.

Mr. François Choquette: Thank you. Since time is running out, I'll ask you two or three questions and let you finish.

You referred to cases involving changes in eligibility, such as when the decision was made to admit members of the bar who had 10 years of experience. It's the same type of example as the bilingualism requirement, which some people consider unconstitutional.

Are there other similar examples?

If not, is that a very good example?

Prof. Sébastien Grammond: It's undoubtedly the closest example to a bilingualism requirement for Supreme Court judges.

Mr. François Choquette: If we take into account the Official Languages Act and understand the federal court obligations, don't we have the right, according to the Constitution and the charter, to have access to judges who understand our arguments?

Prof. Sébastien Grammond: That's another issue. In the text that I published, I didn't consider the issue from a constitutional rights perspective. In the current situation, as a result of decisions rendered by the Supreme Court in 1986, there's no constitutional right to be heard by a judge without the help of an interpreter. The decision was controversial at the time. However, at this point, it hasn't been overturned. That's why I'm presenting the argument mainly from a

public policy perspective, rather than a constitutional rights perspective.

Mr. François Choquette: Have you had the chance to consider which legislation would be the best to amend to make sure bilingual judges are appointed to the Supreme Court?

Is it the Judges Act, Official Languages Act or Supreme Court Act?

Prof. Sébastien Grammond: I think it's the Supreme Court Act, which lists the eligibility requirements for the Supreme Court. It may be the Judges Act, but I don't see why a provision concerning only the Supreme Court would be included that act. That said, either case would be possible.

Regarding the Official Languages Act, I imagine you're referring to the amendment—section 16, I believe—that exempts the Supreme Court from the person being tried's right to be heard in their language by a court created by Parliament. It would be a possibility, but it could lead to the following situation. If a court judge doesn't hear cases in French, the judge wouldn't be able to hear cases from Quebec, including constitutional cases argued by a francophone party. This may be undesirable, in the sense that, for the parties arguing before the court, the door could be opened to strategic choices related to the language used. The parties could see an opportunity to control which judges hear their case. This is undesirable.

•(1235)

Mr. François Choquette: Thank you.

The Chair: Thank you.

Mr. Vandal, you have the floor.

Mr. Dan Vandal (Saint Boniface—Saint Vital, Lib.): Thank you.

Mr. Grammond, I understand that a self-assessment is used to assess the language skills of Supreme Court judges. However, there's also the possibility of having them undergo an objective assessment to determine whether they're functionally bilingual.

Prof. Sébastien Grammond: Exactly.

Mr. Dan Vandal: Do you know what constitutes an objective assessment?

Do you know whether this process is used frequently?

Prof. Sébastien Grammond: I don't know what process the Commissioner for Federal Judicial Affairs used. I also don't know what level was required. I would have trouble commenting on the topic. I know that there are standardized forms of language tests and that various levels are identified as part of the language skills assessment. However, I don't know what the Commissioner for Federal Judicial Affairs used for the process last summer.

Mr. Dan Vandal: Does the self-assessment consist of the survey mentioned by Mr. Généreux?

Prof. Sébastien Grammond: I think so. At that point, the candidate says he's bilingual. Based on the information he submits to support his statement, the people reviewing his appointment can say whether they're satisfied.

I gave the example of a person who has degrees from a francophone university and an anglophone university. There's also the example of a person who, as everyone knows, argues in both English and French before the courts, or the example of a federal court judge who regularly hears cases in both languages. In these instances, I don't think it would be necessary to give the person in question a language test.

Mr. Dan Vandal: What does “functionally bilingual” mean?

Prof. Sébastien Grammond: My own definition relates to the goal of this requirement. Francophone lawyers must be confident that they are understood in their language, both orally and in writing. I think it's called “passive” bilingualism. It means that people don't need to be able to have a detailed conversation, but they must fully understand everything said and written.

Mr. Dan Vandal: Do you have statistics or reports on the past 30 years, since the 1980s?

What is the percentage of bilingual Supreme Court judges?

Prof. Sébastien Grammond: I don't know the percentage. However, I think it can be fairly easily calculated, because currently one judge isn't bilingual.

Mr. Dan Vandal: Right now?

Prof. Sébastien Grammond: Yes. One judge isn't bilingual. There were two from 2011 to 2015, and before that, there was one from 2006 to 2011.

In recent decades, seven or eight Supreme Court judges have been bilingual.

Mr. Dan Vandal: Are there examples of unilingual judges who became bilingual?

Prof. Sébastien Grammond: It's sometimes said that the current chief justice wasn't bilingual when she was appointed to the Supreme Court, but that she has acquired the skill since then. I don't know whether she took tests and I can't say more. However, yes, there have been cases of that nature.

• (1240)

[English]

Mr. Dan Vandal: What would you say to the Assembly of First Nations, who would say that they would like a first nation judge, and we're never going to get one if—

Prof. Sébastien Grammond: This is a very important consideration. Now, I think the assumption behind the question is that aboriginal persons do not speak French. This is an assumption that is not borne out in many cases. I would say, without going to much into detail, that several of the names of first nations individuals or aboriginal individuals who were mentioned as potential candidates for the Supreme Court are indeed bilingual.

I have great sympathy for the idea that one day there should be an aboriginal judge on the Supreme Court of Canada. I don't think the requirement of bilingualism precludes such an appointment.

Mr. Dan Vandal: We have many Métis from Manitoba who are very bilingual.

Prof. Sébastien Grammond: That's a very good example.

[Translation]

Mr. Dan Vandal: How much time do I have left?

The Chair: You have 30 seconds.

Mr. Darrell Samson (Sackville—Preston—Chezzetcook, Lib.): I'll need more than 30 seconds!

Voices: Oh, oh!

Mr. Dan Vandal: Mr. Grammond, are you aware of the recent changes made by the federal government in the judicial appointment process?

Prof. Sébastien Grammond: Yes. We're not talking about Supreme Court judges, but about superior court and appeal court judges. Is that correct?

Mr. Dan Vandal: Regardless, we don't have any time left.

The Chair: Ms. Lapointe, you have the floor.

Ms. Linda Lapointe (Rivière-des-Mille-Îles, Lib.): Thank you, Mr. Grammond, for being with us today.

It's a very specific issue. I understand that you want us to talk about the Supreme Court and not the judicial appointment process. Is that correct?

Prof. Sébastien Grammond: My research mainly concerned the Supreme Court.

Ms. Linda Lapointe: Earlier, you mentioned that we should ask the Supreme Court to make clarifications. Were you talking about the decision in the Justice Nadon case?

Prof. Sébastien Grammond: Yes, exactly.

Ms. Linda Lapointe: What would you have clarified, specifically?

Prof. Sébastien Grammond: It must be determined whether sections 41 and 42 of the Constitution Act, 1982 prevent Parliament from adopting legislation that requires Supreme Court judges to be bilingual.

Ms. Linda Lapointe: What should we, as parliamentarians, do to ask for a clarification?

Prof. Sébastien Grammond: It's a power given to the federal government. You must suggest that cabinet pass an order that refers the question to the Supreme Court.

Ms. Linda Lapointe: Okay.

You spoke earlier about possible interpretation errors, despite all the excellent work done by interpreters. You even said the legislation could be understood differently in English and French, since the words don't have exactly the same meaning. Do you have any examples?

Prof. Sébastien Grammond: I have before me the examples of interpretation errors.

I'll go from English to French.

Ms. Linda Lapointe: That's fine.

Prof. Sébastien Grammond: Here's an example. I said that a paragraph of a section of the Civil Code was applicable, and the interpreters said that it wasn't applicable.

In another case, I said that the rights of an individual protected by the charter hadn't been violated. The interpreter reported that the individual's human rights hadn't been violated, but didn't specify that I was referring to charter rights, which is quite different.

On another occasion, while presenting arguments, I spoke about how things are done in common law. The interpreter failed to say "common law". This gave the impression that I was talking about civil law and it made no sense.

Those are examples of interpretation errors that make arguments very difficult to understand and follow. There's no denying it. When we argue a case before the Supreme Court, we don't have much time and we must be extremely concise and accurate. We don't have the time and opportunity to correct the errors that may occur during simultaneous interpretation.

• (1245)

The Chair: I have a quick comment on the questionnaire you mentioned earlier for the federal judiciary appointments. In the French version, the first question is "Without further training, are you able to read or understand court material...?" In the English version, the question is

[*English*]

"Without further training, are you able to read and understand court material?"

[*Translation*]

"Or" is used in French and "and" is used in English.

Prof. Sébastien Grammond: Oh, oh!

The Chair: Go ahead, Ms. Lapointe.

Ms. Linda Lapointe: Mr. Grammond, you're saying that, if you don't have access to the text of what's being said, the interpretation could lead to an error in the decision.

Prof. Sébastien Grammond: Yes. A judge who listens to my argument with the help of an interpreter will understand something different from what I'm trying to say. I have no way to correct this.

Ms. Linda Lapointe: To correct it or to know about it?

Prof. Sébastien Grammond: I don't even have a way to know about it, short of listening, after the fact, to both versions of the arguments, which, in the Supreme Court's case, are available on its website. Nevertheless, it's a difficult process to put in place.

Ms. Linda Lapointe: As the chair said, the person assesses their language proficiency themselves, to some extent. How do you propose the bilingual proficiency of judges appointed to the Supreme Court be assessed? Earlier you said that someone who had studied equally in English and French at university should not necessarily have to be tested. What is the right way, in your view, to assess a Supreme Court judge's bilingual proficiency?

Prof. Sébastien Grammond: I'm not an expert on language testing, so I don't have any specific techniques to suggest. I would say, though, that there are cases when it is clearly not necessary to test the person's language's skills. When someone says they are bilingual but their claim is not based on criteria that can be easily checked, it may be appropriate to test that person's language skills.

I am not an expert on the various levels of language proficiency, but what I, as a lawyer, care about is that the person can fully understand everything I have said and everything I have written in my factum. That is my criterion. It may not be the same one a linguist would use, but that is what I expect.

Ms. Linda Lapointe: Thank you very much.

The Chair: Thank you.

Your turn, Mr. Généreux.

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

Mr. Grammond, there is something I'd like to clarify.

I agree on the importance of having bilingual judges. I am not against virtue. We live in a bilingual country, and we want the people we are talking to, in either language, to understand us. That is something we all agree on, as a matter of fact. I do, however, have a reservation about whether it is necessary to enshrine in the legislation a requirement that judges be perfectly bilingual.

Prof. Sébastien Grammond: I'm not saying they have to be perfectly bilingual.

Mr. Bernard Généreux: That's precisely what I was getting at. You said earlier that, for a judge to be considered bilingual, they do not necessarily have to be able to communicate in English; they just have to be able to understand it. That means you agree with the government on the type of bilingualism sought among judges. It's not a big deal if judges are not able to express themselves in one language or the other, provided that they can understand someone in that language.

Forgive me, but as I see it, a person is either fully bilingual or not at all. They have to be able to understand and converse. To my mind, that's what it means to be bilingual. It does not mean that someone is unable to communicate perfectly in English while sitting on the highest court in the land. I want to stress the importance of the word "perfectly".

If I were tested, I could answer the questions and do pretty well, but I would not consider myself to be perfectly bilingual or bilingual enough to understand rulings on constitutional issues or the various matters that go before the Supreme Court. Can someone truly have that degree of proficiency and understand everything they are told?

• (1250)

Prof. Sébastien Grammond: Yes.

Mr. Bernard Généreux: You said that, when litigants present their arguments and submissions to the judge in a public hearing, the interpreters do not render exactly what is being said or how it is being said. You are saying that parliamentary interpreters, even those who are here and doing a fine job, are not truly able to render what witnesses say in our committee meetings.

There is a difference between someone who says they are bilingual and someone who truly is. How do we build an evaluation system that can determine whether a lawyer aspiring to join the bench is genuinely bilingual? I'm having a lot of trouble wrapping my head around that, because I want to know who is equipped to say whether a person is truly bilingual.

Prof. Sébastien Grammond: As I said, tests for that exist. I think you're confusing perfect bilingualism with the ability to understand.

When we think of someone who is perfectly bilingual, we tend to think of someone who speaks both languages without an accent. Oftentimes, they have one anglophone parent and one francophone parent. The kind of person who comes to mind is quite clear when we think of someone who is perfectly bilingual.

Supreme Court judges do not have to be perfectly bilingual in that sense. The role of judges is not to give speeches or speak to the media. That is why I don't think it's necessary to evaluate their ability to speak the other language. It goes without saying that, if someone is able to fully understand a legal argument, chances are pretty good that they will also be able to converse reasonably proficiently in both languages. I don't think the purpose should be to test the person's ability to write or give a television interview in English or French.

Mr. Bernard Généreux: I see.

Prof. Sébastien Grammond: Those are two different levels of proficiency. The one Supreme Court judges should have to have is mainly comprehension.

Mr. Bernard Généreux: I'm going to stop you there. Let's imagine I'm the judge and you are a francophone trial lawyer. I have to communicate and ask you questions. I'm able to understand you, but I can't express myself with a high enough degree of proficiency in French. In that context, you obviously have no choice but to wear an earpiece to understand what I am saying, especially when I am asking questions.

Can the interpreter's translation of the judge's questions to the lawyer or witness deviate from what was said or lack clarity?

Prof. Sébastien Grammond: I'm not sure whether you're a lawyer, but—

Mr. Bernard Généreux: No, definitely not.

Prof. Sébastien Grammond: —when the judge asks a question, it is much easier to make sure you have understood properly. You can check with the judge.

Mr. Bernard Généreux: I would nevertheless like to know what is different when the communication happens through an interpreter.

Prof. Sébastien Grammond: If you were a lawyer, you would know that, very often, judges remain silent during—

Mr. Bernard Généreux: My questions may seem simplistic, but, to my mind, a human being is a human being. If someone is asked a question, in either English or in French, and, in order to understand, that person needs the help of a third party, it is obviously the same both ways. I may be wrong, but that's how I see things.

The Chair: Thank you, Mr. Généreux.

It is now over to Mr. Samson.

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

Mr. Grammond, I enjoyed your presentation. I have a lot of questions for you, but little time.

I quite liked what you said about hearings and interpretation. As far as I know, perfection doesn't exist. As I see it, the most important thing is that the judge understand what is being said. I am, however,

concerned about the judge not understanding the influence of factors such as culture, rural regions, and ethnic groups.

We are dealing with common law, so we are building on previously rendered decisions. It is often the case that French decisions rendered in Quebec are not incorporated into English common law. That, to some extent, diminishes the influence of the people of Quebec. I believe interpretation and translation should be as accessible as possible. We are talking about law, in other words, about what is legal. That is why I enjoyed that aspect of your remarks so much. Communities and cultures have a major influence.

That said, would amending the legislation mean that the Constitution had to be amended?

• (1255)

Prof. Sébastien Grammond: I don't think adding a bilingualism requirement to the Supreme Court Act would necessitate an amendment to the Constitution.

Mr. Darrell Samson: Now that is interesting. It is not necessary to amend the Constitution.

Prof. Sébastien Grammond: That is correct.

Mr. Darrell Samson: That is a very important point.

The decision in Nadon actually sought to ensure a guarantee in the Constitution: the representation of Quebec judges on the Supreme Court.

Prof. Sébastien Grammond: Yes.

Mr. Darrell Samson: It is not about limiting the other aspects but, rather, about ensuring that one. Everyone has rights, and those rights can be restricted pursuant to decisions that have been rendered. The fact remains that rights are granted, generally speaking.

Do you see any distinction in that regard?

Prof. Sébastien Grammond: It's important to understand that the Nadon decision was less about constitutional rights and more about eligibility criteria. It was about ensuring what the court called a historic compromise. Thus, in order for Quebec to accept the Supreme Court's existence in the country, given the province's different legal system, three of the seats on the Supreme Court were reserved for Quebec judges. That is the compromise that was renewed in the Constitution of 1982. In Nadon, the Supreme Court determined that Parliament could not change the definition of a Quebec judge without affecting the makeup of the court, which is protected precisely to ensure Quebec's representation on the court.

Mr. Darrell Samson: That is provided for under the Constitution.

Prof. Sébastien Grammond: It's not in the Constitution. That is the problem.

Mr. Darrell Samson: Could it be said that the two founding peoples—

The same is true with respect to senators, in terms of ensuring Quebec's representation so as not to lose that percentage.

Prof. Sébastien Grammond: Precisely. That is another compromise between the various parts of the federation.

Mr. Darrell Samson: I have always considered the provisions in section 23 of the charter as minimum, not maximum, requirements, so the service could be expanded.

Prof. Sébastien Grammond: That is more or less what I was saying earlier. Requirements could be added without amending the Constitution.

Mr. Darrell Samson: That is quite interesting.

Prof. Sébastien Grammond: That is what Parliament did in the Judges Act, for superior courts and appeal courts. It's not in the Constitution. It was determined that, in order to be eligible to be appointed a judge, an individual had to have 10 years' experience as a lawyer. That is an additional requirement set out in the act.

Mr. Darrell Samson: To do that, Parliament did not have to reopen the Constitution.

Prof. Sébastien Grammond: That is correct.

Mr. Darrell Samson: Thank you.

The Chair: Mr. Choquette, you have one minute.

Mr. François Choquette: Mr. Grammond, I'm not sure whether you had time to examine the issue of the pool of bilingual judges. Sometimes, we hear objections from people who ask whether there are enough bilingual judges. Have you considered that question?

Prof. Sébastien Grammond: A few years ago, in fact, we did a study on bilingualism among appeal court judges. We collected information from appeal court registrars. The results were rather surprising. The bilingualism rate was at least 30%, and that includes the western provinces. There are bilingual judges, then.

When we take a long look back at the practice over time, we see that most judges in provinces other than Quebec are bilingual. They had to be found somewhere, and to my knowledge, no one has

criticized the appointments, arguing that a bilingual judge who was not competent had been appointed. I would actually say that bilingualism and competency go hand in hand. The concern over limiting the supply of acceptable candidates is not founded, in my view.

Furthermore, we are seeing many superior and appeal court judges taking French training. It has also long been known that, although not a prerequisite, French proficiency is a tremendous asset for Supreme Court appointees. Any ambitious lawyer should know that.

● (1300)

The Chair: Thank you very much, Professor Grammond.

That brings our meeting today to a close.

Just before we adjourn, however, I would like to know whether committee members wish to hear from officials from the Department of Justice.

Mr. Bernard Généreux: That would certainly be a good idea.

Mr. René Arseneault: I would prefer to hear from constitutional experts first.

Mr. François Choquette: Can we mull it over and let you know this afternoon?

The Chair: No problem.

We will meet again on Thursday.

The meeting is adjourned.

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